Irish Tax Institute

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Julie Burke
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Regular Articles

Policy & Representations Monitor

Lorraine Sheegar provides a comprehensive overview of key developments, including recent submissions from the Institute, and tax policy news. All Revenue eBriefs issued between 1 November 2022 to 31 January 2023 are listed.

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

Mark Ludlow

Tax Appeals Commission

» 03TAC2023 examines the issue of loans in M&A transactions

» 14TACD2023 concerned the definition of worldwide income for the calculation of the domicile levy

» 139TACD2022 looked at deductibility of payments and whether or not they were wholly and exclusively for the purposes of the appelants trade

Court of Appeal

» In *Louis FitzGerald v Revenue Commissioners [2022] IECA 255,* the issue of worldwide income for the purposes of the domicile levy was examined

High Court

» In *Thomas McNamara v Revenue Commissioners [2023] IEHC 15* examined the use of capital losses against a gain made on the sale of land by way of case stated.

Direct Tax Cases: Decisions from the UK and European Courts

Stephen Ruane and **Patrick Lawless**

UK Cases

» In ***Centrica Overseas Holdings Limited v HMRC*** *[2022] EWCA Civ. 1520* the Court of Appeal was unanimous in reversing the decision of the Upper Tribunal determining that adviser fees incurred by an intermediate UK holding company in the Centrica Plc group were deductible expenses of management under the UK equivalent of s83 TCA 1997.

» In ***Gould v HMRC*** *[2022] UKFTT 431* the First-Tier Tribunal held that an interim dividend paid to two shareholders on different dates was taxable on the dates of payment, not the earlier date of declaration. The decision meant that the dividend was taxed in different tax years for each shareholder.

» In ***Mrs A v HMRC*** *[2022] UKFTT 421* (TC), the First-Tier Tribunal found that an amount paid to an employee under a settlement agreement was taxable as normal employment earnings under UK legislation broadly similar to s127 TCA 1997.

» In ***2 Green Smile Ltd v HMRC*** *[2023] UKFTT 15* (TC), the First-tier Tribunal (FTT) determined that there was a *de facto* transfer of a business (including the goodwill) from a partnership to the company on 1 December 2014, meaning that all income generated from the

dental business after that date belonged, beneficially, to the company.

CJEU Case

- In an answer to a preliminary request from the Belgian Constitutional Court, the Court of Justice of the European Union (CJEU) held that the obligation for a lawyer to inform other intermediaries involved is not necessary and infringes the right to respect for communications with his or her client (*Orde van Vlaamse Balies and Others v Vlaamse Regering* C-694/20).

International Tax Update

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

- BEPS: Recent Developments
  - The European Council has adopted the Directive on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, the Pillar Two Directive.
  - The OECD has released its public consultation document on the GloBE Information Return
  - The OECD has released technical guidance on the implementation of the global minimum tax
  - The Korean National Assembly passed the 2022 Tax Revision Bill, legislating for the introduction of a global minimum tax regime, including provisions for an undertaxed profits rule
  - The OECD released a document for public consultation regarding Pillar One – Amount A that includes draft provisions for a multilateral convention (MLC) on the removal of digital services taxes (DSTs) and other similar measures
  - The European Parliament has adopted its amendments to the draft ATAD3 (the Unshell Directive).
  - Mexico has approved the MLI
- US Tax Developments
  - The Inflation Reduction Act (IRA), included a 15% corporate alternative minimum tax (CAMT) on “adjusted financial statement income” and the Department of the Treasury and the Internal Revenue Service released Notice 2023-7 which provided interim guidance on time-sensitive issues and announced their intention to issue proposed Regulations that will be consistent with the Notice and address the application of the CAMT.
- EU Tax Developments
  - Finance Act 2022 contains revised DAC7 provisions and applies from 1 January 2023, with the first reporting by 31 January 2024. Accompanying Regulations have been published, and Revenue guidance is currently being finalised.
  - The President of Finland ratified legislation on 29 December 2022 for implementation of DAC7 into national law. The legislation has effect from 1 January 2023.
  - On 15 December 2022 legislation was approved by the Belgian Chamber of Representatives to implement DAC7 from 1 January 2023. The legislation is in line with the EU Directive, but it also extends the application of the Directive to sellers and service providers that are resident in certain non-EU jurisdictions. The list of those non-EU jurisdictions will be made available by the Belgian authorities in due course.
  - The French tax authorities published guidelines in early January on the DAC7 legislation (which was enacted in 2022).
  - Germany implemented DAC7 legislation at the end of December. In line with the Directive, the DAC7 provisions for in-scope digital reporting platforms will be effective from 1 January 2023 (reporting for the first time by the end of January 2024).

- » At the end of December the legislation to implement the provisions of DAC7, in line with the EU Directive, was adopted by the Dutch Senate. The legislation was then effective from 1 January.
- » DAC8 proposals require service providers to provide crypto-asset users. DAC 8 must be submitted to the European Parliament for consultation and to the European Council for adoption, subject to unanimous approval. It is foreseen that the new reporting requirements with regard to crypto- assets, e-money, and digital currencies would be transposed by 31 December 2025, with a view to entering into force on 1 January 2026.

- » Germany: Upper House has approved a Bill that would reduce scope of extraterritorial taxation and has amended real estate transfer tax rules
- » Italy: Budget law for 2023 has been enacted
- » Hong Kong: Legislative Council has passed the relevant legislation for the foreign-source income exemption regime, effective from 1 January 2023
- » UAE: Newly issued corporate tax law for the introduction of a federal corporate tax regime in the UAE
- » Colombia: Tax reform proposals have been enacted
- » Cyprus: Withholding tax now applies to payments made to non-cooperative jurisdictions
- » Romania: Implemented accounting directive for EU Public County-by-Country Reporting from 1 January 2023

VAT Cases & VAT News

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

VAT Cases

- » The CJEU delivered its judgment in the case of *CIG* ***Pannónia Életbiztosító Nyrt v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*** C-458/21, which related to the exemption for the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State (Article 132(1)(c) of VAT Directive).
- » The CJEU handed down its judgment in the case of ***GE Aircraft Engine Services Ltd v The Commissioners for His Majesty's Revenue and Customs*** C-607/20 in relation to undeclared output VAT on the value of retail vouchers provided by GEAES to its employees under the company's recognition and reward programme.
- » In the case of ***Luxury Trust Automobil GmbH v Finanzamt Osterreich*** C-247/21, the interpretation of Article 42(a) of the EU VAT Directive, was examined which deals with the place of supply for intra-Community acquisitions, together with Article 197(1)(c), which deals with the accountable person, and Articles 219a and 226, relating to invoicing and the required content of invoices.
- » The point at issue in the case of ***The Revenue Commissioners v Novartis Ireland Ltd*** [2022] IEHC 642 was whether volume-based discounts granted/rebate payments made by Novartis to private health insurance companies (PHICs) constitute a reduction in the consideration received by it in respect of the supply of the product and whether Novartis is entitled to repayment of VAT.

Tax Appeals Commission Determinations

- » 16TACD2023 determined whether assessments raised by Revenue were correct. The appellant was engaged in the business of selling goods but had ceased trading and there were a number of delays and difficulties in obtaining outstanding books and records
- » 30TACD2023 dealt with the time limits for reclaiming VAT under the Electronic VAT Refund mechanism (formerly referred to as Eight Directive claims) for refunds of VAT to

persons not established in the Member State in which the VAT was incurred

» 31**TAC2023** related to assessments raised by Revenue on the basis that the appellant knew or should have known that it was participating in transactions connected with the fraudulent evasion of VAT and was liable for the VAT foregone

Accounting Developments of Interest

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

Legal Monitor

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

Tax Appeals Commission Determinations

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

Key Tax Dates

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

Feature Articles

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Pat O'Brien provides a summary and analysis of the key provisions in the Finance Act 2022 relating to employment tax matters.

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104 Temporary Business Energy Support Scheme: Overview of Rules and Key Points for SMEs

Emma Arlow provides an overview of the Temporary Business Energy Support Scheme, including definitions and key checklist items for companies, as well as a brief run-down of other relevant tax supports for SMEs.

110 Taxation Considerations on Transitioning to Emergency Accommodation

Stephen Gahan and **Oonagh Carney** provide an analysis of some of the key issues arising for businesses and property owners when transitioning from an existing business model to the provision of emergency accommodation services.

119 Finance Act 2022: Impact on Financial Services Sector

Laura McKeown and **Caroline Kealey** summarise the key measures in Finance Act 2022 from a financial services perspective.

124 Finance Act 2022: Changes to Pensions & Pan-European Personal Pension Products

Alison McHugh and **Jennifer Dineen** discuss the pension changes in Finance Act 2022, along with the new legislation in the Act that deals with the tax treatment of Pan-European Personal Pension Products.

130 Finance Act Measures Updating R&D Tax Credit, KDB and Digital Games Tax Credit

Damien Flanagan and **Cian Smith** examine the details of the Finance Act 2022 changes for the R&D tax credit regime, the Knowledge Development Box and the digital games tax credit.

137 Finance Act 2022: Residential Property Measures

Brendan Murphy outlines the measures in Finance Act 2022 aimed at alleviating the housing crisis, including incentives for renters, landlords, sellers and purchasers.

140 Finance Act 2022: Disposal of Certain Patent Rights – Amendments to s757 TCA 1997

Karen Grimes and **Billy McMahon** discuss the amendments to s757 TCA 1997 made by Finance Act 2022 and their possible impact on transactions involving intellectual property.

145 Share Remuneration: An Alternative Benefit for Employees

Kim Doyle and **James McMahon** explain the different types of share-based remuneration that companies can use to recruit and retain employees tax-efficiently.

151 Recent Stamp Duty TAC Determinations: A Review

Amanda-Jayne Comyn discusses two recent decisions on stamp duty by the Tax Appeals Commission (and later the High Court and Court of Appeal) that are topical and of importance for practitioners working in the area.

158 Residential Zoned Land Tax: Latest Updates and Operational Considerations

Sinead Lew and **Aaron Mullan** examine amendments to the residential zoned land tax (RZLT) introduced in Finance Act 2022 and outline a number of key practical considerations in relation to the operation of the tax.

President's Pages

Colm Browne
President, Irish Tax Institute

Introduction

It has been a productive and eventful first quarter for the Institute, and the highlight was the Annual Dinner, which returned this year to its customary slot at the end of February.

It was wonderful to see over a thousand people gathered on the night, and from the start the atmosphere in the Clayton Hotel was buzzing. It was a testament to the vitality of the profession and the commitment of members to our Institute. I can confirm that the chat and laughter went on well into the small hours – it's just as well that we have reverted to the usual Friday night date for the big night!

Personally, it was a privilege to be there as President of the Institute and to address my fellow members and their guests. It was a night that I won't forget, and I want to thank all those who attended for making it so memorable.

Review of Enterprise Taxes

Our guest of honour was the Minister for Finance, Michael McGrath TD, and he struck a chord when he told us in his address that he would be taking "a fresh look at all the enterprise tax measures on the table to assess whether they are working properly, and fulfilling the potential that we know our economy can deliver".

The enhancement of business supports such as the EIIS, KEEP and CGT entrepreneurial relief has been a top item on the Institute's agenda over the last decade, and it was encouraging to hear the Minister talk about the need to support, encourage and reward investment and risk-taking in the indigenous sector.

The Institute will certainly be taking Minister McGrath up on his undertaking to review the business reliefs, and we will, as usual, be listening to what members have to say about their operation and effectiveness on the ground.

Business Tax Stakeholder Forum

Shortly before the Annual Dinner, the Department of Finance announced that a formal Business Tax Stakeholder Forum was being set up to enable consultation on international corporate tax legislation. We have been asking for a structured consultation process for some years now, and we warmly welcome the Department's initiative.

The new Stakeholder Forum is to meet in late March, and our hopes are high that it will make a difference. As I said in my speech at the Annual Dinner, it's good to talk, but it is important that the new arrangement facilitates a meaningful and productive exchange of ideas and expertise that can become part of the legislative process both for Pillar Two and for future changes to our tax code.

Territorial Regime

The implementation of Pillar Two is the biggest challenge that we face, and it will have significant implications for affected businesses and those of us who advise them. Since the start of the year, the Institute has responded to successive public consultations from the OECD on technical aspects of the Two-Pillar Solution, as work continues in Paris on its implementation.

But the overarching context of Pillar Two here at home is the need to find new ways of distinguishing ourselves from competitor countries. That is why I focussed on the need to move to a territorial regime in my Annual Dinner speech. Ireland is an outlier among OECD countries in persisting with a worldwide regime, and many of you know only

too well how complicated the system is and the uncertainty that it causes for business.

Competitor European countries are actively wooing Irish-based foreign companies and using our worldwide system as a stick to beat us. A swift and clear statement of intent on the transition to a territorial regime would reassure these companies as they formulate their business plans. As the Minister recommended to us on the night, we will be engaging with his officials on this issue in the coming months.

Tax Simplification

The need for a simplification project for the entire tax code has been a bugbear of the Institute's over the last decade, and I made the point to the Minister at our Annual Dinner that the corporate tax return, which was 8 pages long in 2001, now runs to 58 pages. It is damaging our reputation as an easy place in which to do business. At a time when tax is becoming ever more complex, the compliance burden needs to be lightened while maintaining a robust and vigilant administrative system.

None of us is under any illusions about the enormity and cost of this undertaking, but the reputational risk goes to the heart of our economic model. Resources should be ring-fenced to begin the work of ridding the tax code of unnecessary complexity. Tax simplification has the capacity to become a unique selling point for Ireland.

From the perspective of the profession, Minister McGrath's address to our Annual Dinner was reassuring. He appears to be in listening mode and was generous in his recognition of the contribution that the profession makes to the effective operation of the tax system. The Institute will continue to work constructively on your behalf with Minister McGrath's officials and with Revenue in the challenging period ahead.

Consultation on the Personal Tax System

Two weeks ago the Minister launched a public consultation on the personal tax system. This consultation arises from a commitment to a medium-term review of personal tax that was given in last year's Budget Statement. The review will include a comparative analysis of the tax burden on taxpayers in a range of different countries at a number of income points. It will also examine the option of a third rate of income tax.

The impact of our personal tax regime on our competitiveness and our ability to attract highly skilled workers has been a theme of the Institute's tax policy work in recent years. We will be reiterating our position on these and other matters in our response to this latest public consultation.

Seminar on the Report of the Commission on Taxation and Welfare

The Institute hosted a seminar on the Report of the Commission on Taxation and Welfare in the Royal College of Physicians on 22 March, and for the second time in a month, I had the pleasure of welcoming Minister McGrath as our keynote speaker.

The purpose of the seminar was to explore the practicalities of implementing the report and the potential unintended consequences that could arise for our economy. And it was reassuring to hear that Minister McGrath is certainly very alert to the potential unintended consequences of the Commission's recommendations for the reform of capital taxes. In his speech he said that the impacts of the Commission's proposals on business and investment must be fully considered before any changes are made.

22 March 2023 (clockwise from left): Minister for Finance, Michael McGrath. Shane Coleman, Newstalk; Colm Browne, Institute President; Muireann Lynch, ESRI; Austin Hughes, economist; and Donal de Buitléir, former secretary to the 1980–85 Commission on Taxation. Shane Coleman; Marie Bradley, Bradley Tax Consulting and member of the Commission on Taxation and Welfare; Raymond Donegan, IBI Corporate Finance; John McGrane, Family Business Network Ireland; and Rosanne Longmore, Coroflo.

He was also forthright about his own position on the recommendations around changes to reliefs such as Agricultural Relief and Business Relief: "While my department will consider the Commission's recommendations in the context of the continuous monitoring of these reliefs, I do not intend to bring forward substantial changes as proposed by the Commission." Later, in a short Q&A with Shane Coleman of *Newstalk Breakfast* – our moderator on the day – the Minister said he "wasn't convinced they are the right thing to do".

It was also reassuring that Minister McGrath doubled down on his commitment at our Annual Dinner to refresh the existing suite of tax measures for start-ups and SMEs to ensure that their full potential in promoting investment and growth was unlocked. He added that there is a need "to constantly assess our tax system to ensure that it is competitive both for multinationals and more importantly in my view indigenous SMEs".

After the Minister's speech we had two lively and thought-provoking panel discussions moderated by Newstalk's Shane Coleman. I took part in the first panel along with Muireann Lynch, Senior Research Officer with the ESRI, economist Austin Hughes, and Fellow of our Institute Donal de Buitléir, who served as Secretary to the early 1980s' Commission on Taxation. We had a wide-ranging debate on the report in the round.

The second panel focussed on the implications for indigenous companies of the report's recommendations that more revenue be raised from capital taxes and its proposals for the reform of SME supports such as the EIIS and KEEP. Former ITI President and member of the Commission Marie Bradley was joined by Raymond Donegan of IBI Corporate Finance, John McGrane of the Family Business Network Ireland and Rosanne Longmore, CEO of med-tech start-up Coroflo, which is currently seeking funding. This was another excellent discussion, which concluded that the best way to increase revenue from CGT would be to cut the rate.

The Minister said that he would definitely be taking account of the report's recommendations when he is drawing up Budget 2024 and that some would be implemented. He also predicted that it would inform budgetary policy for quite some time to come.

Foundations for the Future proposes a blueprint for the medium to long term. It is a serious piece of work that deserves our close attention and debate. My guess is that it is in no danger of gathering dust.

Contributors' Dinner

The first event of the year was our Contributors' Dinner, another staple of the Institute's calendar that couldn't take place over the last three years because of the pandemic. So it was long overdue for us to say thank you to the members who give their time and expertise to support the work of the Institute. These are the members who volunteer to serve on Committees; to be lecturers, examiners and moderators; to be authors of the Institute's array of publications; and to be speakers at our conferences and events and on our CPD programme and of course my fellow members on Council.

The Institute's capacity to continue providing a tax education that is held in the highest regard at home and abroad depends on their generosity. So the work that they do is important, not just for the Institute but also for the entire profession.

We were delighted to have the company of some special guests from Revenue and from industry and academia on the night. Traditionally, this event is held in the run-up to Christmas, but pressure of work led to its postponement until the last Thursday of January. And the consensus on the night was that we may have accidentally stumbled on the best night of the year for this lovely occasion. Everyone was in the height of good form and delighted with the opportunity to get out and meet friends and colleagues after the long month of January. It might be the beginning of something new in the Institute's calendar.

Conclusion

As I said at the outset, it has been an eventful first quarter, and as we enter Q2 the Institute is busy putting in place the final preparations for our return to Galway at the end of March for the first in-person Annual Conference since 2019. This year's title is *Forging a Sustainable Future*, and a topical and interesting programme is in store.

Then, on 19 May, I look forward to welcoming members to the Institute/Revenue Joint Conference. It is six years since the last Joint Conference, and I'm sure that there will be much interest in the event, so keep an eye out for registration.

Chief Executive's Pages

Martin Lambe
Irish Tax Institute Chief Executive

By the end of 2022 I was already anticipating the many familiar and new faces that would join us in-person during 2023. I'm delighted that the first three months have not disappointed, with excellent attendances and atmosphere at our first few events of the year.

Fantasy Budget

Each year we welcome submissions from teams of third-level students that analyse the proposed Budget measures. On 26 January the top three teams and their lecturers were invited to our offices at Grand Canal Dock for lunch and a prize presentation. It is a small way to mark their achievement but gives us time to get to know the students. Hopefully, we will see them pursue a career in tax in the future.

26 January 2023: Colm Browne, Institute President, presenting the first-place Fantasy Budget 2023 team from UCD with their prize.

L – R: Michael Lynch, Joe Carmody, Colm Browne, Irish Tax Institute President, Sinead O'Brien, Lecturer, Mark Haran and Shane Walsh. Not photographed: Noreen Lynch, Lecturer.

Contributors' Dinner

Later in the evening of 26 January we hosted an event to show our appreciation to everyone who contributes to the Institute's work. Without their involvement, we would not be able to deliver the high standard and wide range of services to support your needs.

It was lovely to see old friends again in-person, but perhaps even more so to meet the first-time contributors who got involved only in the last two years. We look forward to working with them again in 2023 and beyond. If you would like to get involved in any of our work, please let us know here.

26 January 2023: Institute contributors enjoying the evening with colleagues.

Annual Dinner

The Institute's flagship event exceeded all expectations on 24 February. Over 1,000 guests descended on the Clayton Hotel, Burlington Road, in black-tie attire, ready for the evening ahead. There was a great buzz in the room as everyone was in high spirits and happy to finish out the week with their colleagues and fellow CTAs.

Our guest of honour, Michael McGrath TD, Minister for Finance, announced the introduction of a dedicated Business Tax Stakeholder Forum, a welcome development, during his keynote address. The Minister also detailed the economic outlook for Ireland over the coming months.

Congratulations to our President, Colm Browne, and the Institute team on a very successful night.

24 February 2023: Minister for Finance, Michael McGrath, delivering his keynote address to over 1,000 guests in the Clayton Hotel, Burlington Road.

Commission on Taxation and Welfare Report – Practical Implications

Five months after the publication of the Commission on Taxation and Welfare (CoTW) Report, discussion of the comprehensive body of work has been relatively low-key. To facilitate close examination and debate, we held a complimentary event at the Royal College of Physicians. More than 100 people joined us and our speakers for a morning of robust debate.

First, during the keynote address and Q&A session, we heard how the Minister for Finance, Michael McGrath, will consider the recommendations and his view on how they can be implemented. Having heard the Minister's views, our first panel considered the practicalities of implementing the report's recommendations and their effectiveness in meeting Ireland's future challenges. It sparked lively debate between our panellists – Colm Browne, Institute President, Muireann Lynch, ESRI, Austin Hughes, economist, and Donal de Buitléir, who served as secretary to the 1980s' Commission on Taxation. The second panel – Marie Bradley, Bradley Tax Consulting, former Institute President and member of the CoTW; John McGrane, Family Business Network Ireland; Raymond Donegan, IBI Corporate Finance; and Rosanne Longmore, Coroflo – focused on the implications for businesses and investment. The discussion covered a broad range of wealth management recommendations and the reliefs, which kept the conversation balanced, with differing views on the recommendations of the Commission. You can read more about the event here.

22 March 2023 (clockwise from left): Minister for Finance, Michael McGrath. Shane Coleman, Newstalk; Colm Browne, Institute President; Muireann Lynch, ESRI; Austin Hughes, economist; and Donal de Buitléir, former secretary to the 1980–85 Commission on Taxation. Shane Coleman; Marie Bradley, Bradley Tax Consulting and member of the Commission on Taxation and Welfare; Raymond Donegan, IBI Corporate Finance; John McGrane, Family Business Network Ireland; and Rosanne Longmore, Coroflo.

A Career in Tax

Graduate recruitment and retention is a key issue for member firms, and the market has never been more challenging. We are currently conducting research to explore the increasingly complex landscape of graduate recruitment and the positioning of tax as a first choice for graduate careers. The qualitative part of the research project is already complete, providing us with a better understanding of how third-level students feel about a career in tax and how we could reposition it in their minds. We will begin collecting responses to the quantitative part shortly.

While the research continues, we are not slowing down our attendance at career fairs across the country, having already travelled to Galway for ATU Galway's fair. We also attended the Institute of Guidance Counsellors' conference. There was much genuine interest from those who can directly influence second-level students' decisions, whether it was in what the career path could offer their students or our Third-Level Scholarship, which closes at the end of March.

Good Luck

Our Autumn students have come to the end of their courses and are gearing up for their exams. They are revising and have access to study skills webinars to help prepare themselves for their April/May exams. On behalf of the Institute, I would like to wish them all the best of luck in their upcoming exams.

Upcoming Conferences

The Annual Conference is back in Galway on the weekend of 31 March–1 April. We are looking forward to seeing you there and returning to the normal, in-person format. The conference is a great opportunity to get tax technical updates from a wide range of

speakers, to connect with your fellow CTAs and to visit the various trade stands, including representatives from the Galway Local Enterprise Office. The conference programme also features the option to participate in a chair yoga session over lunch. We are delighted to have Ray Goggins, former Special Forces Operator, best known as the chief instructor on RTÉ's *Ultimate Hell Week*, join us for dinner on the Friday evening. The final few places are available to book here.

The Institute/Revenue Joint Conference also returns to the CPD calendar, on 19 and 20 May. This conference provides members with a unique opportunity to network with, learn from and share perspectives with senior Revenue personnel on current and emerging issues in tax administration. This year the conference will take place in Limerick, and it will open for bookings shortly.

New Subscription Year

The 2022 subscription year is coming to an end this week. For you, this means that there a couple of deadlines you need to be aware of, including the CPD filing deadline of 30 April 2023. Keep an eye out for communications from the Institute over the coming weeks with the details of how to renew for 2023 and declare your 2022 CPD.

Policy and Representations Monitor

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

News Alert

Pillar Two Minimum Tax Directive formally adopted

The Pillar Two Minimum Tax Directive (Council Directive (EU) 2022/2523) was formally adopted by European Council written procedure on 15 December. The Directive must be transposed into the national law of Member States by the end of 2023 and will apply for accounting periods beginning on or after 31 December 2023.

Article 55a, which was included in the compromise text dated 21 June 2022 and is now contained in Article 57 of the adopted Directive, provides that the Commission shall, by 30 June 2023, submit a report to the Council assessing the implementation of Pillar One of the *Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* and, if appropriate, submit a legislative proposal to address those tax challenges in the absence of the implementation of Pillar One.

On 9 December the Department of Finance published the responses that it had received to the public consultation on "Pillar Two Minimum Tax Rate Implementation", which closed in July of last year. The Department received 12 submissions, including a response from the Institute, which is available on our website, www.taxinstitute.ie.

Institute responds to consultations on Pillar One and Pillar Two

As part of the *Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, the OECD/G20 Inclusive Framework on BEPS has been consulting with stakeholders on certain aspects of both Pillar One and Pillar Two. The Institute has responded to these public consultations, as outlined below, and the submissions are available on our website, www.taxinstitute.ie.

Pillar One

Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One

On 11 November the Institute responded to the public consultation on the "Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One". In our response we highlighted the importance of ensuring that double taxation outcomes are minimised when considering either a "single taxpayer approach" or a "multiple taxpayer approach" under the administration framework for Amount A. We also raised concerns regarding the proposal for a lead tax administration to share the complete common documentation package with all affected parties (i.e. market and relieving jurisdictions), as it may contain sensitive commercial information. We recommended that there be appropriate safeguards for taxpayers, including, for example, limiting the sharing of data with affected parties to relevant information only and ensuring that there is appropriate recourse for a taxpayer if there is a breach of data confidentiality.

In respect of the tax certainty framework for Amount A, we welcomed the inclusion of

timelines for the various stages of each of the certainty review processes but highlighted the importance of considering the options available to taxpayers if these timelines are not met by tax administrations. We also raised concerns regarding the intended scope, timing and process of the advance certainty review.

The OECD published the comments that it received from stakeholders in response to this public consultation on 16 November.

Draft Multilateral Convention (MLC) Provisions on Digital Services Taxes and Other Relevant Similar Measures for Amount A of Pillar One

On 20 January the Institute responded to the public consultation document on the "Draft Multilateral Convention (MLC) Provisions on Digital Services Taxes and Other Relevant Similar Measures for Amount A of Pillar One". In our letter we noted that the standstill and withdrawal commitment for digital services taxes (DSTs) and other relevant similar measures is a core part of Pillar One and its objective to stabilise the international tax system.

We highlighted that a fundamental aspect of the commitment will be to define what are DSTs and other relevant similar measures for the purpose of the multilateral convention through which the new taxing right under Amount A will be implemented and to identify a definitive list of existing measures. However, we noted that it is clear from the extensive footnotes to the draft articles of the MLC in the consultation document that significant technical detail remains under consideration among Inclusive Framework members, which inhibits the level of feedback that can be provided on the draft articles at this time.

Regarding the proposed criteria for identifying a DST or relevant similar measure, we queried the operation in an EU context of a proposed requirement that the DST or relevant similar measure be a tax that applies solely to non-residents or foreign-owned businesses. We also underlined the need for clarity on how Pillar One, including the withdrawal of DSTs, will apply in practice if only a proportion of those countries that joined the Two-Pillar Solution ratify the MLC.

The OECD published the comments that it received from stakeholders in response to this public consultation on 24 January.

Amount B

The Institute responded to the public consultation on Amount B of Pillar One on 25 January. The consultation sought input from stakeholders on the technical aspects of Amount B, which provides for a simplified and streamlined approach to the application of the arm's-length principle to in-country baseline marketing and distribution activities, with a particular focus on the needs of low-capacity countries.

In our response we noted that Amounts A and B constitute Pillar One of the OECD/G20 Inclusive Framework Two-Pillar Solution to Address the Tax Challenges of Digitalisation. As this is a package of twin measures, we highlighted that the proposal to implement Amount B as part of an update to the OECD Transfer Pricing Guidelines (TPG) – rather than its forming part of the Draft Multilateral Convention Provisions on Digital Services Taxes and other Relevant Similar Measures, through which the new taxing right under Amount A would be implemented – is unclear. We noted that, should guidance on the application of Amount B be included in the OECD TPG, it would be essential to specify a commencement date for the application of Amount B to in-scope transactions. This would improve certainty for taxpayers regarding the potential application of Amount B to pre-existing transactions.

We emphasised the importance of ensuring that the rules for Amount B are not overly prescriptive to the extent that taxpayers would be forced to use a pricing method that would not make sense for their particular business, and we stressed that the application of Amount B would operate most effectively as a safe harbour that taxpayers could elect to adopt.

In our submission we also made a number of observations on the main design elements of Amount B. We highlighted that the extensive qualitative scoping assessment that taxpayers would be required to complete to confirm whether their activities are in the scope of Amount B, coupled with the proposed onerous documentation requirements, would not provide simplification for taxpayers.

Although a key objective of Amount B is to improve tax certainty and reduce disputes involving in-scope baseline marketing and distribution transactions, we noted that the subjective nature of the qualitative scoping assessment proposed for Amount B would likely result in the assessment's being open to challenge by tax administrations.

We also noted that Amount B would not provide certainty for taxpayers if it is open to tax administrations to challenge the application of the Amount B pricing methodology by requiring the use of local-market comparables. In this regard, we emphasised that the dataset of global comparables on which the Amount B pricing methodology would be based must be sufficiently substantial as to remove the need for local-market comparables.

The OECD published the comments that it received from stakeholders in response to this public consultation on 30 January.

Pillar Two

The Inclusive Framework released an implementation package relating to the Pillar Two Global Anti-Base Erosion (GloBE) Rules at the end of December, consisting of:

- guidance on safe harbours and penalty relief,
- a public consultation document on the GloBE information return and
- a public consultation document on tax certainty for the GloBE rules.

The guidance on safe harbours and penalty relief includes the agreed terms of a "transitional country-by-country reporting safe harbour" that effectively removes the obligation of calculating the GloBE effective tax rate for an MNE's operations in lower-risk jurisdictions in the initial years, thereby providing relief to MNEs in respect of their GloBE compliance obligations as they implement the rules.

The document also includes the framework for the development of permanent safe harbours, requiring simplified income and tax calculations, as well as a common understanding for a transitional penalty relief regime, which requires careful consideration for applying penalties or sanctions where an MNE has taken reasonable measures to ensure the correct application of the GloBE rules.

GloBE information return

The public consultation document on the GloBE information return (GIR) sought input on the amount and type of information that multinational enterprise (MNE) groups should be expected to collect, retain and/or report for the application of the GloBE rules and possible simplifications that could be incorporated in the GIR, as well as the ability of the MNE group to provide alternative data points.

In our response to this consultation on 3 February we highlighted the overwhelming feedback that we received from our members that the extensive data to be included in the GIR is excessive and would result in an unwarranted administration burden for MNEs. Noting that the GIR should be as streamlined as possible, we emphasised that the information to be included in the GIR must be limited to that which is necessary to verify compliance with the GloBE rules.

In our submission we outlined our key concerns with the GIR, including that it is neither appropriate nor feasible for data to be provided on a constituent-entity basis. As the GloBE rules operate on a jurisdictional basis, the data presented on the GIR should also be provided on a jurisdictional basis.

We noted that, in identifying the data points on the GIR that an MNE will be required to complete, regard must be had to any applicable safe harbours and any income inclusion rules

(IIRs), undertaxed payments rules (UTPRs) and qualified domestic minimum top-up tax rules (QDMTTs) that have been identified as having qualified rule status through the multilateral review process.

Regarding the QDMTT safe harbour, which is currently being developed by the Inclusive Framework, we noted that simplification of the reporting requirements must be an essential element. We emphasised that in the absence of simplified reporting requirements where the QDMTT safe harbour applies, the immense compliance burden for MNEs associated with investing in a jurisdiction with a corporate tax rate close to, or below, the 15% minimum effective tax rate, compared with jurisdictions that have higher corporate tax rates, could act as a disincentive to investment in that jurisdiction, notwithstanding that it has implemented a QDMTT and is complying with Pillar Two. We highlighted that this is particularly important given that a QDMTT is not considered a covered tax and, therefore, groups located in such jurisdictions will most likely not qualify for the transitional safe harbour or the permanent safe harbour, which are based on an effective tax rate test, even though the jurisdiction has implemented a QDMTT.

The OECD published the comments that it received from stakeholders in response to this public consultation on 16 February.

Tax certainty for the GloBE rules

The public consultation document on tax certainty for the GloBE rules outlined various mechanisms, including dispute prevention and dispute resolution, for achieving tax certainty under the rules. The document outlined the expected next steps in connection with the development of these mechanisms and identified a number of areas where stakeholder input would be valuable.

In our response to this consultation on 3 February we noted that although it is expected that jurisdictions will endeavour to align their domestic legislative provisions with the GloBE rules, variations in interpretation will undoubtedly arise, which will inevitably lead to disputes. The uncertainty and additional costs that could arise in cases of inconsistent or uncoordinated application of the GloBE rules remain a key concern for MNEs.

We highlighted the need for an intense focus on ensuring that the potential for disputes is minimised to the greatest extent possible. We stressed that a key factor in minimising the number of disputes will be the development of permanent safe harbours and the identification of IIRs, UTPRs and QDMTTs that are considered to have qualified rule status.

In our submission we also emphasised the need for the OECD to establish an appropriate mechanism that would be adequately resourced to address the complex and detailed questions regarding the application of the GloBE rules that are likely to arise in the circumstances of individual taxpayers.

Finally, we stressed the necessity of an effective dispute resolution mechanism, agreed by all jurisdictions, to resolve issues arising for MNEs based on differences in the interpretation or application of the GloBE rules by jurisdictions. It should not be the case that countries are left to resolve disputes regarding double or over-taxation between themselves, as inevitably such an approach will lead to divergences in the application of the GloBE rules.

The OECD published the comments that it received from stakeholders in response to this public consultation on 16 February.

Next steps

The Inclusive Framework released *Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two)* on 2 February to assist governments with the implementation of the new international tax rules that will ensure that MNEs are subject to a 15% effective minimum tax rate. The aim of the guidance is to ensure coordinated outcomes and greater certainty for businesses as they move to apply the global minimum corporate tax rules from the beginning of 2024.

In a press release on 2 February the OECD confirmed that the Inclusive Framework's previous publications, including the *Safe Harbours and Penalty Relief: Global Anti-Base Erosion Rules (Pillar Two)* document of December 2022 and public consultations on the GloBE information return and tax certainty, together with the publication of the *Administrative Guidance*, finalise the Implementation Framework as set out in the October 2021 "Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy".

The *Administrative Guidance* will be incorporated into a revised version of the Commentary on the GloBE rules that will be released later this year and will replace the original version of the Commentary, which was issued in March 2022. The Inclusive Framework has confirmed that it will continue to release administrative guidance on an ongoing basis to ensure that the GloBE rules continue to be implemented and applied in a coordinated manner.

The Inclusive Framework will now continue its focus on developing the model provision for the subject-to-tax rule under Pillar Two and the related multilateral instrument to assist in its implementation. The technical work relating to Pillar One is still ongoing, with members of the Inclusive Framework aiming to finalise a new multilateral convention by mid-2023, for entry into force in 2024.

Institute responds to consultation on BEFIT

The Institute responded to the European Commission's public consultation on a proposed Directive for a comprehensive solution for business taxation in the EU, known as the Business in Europe: Framework for Income Taxation, or BEFIT, on 26 January.

The stated objective of BEFIT is to simplify the rules for corporate taxation in the Single Market by establishing a single set of tax rules for calculating, consolidating and sharing tax bases. It is intended that BEFIT will be consistent with, and partially based on, the principles that underpin the OECD/G20 Inclusive Framework's Two-Pillar Solution. It will also build on the Commission's previous proposals for a common consolidated corporate tax base (CCCTB) and a common corporate tax base (CCTB).

In our position paper we outlined a number of significant concerns raised by members regarding what is being proposed under BEFIT, including:

- We do not consider that a CCCTB would benefit businesses or tax authorities across the EU.
- At a minimum, the European Commission should defer further consideration of BEFIT until the rules for the implementation of the Pillar Two Minimum Tax Directive have had sufficient time to be put into practice.
- BEFIT, which includes "sales by destination" as a core factor in the formula for allocating taxable profits, would represent a fundamental move away from the principle that a business should have a physical presence in a country before that country has a right to tax that business.
- It is premature to suggest that a new system of formulary apportionment of a CCCTB within the EU could be designed based on Pillar One, given that Pillar One will apply only to the very largest MNEs and a number of its central operational issues remain unresolved, including the identification of the final customer and their location.
- Allocating profits by reference to a formula that would favour countries where customers are located and that would under-attribute value to ownership of critical intangible assets would adversely impact smaller countries with service-based open economies, making them less attractive as destinations for inward investment and thus eroding their tax base.
- Introducing and complying with a new tax system would involve significant additional implementation costs for all businesses and could act as a barrier for SMEs seeking to scale up and operate cross-border in the Single Market.

- BEFIT would create a further layer of uncertainty for businesses, which could create a disincentive for investment in the EU Single Market at a time when it is needed to support the recovery of the economies of Member States.

The Institute's submission is available on our website, www.taxinstitute.ie.

Institute appears before Oireachtas Committee on Budgetary Oversight

On 16 November the Institute's Director of Tax Policy & Representations, Anne Gunnell, and Council Member and Chair of the Institute's Policy and Technical Committee, Brian Brennan, appeared before the Oireachtas Committee on Budgetary Oversight as part of the Committee's ongoing scrutiny of the *Foundations for the Future: Report of the Commission on Taxation and Welfare*, in particular, chapters 6 (Tax Equity and Base Broadening), 7 (Taxes on Capital and Wealth), 8 (Taxes on Retirement Savings) and 14 (Land and Property).

In our opening statement we welcomed the Commission's central guiding principle of broadening the tax base to correct the existing over-reliance on labour taxes and to tip the balance in favour of indirect taxes. We agreed with the Commission that there should be a review of the VAT treatment of goods and services in Ireland to ensure that our rates are in line with EU rules and to phase out preferential treatment of environmentally harmful goods, such as fossil fuels.

The Institute noted members' concerns with some of the Commission's recommendations on capital taxes in chapter 7, in particular, the proposal to treat the transfer of assets on death as a disposal for CGT purposes. We highlighted that this recommendation, if enacted, would make the process of administering an estate difficult and costly for taxpayers, with minimal benefits for the Exchequer. We also pointed out that some of the CGT and CAT reliefs relating to retirement and agricultural and business assets, which the Commission has recommended be restricted, help to facilitate the smooth transfer and continued operation of income-generating farms and businesses.

We also welcomed the Commission's conclusion in chapter 8 that tax relief on pension contributions should be given at an individual's marginal income tax rate because such contributions are a deferral of income.

Regarding chapter 14, we agreed with the Commission's recommendation to retain the local property tax and noted the importance of keeping its tax base, rates, exemptions and deferrals under constant review. We also noted the merits of considering a site value tax to replace the existing commercial rates system.

Finally, the Institute highlighted the importance of stakeholder consultation to the successful implementation of any tax policy changes by the Government.

Representatives from the OECD also appeared before the Committee on Budgetary Oversight to discuss the same chapters of the Commission's report. In her opening statement, the Head of the Personal and Property Unit at the OECD, Sarah Perret, noted the commonality of many of the issues highlighted in the Commission's report across OECD countries in relation to taxes on capital and wealth, including high levels of income and wealth inequality.

Responding to questions from Committee members about the possibility of introducing a wealth tax in Ireland, the Head of the Country Tax Policy Unit at the OECD, Bert Brys, noted that Ireland may end up with very high effective tax rates on certain types of capital income if a wealth tax were added, as well as implementing some of recommendations included in the Commission's report, given the current design of Ireland's capital taxes system.

In response to questions about gift and inheritance tax thresholds, Dr Brys noted that Ireland's CAT regime has "the best practice with regard to the amount of money that can be transferred tax-free over a lifetime".

Policy News

Temporary Business Energy Support Scheme registration and claims

Finance Act 2022 introduced legislation relating to the Temporary Business Energy Support Scheme (TBESS), to provide support to businesses impacted by increases in energy costs. The TBESS received State Aid approval under the European Commission's Temporary Crisis Framework on 25 November, and Revenue opened the e-Registration facility in the Revenue Online Service (ROS) to accept registration applications from 26 November.

A claim portal in respect of the TBESS has been available via the e-repayments system on ROS since 5 December. Revenue began to make payments in respect of valid claims once Finance Act 2022 was signed into law on 15 December. Information on registering for and claiming under the scheme is included in Revenue's "Guidelines on the Operation of the Temporary Business Energy Support Scheme (TBESS)".

The Institute posted a news item on our website homepage in December, summarising the key information available on the registration and claims process and links to Revenue's TBESS guidelines, TBESS webpage, "Understanding Your Bill" guide and TBESS calculator. Revenue hosted a live webinar on 14 December providing information about the TBESS, along with an explanation of the registration and claim process, and addressing questions submitted by event participants. A recording of the webinar and Revenue's slides are available on Revenue's TBESS webpage.

Section 101 of Finance Act 2022 provides that a claim for a temporary business energy payment (TBEP) shall be made no later than four months from the date on which the period to which the claim relates ends. Therefore, businesses were required to submit claims for September 2022 by 31 January 2023.

However, on 30 January, Revenue announced that claims under the TBESS for the September 2022 claim period could be made by eligible businesses after the 31 January 2023 deadline. In a press release the Collector-General, Mr. Joe Howley, noted that there had been significant increased activity on the TBESS claims portal and calls to the TBESS helpline in respect of the impending deadline. A cut-off point for the extension was not provided by Revenue, but eligible businesses were encouraged to submit their claims for the September period as soon as possible.

The Institute had provided feedback to Revenue in January on observations by members about the TBESS and its uptake by businesses. Issues we raised included difficulties for businesses on market-tracking tariffs or fixed contracts in meeting the current "energy cost threshold", the exclusion of LPG and oil from the scheme, perceptions of clients of the amounts that they can receive under the TBESS and reduced awareness of deadlines where businesses are preparing claims without the involvement of their tax agents.

On 21 February, the government announced the latest cost-of-living package, and as part of this package a number of revisions were made to the TBESS. On 1 March, the Minister for Finance, Michael McGrath T.D. exercised his power contained in Section 100 of Finance Act 2022 to extend the scheme immediately to 30 April 2023 and to increase the monthly limit on aid under the scheme from 1 March to €15,000 per qualifying business, subject to an overall monthly cap of €45,000 in cases where a business is carried on from multiple locations. The commencement of these changes was made by way of Ministerial order; S.I. No. 73 of 2023; S.I. No. 74 of 2023; and S.I. No. 75 of 2023.

The other revisions to the TBESS announced 21 February required State aid approval, and subject to that approval, are provided for in the Finance Bill 2023, published on 9 March.

These revisions are:

- The extension of the TBESS to 31 May 2023 (with a further option to extend it to 31 July 2023).
- With effect from 1 March 2023, an extension of the 'specified period' from 28 February to 31 May 2023.
- A reduction in the 50% 'energy costs threshold' to qualify for the TBESS enabling businesses that experience a 30% or more increase in their average unit price for electricity/natural gas to avail of the scheme. The revised 'energy costs threshold' will apply retrospectively from 1 September 2022.
- An increase in the level of relief available to claimants, increasing the relief from 40% to 50% of a business's eligible costs from 1 March 2023 (subject to the monthly cap outlined above).
- A change to the period in which a claim must be made so that claims shall be made no later than two months from the end of the specified period. (As the specified period ends on 31 May, this would enable claims to be made up to 31 July 2023).

The Institute will continue to keep members updated on developments regarding the TBESS in TaxFax and on our dedicated webpage.

Enhanced reporting of benefits by employers

As outlined in the Policy and Representations Monitor, Issue 4, 2022, s9 of Finance Act 2022 provides for "enhanced reporting requirements" for employers regarding certain "reportable benefits" that are not subject to PAYE. The three reportable benefits specified are the remote working daily allowance, benefits provided under the small-benefit exemption, and travel and subsistence payments where no tax is deducted. The Finance Act 2022 amendment is subject to a Commencement Order, to facilitate stakeholder engagement on its implementation, and Revenue expects the reporting requirements to commence in early 2024.

Revenue issued a ROS Information Notice and a survey to the ROS inbox of agents, employers and software developers in January to gather feedback from stakeholders on their current processes to assist Revenue in the design of the new reporting requirements.

The survey closed on 5 February and sought feedback on matters such as the extent and frequency of these types of payments and the recording and processing systems. Revenue confirmed that the information gathered from this engagement will be used to inform plans for the ongoing engagement needed to implement this new reporting requirement successfully. The Institute will be participating in this stakeholder process and will keep members updated on developments as further details emerge.

Public access to Central Register of Beneficial Ownership suspended

After a judgment[1] by the Court of Justice of the European Union (CJEU) in November, the search facility on the Central Register of Beneficial Ownership of Companies and Industrial and Provident Societies (RBO) for beneficial-ownership information was suspended. The RBO is the central repository of statutory information required to be held by relevant entities (corporate and legal entities incorporated in the State) in respect of the natural persons who are their beneficial owners/controllers, including details of the beneficial interests held by them. The RBO has restricted access to designated persons and competent authorities only, with very limited information being available to other parties, in accordance with the recent ruling of the CJEU.

On 22 November the CJEU held that, in the light of the Charter of Fundamental Rights of the European Union (the Charter), the provision of the Fifth Anti-Money Laundering Directive (Directive (EU) 2018/843) whereby Member States must ensure that the information on the

1 Judgment of the Court of Justice of the European Union in Joined Cases C-37/20 | Luxembourg Business Registers and C-601/20 | Sovim.

beneficial ownership of corporate and other legal entities incorporated within their territory is accessible in all cases to any member of the general public is invalid. According to the CJEU, the general public's access to information on beneficial ownership constitutes a serious interference with the fundamental rights to respect for private life and the protection of personal data, enshrined in Articles 7[2] and 8[3] of the Charter, respectively.

New transparency rules for crypto-asset transactions proposed

In December the European Commission proposed new tax transparency rules for all service providers facilitating transactions in crypto-assets for customers resident in the EU, which will complement the Markets in Crypto-Assets (MiCA) Regulation and anti-money-laundering rules.

The proposed Directive, which takes the form of an amendment to the Directive on Administration Cooperation (DAC) (referred to as DAC8), will contain provisions on the reporting and exchange of information on crypto-assets for direct tax purposes. The proposal also aims to improve existing provisions and ensure the correct functioning of the rules. The Commission sought feedback on the proposed Directive by 3 February.

The DAC8 proposal is consistent with the OECD initiative on the Crypto-Asset Reporting Framework (CARF) and the amendments to the OECD Common Reporting Standard (CRS).

The draft text will be submitted to the European Parliament for consultation and to the Council for adoption. It is foreseen that the new reporting requirements with regard to crypto-assets, e-money and digital currencies would enter into force on 1 January 2026.

Council agrees position on strengthened anti-money-laundering rulebook

The European Council agreed its position on a proposed anti-money-laundering Regulation and a proposed new anti-money-laundering Directive in December. The Council can now proceed to start trilogue negotiations with the European Parliament and Commission to agree a final version of the texts. Together with the proposed recast of the transfer-of-funds Regulation, on which agreement has already been reached with the Parliament, these will form the new EU anti-money-laundering rulebook once adopted.

Commission proposes measures to bring VAT into digital age

On 8 December the European Commission proposed a series of measures to modernise and make the EU's VAT system work better for businesses and more resilient to fraud by embracing and promoting digitalisation. The proposal also aims to address challenges in the area of VAT raised by the development of the platform economy.

The proposals put forward by the Commission include:

- **A move to real-time digital reporting based on e-invoicing for businesses that operate cross-border in the EU and a harmonised framework for domestic transactions:** The new system introduces real-time, transaction-based digital reporting for VAT purposes, based on e-invoicing. The move to e-invoicing is intended to help reduce VAT fraud and bring down administrative and compliance costs for EU traders. It also makes sure that existing national systems converge across the EU and paves the way for Member States that wish to set up national digital reporting systems for domestic trade in the coming years.
- **Updated VAT rules for passenger transport and short-term accommodation platforms:** Under the new rules, platform economy operators themselves will be deemed responsible for collecting VAT when service providers do not (because they are, for example, a small business not usually required to register for VAT) and

2 Article 7, Chapter I, Charter of Fundamental Rights of the European Union: Respect for private and family life.
3 Article 8, Chapter I, Charter of Fundamental Rights of the European Union: Protection of personal data.

for remitting this VAT to tax authorities. This, together with other clarifications, is intended to ensure a uniform approach across all Member States and contribute to a more level playing field between online and traditional accommodation and transport services.

- **The introduction of a single VAT registration across the EU:** Building on the existing "One-Stop Shop" model for e-commerce traders, the proposal will further reduce the circumstances in which businesses that want to sell to consumers in more than one Member State have to register in other Member States. With this reform, traders who operate cross-border will be able to opt to register in only one Member State for their sales to consumers across the EU and for their transfers of goods for storage in other Member States.

The Commission is seeking feedback on its Proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards the VAT administrative cooperation arrangements needed for the digital age and its Proposal for a Council Directive amending Directive 2006/112/EC as regards VAT rules for the digital age. The feedback period runs until 4 April 2023.

Provisional agreement reached on Carbon Border Adjustment Mechanism and EU Emissions Trading System

Negotiators from the European Council and the European Parliament reached an agreement in December, of a provisional and conditional nature, on the Carbon Border Adjustment Mechanism (CBAM). The agreement must be confirmed by ambassadors of the Member States and by the European Parliament and be adopted by both institutions before it is final. Under the provisional agreement the CBAM will begin to operate from October 2023.

The CBAM will initially cover a number of specific products in some of the most carbon-intensive sectors: iron and steel, cement, fertilisers, aluminium, electricity and hydrogen, as well as some precursors and a limited number of downstream products. Indirect emissions would also be included in the Regulation in a well-circumscribed manner.

It is proposed that the CBAM would be phased in gradually, in parallel to a phasing-out of the free allowances, once it begins under the revised EU Emissions Trading System (ETS) for the sectors concerned. This will ensure compatibility of the CBAM with international rules on trade.

In December the Commission also welcomed the provisional agreement reached with the European Parliament and Council to strengthen the ETS, to apply emissions trading to new sectors for effective economy-wide climate action and to establish a Social Climate Fund. The Commission notes that the deal is a fundamental step towards reaching the EU's commitment to reduce net greenhouse gas emissions by at least 55% by 2030. Further work is also required on measures to prevent carbon leakage on exports.

To complement the substantial spending on climate in the EU budget, Member States will spend the entirety of their emissions trading revenues on climate and energy-related projects and addressing social aspects of the transition.

To support Member States in their efforts to reduce emissions from buildings and road transport and certain industrial sectors, a new, separate emissions trading system will start from 2027 for relevant fuel use.

This provisional agreement requires formal adoption by the Parliament and the Council. Once this process is completed, the new legislation will be published in the *Official Journal of the European Union* and enter into force.

Ireland signs international tax agreement to exchange information collected by operators of digital platforms

During the annual plenary meeting of the Global Forum on Transparency and Exchange of Information for Tax Purposes on 9 November, 22 jurisdictions, including Ireland, signed the

multilateral competent authority agreement for the automatic exchange of information under the OECD Model Rules for Reporting by Digital Platforms.

The agreement will allow jurisdictions to automatically exchange information collected by operators of digital platforms with respect to transactions and income realised by platform sellers in the sharing and gig economy and from the sale of goods through such platforms.

In addition, the OECD published a new peer-review report, *Peer Review of the Automatic Exchange of Financial Account Information 2022*, presenting the first peer-reviews with effectiveness ratings for the 99 countries and jurisdictions that had committed to starting automatic exchange of information in 2017 or 2018. It shows that virtually all jurisdictions have put in place the necessary legal frameworks, have successfully started exchanges and are exchanging information without significant timing or technical issues. Ireland received an "on track" rating.

Foreign Subsidies Regulation enters into force

On 12 January Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market, or the Foreign Subsidies Regulation (FSR), entered into force. The Regulation was proposed by the Commission in May 2021 and agreed by the European Parliament and the Council in June 2022.

The FSR consists of three tools, which will be enforced by the Commission:

- An obligation for companies to notify to the Commission concentrations (i.e. mergers and acquisitions) involving a financial contribution by a non-EU government where (1) the acquired company, one of the merging parties or the joint venture generates an EU turnover of at least €500m and (2) the foreign financial contribution involved is at least €50m.
- An obligation for companies to notify to the Commission participation in public procurement procedures where (1) the estimated contract value is at least €250m and (2) the foreign financial contribution involved is at least €4m per non-EU country. The Commission may prohibit the awarding of contracts in such procedures to companies benefiting from distortive subsidies.
- For all other market situations, the Commission can start investigations on its own initiative (*ex-officio*) if it suspects that distortive foreign subsidies may be involved. This includes the possibility to request ad-hoc notifications for public procurement procedures and smaller concentrations.

The FSR grants the Commission a wide range of investigative powers to gather the necessary information, and if the Commission finds that a foreign subsidy exists and distorts the Single Market, it may balance the negative effects in terms of the distortion with the positive effects of the subsidy on the development of the subsidised economic activity. As a general rule, subsidies below €4m over three years are considered "unlikely" to be distortive and subsidies below the EU State Aid *de minimus* thresholds are considered non-distortive.

The FSR will start to apply on 12 July 2023; therefore, as of this date, the Commission will be able to launch *ex-officio* investigations. The notification obligation for companies will be effective as of 12 October 2023.

The Commission will shortly present a draft Implementing Regulation that will clarify the applicable rules and procedures, including the notification forms for concentrations and public procurement procedures, the calculation of time limits, access to file procedures and confidentiality of information. Stakeholders will then have four weeks to provide feedback on these draft documents before the implementing rules are finalised and adopted by mid-2023.

UK Autumn Statement 2022 published

On 17 November the UK Chancellor of the Exchequer, the Rt Hon Jeremy Hunt MP, delivered his Autumn Statement 2022.

A summary of the key tax measures is given below:

Corporation tax

- The planned increase in the corporation tax rate to 25% for companies with profits of more than £250,000 will proceed from 1 April 2023.
- From April 2023, the rate of diverted profits tax will increase from 25% to 31% to retain a 6-percentage point differential above the main rate of corporation tax.
- The annual investment allowance, which provides 100% relief on qualifying capital expenditure in the year of acquisition, will be permanently set at £1m 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 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 is currently running a research and development (R&D) tax relief Reform consultation on the design of a single R&D scheme and to understand whether further support is necessary for R&D-intensive SMEs, without significant change to the overall cost for supporting R&D. The consultation period runs to 13 March 2023. If implemented, the new scheme is expected to be in place from 1 April 2024.
- 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%; and
  - a supplementary qualified domestic minimum top-up tax (QDMTT) 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 the 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 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 was 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 CGT 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 legislated 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 for 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

- After consultation the UK Government has decided not to introduce an online sales tax.
- 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 £13.6bn over the next five 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 were published by HMRC.
- The UK Government is investing a further £79m over the next five years to enable HMRC to allocate additional staff to tackle more cases of serious tax fraud and address tax compliance risks among wealthy taxpayers.

The Spring Budget is scheduled for 15 March 2023.

HMRC revises late-payment interest rates

The Bank of England Monetary Policy Committee voted on 3 November 2022 to increase the Bank of England base rate from 2.25% to 3%, on 15 December 2022 to increase it to 3.5% and on 2 February 2023 to increase it

to 4%. As HMRC interest rates are linked to the Bank of England base rate, the HMRC interest rates for late payment and repayment also increased.

Late-payment interest is currently set at the base rate plus 2.5%, and repayment interest is currently set at the base rate minus 1%, with a lower limit, or "minimum floor", of 0.5%.

The updates to the late-payment and repayment interest rates that apply to the main taxes and duties that HMRC charges and pays interest on are outlined below in chronological order:

- 5.5% for late payment and 2% for repayments from 22 November 2022,
- 6% for late payment and 2.5% for repayments from 6 January 2023 and
- 6.5% for late payment and 3% for repayments from 21 February 2023.

HMRC to introduce legislation to change the way repayment agents are paid

HMRC announced that it will introduce legislation to change the way in which repayment agents are paid for their services and to protect taxpayers better. These changes will prevent the use of legally binding "assignments" as part of claiming an income tax repayment, which could be cancelled only if the agent and taxpayer both agreed to do so. HMRC considers that this can be challenging for taxpayers who become dissatisfied with their agent or who wish to take over managing their own claim.

Under new arrangements, if a taxpayer chooses to use a repayment agent to reclaim overpaid tax and wants the tax refunded to the agent, they will need to make a nomination, which they can cancel at any time. The new process is intended to make it easier for taxpayers to stay in control of their repayments.

HMRC also announced updated standards applicable to all agents to improve transparency and a new HMRC registration process for repayment agents. The updated HMRC standard for agents includes greater evidence of taxpayer consent, which aims to ensure that taxpayers better understand the agreement they are entering into; a 14-day "cooling-off" period for taxpayers after entering into an arrangement with an agent; and an obligation on agents to ensure that all communications and advertising material are fair, clear and accurate and do not mislead or conceal material facts. Further details on the HMRC approach to registration for repayment agents are expected to be set out in due course.

Revenue eBriefs Issued from 1 November 2022 to 31 January 2023

No. 195 Help to Buy (HTB)

Revenue has updated the manual "Help to Buy (HTB)" at paragraph 7 to clarify that equity funding provided as part of an Affordable Purchase Housing Scheme introduced under the Affordable Housing Act 2021 does not meet the legislative definition of a qualifying loan for the purposes of s477C TCA 1997 and thus does not form part of the loan-to-value calculation required by sub-section (11) of that section.

No. 196 Update to Chapter 5 – The Small Benefit Exemption

Revenue has updated the manual "Chapter 5 – The Small Benefit Exemption (SBE)" at section 4 to reflect Finance Bill 2022 amendments to s112B TCA 1997. Broadly, the changes are to provide for an increase in the combined aggregate value of benefits or vouchers that an employer can give in a tax year to a maximum of €1,000 (from €500) and an increase in the combined number of such benefits that can be given in a tax year from one to two. This treatment will apply for the 2022 year of assessment and subsequent years.

The manual confirms if more than two benefits are given in a year, only the first two may qualify for tax exemption (provided all other conditions of the section are satisfied). A Financial Resolution was passed on Budget Day to give this measure effect, pending the passing of the Finance Bill.

No. 197 Emergency Accommodation and Ancillary Services

Revenue has updated the "Emergency Accommodation and Ancillary Services" manual to clarify that the supply of accommodation for the purposes of direct provision constitutes a VAT-exempt supply of emergency accommodation. The manual also includes guidance on when a Capital Goods Scheme adjustment may be required and guidance on the operation of the option to tax lettings of immovable goods.

No. 198 Accelerated Loss Relief for Companies Adversely Impacted by the Covid-19 Pandemic Restrictions

Revenue's manual "Corporation Tax: Accelerated Loss Relief for Companies Adversely Impacted by Covid-19 Restrictions" has been updated:

- in the introduction and section 2.7, to outline that accelerated loss relief under s396D TCA 1997 is no longer available due to the time limits provided for in the legislation (the last possible date by which a claim could be made under s396D was 30 May 2022); and
- to include references to s1077F TCA 1997 and the new Code of Practice for Revenue Compliance Interventions.

No. 199 Non-resident Corporate Landlords Within the Charge to Corporation Tax

Finance Act 2021 amended ss25, 308, 399 and 959AS TCA 1997 and introduced a new s25A TCA 1997 to bring non-resident corporate landlords within the charge to corporation tax, instead of income tax, from 1 January 2022. The amendments increased the rate of tax for non-resident corporate landlords from 20% to 25%, equalising the position with Irish-resident companies.

In addition, from 1 January 2022, a gain on the disposal of an asset by a non-resident company, the profits or gains from which were chargeable to tax under Case V of Schedule D, is within the charge to corporation tax rather than capital gains tax (CGT). The only exception to this rule is where a gain is realised on the disposal of development land, in which case the gain is within the charge to CGT.

Revenue has updated the following manuals to reflect the changes introduced by Finance Act 2021:

- "Corporation Tax – General Background", at section 1;
- "The Charge to and Rates of Corporation Tax", at section 3;
- "Certain Non-resident Companies Within the Charge to Corporation Tax (Section 25 TCA 1997)", at sections 1, 2 and 3;
- "Corporation Tax – General Scheme, Scope of Charge and Basis of Assessment", at section 1; and
- "Corporation Tax/Capital Gains Tax Interaction", at section 2.

No. 200 Corporation Tax: Relief for Terminal Loss in a Trade

Revenue updated the manual "Corporation Tax: Relief for Terminal Loss in a Trade" at section 4 to clarify the time limit for making a terminal loss relief claim. The claim must be made within four years from the end of the accounting period in which the terminal loss is incurred.

No. 201 Accounting for Mineral Oil Tax Manual

Revenue updated appendix I of the "Accounting for Mineral Oil Tax Manual" to reflect changes to the excise duty rates that apply from 12 October 2022. The historical rates of mineral oil tax in appendix XI have also been updated.

No. 202 Updated Guidelines for the Temporary Business Energy Support Scheme (TBESS)

Revenue updated the "Guidelines on the Operation of the Temporary Business Energy Support Scheme (TBESS)" to reflect that the scheme received State Aid approval from the European Commission and opened for registration on Revenue's Online Service (ROS) from 26 November 2022.

A list of the main additions and amendments that have been made to the TBESS guidelines since the last version issued on 26 October 2022 is provided in appendix IV.

The updated TBESS guidelines provide a link to Revenue's "Understanding Your Bill" guide, which includes sample invoices and statements to help businesses to identify the information needed during the registration process. This guide will be updated to include information on the claims process shortly.

The claims process will open from 5 December.

No. 203 ROS – Return Preparation Facility (RPF)

Revenue has been developing a replacement for the ROS Offline suite of tax returns. This new ROS Return Preparation Facility (RPF) is available for a number of forms, with further forms to be added over time.

The RPF enables users to complete forms without being logged in to ROS and to save those forms as files on their local computer to upload to ROS later, using ROS Online to sign and submit the return. The RPF can be accessed through a link on the ROS log-in screen.

Revenue's new manual "ROS – Return Preparation Facility (RPF)" provides detailed information, including screenshots, on accessing and using the RPF. Further guidance can be found on Revenue's Return Preparation Facility webpage.

At the end of November the following forms are available in the RPF (as set out in the appendix to the manual).

- eStamping,
- Form 11 2020 and Form 11 2022,
- Form 1 Trust and Estates 2022 and
- Form 1 Firms 2022.

Work is ongoing to develop additional forms in RPF, in line with the regular annual or periodic update of such forms.

No. 204 Capital Gains Tax (CGT) – s604A TCA 1997 Updates Including Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020 Changes

Revenue has updated the manual "Relief on Disposals of Certain Land or Buildings (S.604A)" to note that the relief contained in s604A TCA 1997 may apply in respect of disposals of land or buildings located in the UK. This reflects an amendment made to s604A by the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020.

The manual has also been updated to include a paragraph 3A.5 to confirm the meaning of "consideration" for the purpose of the relief.

No. 205 Irish Real Estate Funds (IREF) January 2022 Filing – Updated Form IREF Available

Irish real estate funds (IREFs) with accounting periods ending between 1 January 2022 and 30 June 2022 are required to file a Form IREF on or before 30 January 2023, as provided by s739R(2) TCA 1997.

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

The eBrief notes that the Form IREF January 2023 does not contain any substantial updates. Revenue also advises IREFs to ensure that they use the correct version of the Form IREF.

No. 206 Updated Guidelines for the Temporary Business Energy Support Scheme (TBESS)

Revenue updated the "Guidelines on the Operation of the Temporary Business Energy Support Scheme (TBESS)" to include additional information on how businesses can register for and make a claim under the scheme. From 5 December 2022 businesses can submit claims on Revenue's Online Service (ROS). Businesses

must register for the TBESS on ROS and have tax clearance before a claim can be submitted.

A list of the main additions and amendments that have been made to the TBESS guidelines since the last version issued on 25 November 2022 is provided in appendix IV.

Revenue's "Understanding Your Bill" guide, which provides sample invoices and statements to help businesses to identify the information needed during the registration process, has been updated to include additional sample bills provided to Revenue by a number of energy suppliers.

No. 207 Real Estate Investment Trusts (REITs)

Revenue's "Real Estate Investment Trusts (REITs)" manual has been updated (at footnote 3) to clarify that Irish REITs may not rely on the application of the EU Parent/Subsidiary Directive to exempt a distribution from dividend withholding tax.

No. 208 Securitisation Regulation: Notification of Investment

Revenue has updated the manual "Securitisation Regulation: Notification of Investment" to provide further clarification on whether an investor is required to submit a Notification of Investment (NOI) in relation to an investment in a securitisation special-purpose entity and the deadline for submission of the NOI. Additional examples have also been included in the manual.

Appendix 1 of the manual has been updated to include the list of relevant Annex II jurisdictions for the period from 3 March 2022 to 11 October 2022 and to link to the EU list of non-cooperative jurisdictions for tax purposes that was updated on 12 October 2022.

No. 209 Preparation of Accounts for Revenue Purposes, Treatment of Debtors, Creditors and Work-in-Progress in Professional Accounts

Revenue has updated the manual "Preparation of Accounts for Revenue Purposes, Treatment of Debtors, Creditors and Work-in-Progress in Professional Accounts" to reflect the relevant legislative references in TCA 1997.

No. 210 Revisions to the Administration & Control of Tax Warehouses Manuals: Part 2 – Breweries, Micro-Breweries and Cider Manufacturers and Part 3 – Distilleries

Revenue has updated "The Administration & Control of Tax Warehouses Manual Part 2 – Breweries, Microbreweries and Cider Manufacturers" and "The Administration & Control of Tax Warehouses Manual Part 3 – Distilleries" to reflect amendments to Finance Act 2003 made under s43 Finance Act 2021.

The amendments include the introduction of the Certification System for Small Alcohol Producers by s78B Finance Act 2003 and changes to ss77(c) and 77(d) Finance Act 2003 regarding denatured alcohol.

No. 211 MyEnquiries

Revenue has amended the "MyEnquiries" manual to reflect that the "Access to and registering for MyEnquiries" manual has been updated. New text was added to paragraph 3.6 on Removing Email Addresses in the "Access to and registering for MyEnquiries" manual to advise ROS users that when a ROS Inbox email address is deactivated, this is highlighted to Revenue staff replying to active enquiries or initiating enquiries.

No. 212 Betting Duty Returns and Payments Compliance Procedures Manual

The manual "Betting Duty Returns and Payments Compliance Procedures" has been updated at paragraph 1.4.2 to reflect the amendment made under s50 Finance Act 2022.

Betting duty is chargeable on all bets made, laid or otherwise entered into by licensed bookmakers and licensed remote bookmakers with persons in the State, including bets staked wholly or partially on foot of an offer (namely, "free" or "bonus" bets).

After an amendment to s67 Finance Act 2002 made under s50 Finance Act 2022, paragraph 1.4.2 of the manual has been updated. The update further clarifies that when a bet is staked wholly or partially on foot of an offer, the amount subject to betting duty shall be equal to the nominal value of the unit stake. The rate of betting duty that applies to such bets is 2%.

No. 213 eRCT System – Additional Guidance on the Bulk Rate Review (BRR)

Revenue has updated paragraph 8 of its manual "Electronic Relevant Contracts Tax System" to include some guidance on the new monthly Bulk Rate Reviews (BRRs).

In summary, a BRR will take place at monthly intervals, with only certain sub-contractors reviewed in each month. Only RCT sub-contractors with a live RCT registration will be reviewed. Sub-contractors selected for each month are determined by location and whether a corporate or non-corporate entity.

All sub-contractors on Revenue records have been issued with a rate determination. Newly registered sub-contractors are issued with a rate determination once a contract has been notified to Revenue. As rates are amended, either through the BRR or by the sub-contractor through the ROS self-review facility, the sub-contractor will be notified of the new rate.

No. 214 VAT Notes for Guidance

At the end of December Revenue published the "Finance Act 2022 VAT Notes for Guidance" on its website.

No. 215 Import of Motor Vehicles from the UK

Revenue has updated the manual "Importation of Motor Vehicles from the UK" to provide clarity on the requirements for registering a vehicle in the State that was first brought into Northern Ireland before 1 January 2021.

No. 216 Section 110: Entitlement to Treatment

Revenue updated the manual "Section 110: Entitlement to Treatment" to provide clarification on the "double trade" test and the deductibility of payments to the European Bank for Reconstruction and Development.

No. 217 Capital Acquisitions Tax Manual Part 12: Business Relief – Clawing Back the Relief (Section 101)

Revenue has updated "Part 12 – Business Relief" of the CAT manual at section 12.7, which deals with the circumstances where the relief will be withdrawn. The update clarifies that business relief will not be withdrawn where the event that would otherwise give rise to the withdrawal occurs after the death of the donee or successor. Two examples have been added to provide further clarity on this issue.

No. 218 Research and Development (R&D) Tax Credit: Appointment of Experts to Assist in Audits

Revenue has updated the manual "Research and Development (R&D) Credit: Appointment of Expert to Assist in Audits" to include a link to the 2022/23 e-tender application process. Each year, Revenue establishes a panel of experts who may be called on to assist with reviews of R&D tax credit claims. The e-tender for the 2022/23 panel has been launched.

No. 219 Updated Guidelines for the Temporary Business Energy Support Scheme (TBESS)

Revenue updated its "Guidelines on the Operation of the Temporary Business Energy Support Scheme (TBESS)" to reflect the queries raised during the Q&A at Revenue's webinar on the TBESS held on 14 December. A recording of the webinar can be viewed on Revenue's website, together with the presentation slides and other resources to assist claimants.

A list of the main additions and amendments that have been made to the TBESS guidelines since the last version issued on 5 December 2022 is provided in the "What's New" page at the beginning of the guidelines.

No. 220 Tax Treatment of Payments Received under the Basic Income for the Arts Pilot Scheme

Revenue published a new manual titled "Tax Treatment of Payments Received Under the Basic Income for the Arts Pilot Scheme". This clarifies that the payments, which are in the nature of an income grant, are taxable under either Case I or Case II of Schedule D as income from a trade or profession (i.e. self-employed income).

The pilot scheme was launched in April 2022 and is administered by the Department of Tourism, Culture, Arts, Gaeltacht, Sports and Media. It is open to eligible artists and creative arts workers. Individuals who qualify for the scheme receive a payment of €325 per week, payable monthly.

No. 221 Payment and Receipt of Interest and Royalties Without Deduction of Income Tax

Revenue has updated the manual "Payment and Receipt of Interest and Royalties Without Deduction of Income Tax" to clarify Revenue's interpretation of the meaning of a "bona fide banking business in the State".

The manual has also been updated to modify, in certain circumstances, the self-certification process in relation to the application of withholding tax on certain payments of interest and royalties at the applicable rate under the terms of a double taxation agreement.

No. 222 Tax Treatment of Payments Received under the Brexit Voluntary Permanent Cessation Scheme

A new Revenue manual titled "Tax Treatment of Payments Received under the Brexit Voluntary Permanent Cessation Scheme" provides guidance on the tax treatment of payments made in respect of the decommissioning of fishing vessels under the scheme.

No. 223 Accelerated Capital Allowances for Farm Safety Equipment Manual

Revenue has released a new manual titled "Accelerated Capital Allowances for Farm Safety Equipment" on the operation of this safety scheme.

Section 285D TCA 1997 provides for a scheme of accelerated capital allowances for capital expenditure incurred on certain farm safety equipment by a person carrying on a trade of farming. The expenditure must be incurred in the period from 1 January 2021 to 31 December 2023, and the Minister for Agriculture, Food and the Marine must certify the expenditure. Once certified, the expenditure can be written off at a rate of 50% per annum over two years rather than at the normal rate of 12.5% per annum over eight years.

The scheme is subject to an overall annual budget of €5m (excluding VAT). In addition, there is a limit of €500,000 on the total amount of relief that can be granted to any person under this scheme.

No. 224 VAT Treatment of Dental Services

Revenue has published a new manual titled "VAT Treatment of Dental Services". The manual sets out the VAT treatment of dental services, dental technicians and dental arrangements between principal dentists and associate dentists.

No. 225 Update to Share Schemes Manual – Chapter 14

Revenue has updated "Chapter 14 – Cash-Settled Share Awards" of the share schemes manual to include a reference to chapter 15, which provides guidelines on how to file a Form ESA.

No. 226 Tax and Duty Manual Part 05-02-10 – Road Haulier Drivers (Employees) – Subsistence Rates

The manual "Road Haulier Drivers (Employees) – Subsistence Rates" has been updated as follows:

- Paragraph 2 includes reference to the conditions for the reimbursement of subsistence expenses based on civil service rates.
- Paragraph 3 reflects the terminology in Revenue's Compliance Intervention Framework.

- Paragraphs 5 and 6 reflect updates to the rates of subsistence.

No. 227 Payments on Termination of an Office or Employment or Removal from an Office or Employment

Revenue has made several updates to the manual "Payments on Termination of an Office or Employment or Removal from an Office or Employment", as follows:

- The layout has been amended to follow the structure of the legislation.
- Paragraphs 2.1 and 5 clarify that termination payments received on or after 1 January 2018 are taxed on the receipts basis.
- Paragraph 2.3 outlines that redundancy will generally not be regarded as taking place where, after termination, an employee commences work with another company in the same group.
- Paragraph 3 outlines the tax exemptions that apply to the Covid-19-related layoff payment and the Covid-19 death-in-service payment, which were introduced by Finance Act 2022.
- Paragraph 4.6 has been added to provide detail on the relevant capital sum.
- Paragraph 4.7 has been added to provide detail on the interaction of Covid-19 supports with the exemptions offered by s201 and Schedule 3 TCA 1997.
- Paragraph 5 clarifies that where an employment contract provides for payment in lieu of notice, the payment is taxable as pay and the exemptions offered by s201 and Schedule 3 TCA 1997 do not apply.
- References to foreign service relief have been removed, as it ceased to have effect from 7 March 2013.
- References to top-slicing relief have been removed, as it ceased to have effect from 1 January 2014.

No. 228 Sea-Going Naval Personnel Tax Credit

The "Sea-Going Naval Personnel Tax Credit" manual has been updated to reflect the extension of the credit to the 2023 year of assessment by Finance Act 2022. The value of the credit and qualifying conditions remain unchanged.

No. 229 Tax and Duty Manual Part 05-01-01b Updated

Revenue has updated the manual "Chapter 2 – Employer-Provided Vehicles" as follows:

- Section 6 has been updated in respect of the provision of electric charging points and the payment of electricity bills. [The Institute had requested further clarity from Revenue regarding the tax treatment where employees charge their employer-provided electric vehicles at home and are reimbursed for the cost related to business travel.]
- Section 8 reflects the simplification measures applicable from 1 January 2023 for employees in the motor industry.
- Section 9 updates the material on the Covid-19 concession.
- Section 10 now includes the tax treatment for 2023 and subsequent years, which has been moved from the appendix.
- Examples have been updated throughout.

No. 230 Customs Export Procedures Manual

The "Customs Export Procedures Manual" has been updated to reflect impending changes to export procedures with the introduction of a new customs export system, AES, in January 2023:

- Paragraph 5.6 includes the new official name for Turkey – Türkiye. This paragraph has also been updated to reflect the countries that accept invoice declarations/EUR-MEDs and to reflect the countries that can avail of preferential export and provide additional information regarding the Registered Export System (REX).
- A new paragraph 9.4, "Outward Processing", has been included to provide information on what is required at time of export for goods intended for temporary export for processing or repair.

- General changes have been made to the text throughout the manual to improve readability.

No. 231 Guidance on Part 35A Transfer Pricing

Revenue has updated the "Transfer Pricing" manual after amendments were made to the transfer pricing rules in Part 35A TCA 1997:

- Finance Act 2021 substituted s835E TCA 1997, which provides for an exclusion from the application of transfer pricing rules in certain circumstances.
- Finance Act 2022 updated the definition of "transfer pricing guidelines" in s835D TCA 1997. It now refers to the updated OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations published on 20 January 2022.
- The manual has also been updated to reflect the Code of Practice for Revenue Compliance Interventions, which came into effect on 1 May 2022.

No. 232 Cycle to Work Scheme – Finance Act 2022 Updates

Revenue has updated the manual "Chapter 7 – The Provision of Bikes and Safety Equipment ('Cycle to Work Scheme')" at section 7 to reflect Finance Act 2022 amendments. The guidance now includes a definition of a cargo bike for the purposes of availing of the higher exemption limit of €3,000, together with updated examples.

No. 233 Rent Tax Credit

Revenue has published a new "Rent Tax Credit" manual, which outlines the conditions that must be met for an individual to be eligible to claim this new credit. The rent tax credit is available for the tax years 2022 to 2025 inclusive. The manual also outlines the process by which the credit may be claimed.

In addition, Revenue has marked the contents of the manual "Allowance in Respect of Rent Payable for Residential Premises" as no longer relevant. This relief was phased out over the tax years 2011 to 2017 and is no longer available.

No. 234 Preliminary Income Tax Direct Debit Guidelines

Revenue's manual "Preliminary Income Tax Direct Debit Guidelines" has been updated at appendix 4 to include the following information: "If you have more than one Direct Debit, each Direct Debit needs to be updated separately".

No. 235 VAT and Employer Income Tax/ PRSI/USC/LPT

Revenue's manual "VAT and Employer Income Tax/PRSI/USC/LPT Direct Debit Guidelines" has been amended at section 12. The sentence "Revenue will request the missed or unpaid Variable Direct Debit payment seven working days after the date the original payment was due" has been deleted in that section, as Revenue no longer requests this.

No. 236 VAT Treatment of Printing and Printed Matter

The VAT manual titled "Printing and Printed Matter" has been updated to outline the new zero rate of VAT for newspapers, which takes effect from 1 January 2023.

In addition, the following VAT manuals have been updated:

- "Electronic Publications",
- "Certain Sanitary Products",
- "Management of Special Investment Funds",
- "VAT Treatment of Food and Drink Supplied by Wholesalers and Retailers" and
- "Medical Services".

No. 001 Universal Social Charge

Revenue has updated the "Universal Social Charge" manual to reflect Finance Act 2022 amendments. The changes to the manual include:

- Paragraph 4 reflects the increase in the USC rate thresholds in line with increases to the national minimum wage.

- Paragraphs 6.1 and 11.3 confirm that employer contributions to a PEPP (pan-European pension product) are not considered relevant emoluments for the purposes of USC.
- Paragraph 11.2 reflects that, from 1 January 2023, employer contributions to a PRSA (personal retirement savings account) are not considered a taxable benefit-in-kind, following an amendment to s118 TCA 1997.
- The following USC-exempt payments have been added to the list of exemptions in paragraph 12.2:
  - Section 192J: Electricity costs emergency benefit payment,
  - Section 192JA: Payments under Electricity Costs Emergency Benefit Scheme II,
  - Section 192K: Pandemic Special Recognition Payment,
  - Section 192L: Ex Gratia Payment in Respect of an Incorrect Birth Registration,
  - Section 192M: Payments under Covid-19 Death in Service Ex-Gratia Scheme for Health Care Workers and
  - Section 192N: Payments in relation to Ex-Gratia Scheme for Community Employment Scheme Supervisors and Assistant Supervisors.
- Paragraph 13 has been updated to confirm that the reduced rate of USC for medical card holders has been extended for one further year, to the 2023 year of assessment.

No. 002 Large Corporates Division: Co-operative Compliance Framework

Revenue has updated the manual "Large Corporates Division: Co-operative Compliance Framework", which contains general information on the procedures and operation of the Co-operative Compliance Framework by the Large Corporates Division.

No. 003 Deduction for Income Earned in Certain Foreign States (Foreign Earnings Deduction)

Revenue has updated the manual "Deduction for Income Earned in Certain Foreign States (Foreign Earnings Deduction)" to reflect the extension of the relief, by Finance Act 2022, to the 2025 year of assessment. The qualifying conditions of the FED and the maximum amount of income tax relief that may be claimed remain unchanged.

No. 004 Guidelines for Agents or Advisors Acting on Behalf of Taxpayers

Revenue has updated the manual "Guidelines for Agents or Advisors acting on Behalf of Taxpayers" as follows:

- Paragraph 2 and appendix 3 have been updated to include information on registering as an Import One-Stop Shop (IOSS) intermediary.
- Paragraph 3 includes updated contact details for the National Tax Agent Identification Number/Transaction Advisory Identification Number (TAIN) Register.
- Paragraph 6 and a new paragraph 11 include updated guidance for agents of PAYE (only) clients.
- Guidance for registering local property tax clients is included in a new paragraph 7, and guidance for registering IOSS clients in a new paragraph 9.
- Updates have been made to paragraph 8 to reflect the appointment of specialist advisers for one-off transactions.
- Updates have been made to paragraphs 12, 13 and 14 on electronic signatures and client bank and contact details.

No. 005 Changes to Standard Rate Tax Band and Personal Tax Credits

Revenue has updated a number of manuals to reflect the changes to the value of the standard rate tax band and a number of personal tax credits introduced by Finance Act 2022. The changes apply with effect from 1 January 2023 and include:

- The value of the standard rate tax band has increased by €3,200 per person.
- The value of the basic personal tax credit, the employee (PAYE) tax credit and the

- earned income tax credit have all increased to €1,775 per person.
- The value of the home carer tax credit has increased to €1,700 per person.

The following manuals have now been updated to reflect these changes and to update the text for the current tax year:

- "Incapacitated Child Tax Credit",
- "Employee (PAYE) Tax Credit",
- "Rate of Tax at Which Repayments Are To Be Made",
- "Income Tax Relief for Medical and/or Dental Insurance",
- "Employed Person Taking Care of an Incapacitated Individual",
- "Income Tax Credits and Reliefs for Individuals Over 65 and Individuals Caring for Those Over 65",
- "Home Carer Tax Credit",
- "Tax Relief on Retirement for Certain Income of Certain Sportspersons – s480A TCA 1997",
- "Single Person Child Carer Credit",
- "Earned Income Tax Credit" and
- "Income Tax Treatment of Married Persons and Civil Partners".

No. 006 Removal of Vietnam from the Generalised System of Preferences (GSP) Scheme

Revenue has updated the "Customs Manual on Preferential Origin – Appendix 2" to reflect the removal of Vietnam from the Generalised System of Preferences (GSP).

When a country enters into a bilateral trade agreement with the EU, it can no longer benefit from the unilateral GSP. Vietnam and the EU entered a bilateral trade agreement on 1 August 2020, and after the transition period Vietnam was removed from the GSP on 1 January 2023.

No. 007 Stamp Duty: Section 31C Tax and Duty Manual

Part 5 of the Stamp Duties Consolidation Act 1999 (SDCA 1999) legislates for various anti-avoidance provisions. The related stamp duty manual "Section 31C: Shares Deriving Value from Immovable Property" has been updated to include a new part 6.6, which provides information on how this section interacts with s31E SDCA 1999, which deals with stamp duty on certain acquisitions of residential property.

No. 008 Stamp Duty – Section 31D Tax and Duty Manual (TDM)

Part 5 of the Stamp Duties Consolidation Act 1999 (SDCA 1999) legislates for various anti-avoidance provisions. The related stamp duty manual "Section 31D: Cancellation Schemes of Arrangement" has been updated to include a new point 5, which provides information about how this section interacts with s31E SDCA 1999, which deals with stamp duty on certain acquisitions of residential property.

No. 009 Changes to the Operation of "Week 53" Provisions

Revenue has updated the manual "PAYE Reviews Where Week 53 Applies" to reflect Finance Act 2022 changes:

- An amendment was made to s480 TCA 1997 to provide that the Week 53 provisions apply to the sea-going naval personnel tax credit with effect from 1 January 2023.
- A statutory footing was provided for the application of the Week 53 provisions to the income threshold applicable when determining whether an individual qualifies for the home carer tax credit. As this treatment was applied by Revenue previously on an administrative basis, claimants of the home carer tax credit will not see any difference in their tax treatment.

No. 010 Review of Opinions/Confirmations

Revenue has updated the "Review of Opinions or Confirmations" manual to provide guidance to taxpayers who wish to continue to rely on an opinion or confirmation issued by Revenue between 1 January and 31 December 2017, in respect of a transaction, period or part of a period, on or after 1 January 2023. A taxpayer who wishes to continue to rely on such an opinion or confirmation is required to make an

application for its renewal or extension on or before 31 March 2023.

No. 011 Income Tax (Employments) Regulations 2022 S.I. No. 690 of 2022

Revenue's manual "Income Tax (Employments) Regulations 2018" has been updated to reflect the changes made to the Income Tax (Employments) Regulations 2018 (SI 345 of 2018) as a result of the Income Tax (Employments) Regulations 2022 (SI 690 of 2022).

These changes, which are operational from 1 January 2023, amend the Income Tax (Employments) Regulations 2018 that prescribe the manner in which the deduction of tax from salaries and wages under the PAYE system operates. The changes are:

- Regulation 4(1)(a) is amended to provide that the reliefs from income tax to which an employee is entitled for the year may include reliefs in respect of which a claim has been made before the end of the year of assessment through such electronic means as Revenue will make available. The amendment also provides clarity that tax relief available under s469 TCA 1997, "Relief for health expenses", may be included on a claim made before the end of the year of assessment.
- Regulation 10(1) is amended to provide clarity that an employer is required to send certain information relating to a payment of emoluments to an employee using the prescribed form, which is "a notification", and to provide for the reporting of certain information in respect of employee and employer contributions to a pan-European pension product (PEPP).
- Regulation 11(3) contains a technical amendment amending the reference from "Section" to "Regulation".
- Regulation 17(2) is amended to provide clarity that an employer is required to send certain information relating to the commencement of a new employee in employment using the prescribed form, which is "a notification".
- New Regulation 22A, which provides that an employer may, in certain circumstances and where no payment of emoluments is made during the last income tax month of the year, make a repayment of tax to an employee during the last income tax month of the year so that the employee can get the benefit of any unused credits at the end of the year under the cumulative PAYE system.
- Regulation 27 is amended to require an employer to correct a return for any pay period when requested to do so by Revenue.
- Regulation 31, which provides for net pay arrangements, is amended at paragraph 1 to include contributions to a PEPP in the meaning of "allowable contribution".

No. 012 Enhanced Reporting Requirements

The introduction in Finance Act 2022 of s897C TCA 1997 will require employers to report to Revenue details of certain payments made to employees and/or directors. The requirement to provide this information will commence in 2024.

Revenue is now seeking the engagement of employers, software providers and agents in the implementation of this reporting requirement. Further information, together with a link to a survey, has issued through their ROS inbox, allowing stakeholders to provide information on their current processes that will assist Revenue in the design of this new reporting obligation.

No. 013 Updated Guidance on the Level 1 Compliance Programme – Debt Warehouse Scheme

Revenue has updated the manual "Level 1 Compliance Programme – Debt Warehousing Scheme", which sets out the process whereby taxpayers making an unprompted qualifying disclosure in relation to previously undisclosed Period 1 liabilities on or before 31 January 2023 have an opportunity to have those additional liabilities warehoused under the terms of the debt warehouse scheme.

The manual has been updated at section 2.4 to reflect the changes to the period within which taxpayers availing of debt warehousing

are required to enter into a phased payment arrangement to pay their warehoused liabilities.

No. 014 Stamp Duties Consolidation Act 1999 – Notes for Guidance Updated

Revenue has updated "Stamp Duties Consolidation Act 1999 – Notes for Guidance", reflecting all amendments to the 1999 Act by subsequent Acts up to and including Finance Act 2022.

No. 015 VAT Zero-Rating of Covid-19 Testing Kits

After a request from the Minister for Finance, Michael McGrath TD, Revenue will permit the application of the zero rate of VAT to the supply of Covid-19 in-vitro diagnostic medical devices, i.e. testing kits. The Covid-19 test kits must conform with the essential requirements of all relevant European Medical Device Directives – for example, a Covid-19 test kit that has a CE marking is proof that it meets those requirements.

This temporary measure will apply from 1 January 2023 on an administrative basis pending enactment of the appropriate legislative provisions.

No. 016 Updated Stamp Duty Tax and Duty Manuals

Revenue issued the following updates to the stamp duty manual "Filing and Paying Stamp Duty on Instruments":

- "Chapter 1: Introduction": the general background has been updated.
- "Chapter 2: Obligation to File a Stamp Duty Return" has been updated to include new information regarding leases in sections 1 and 2. The general background has also been updated in sections 1 and 2. Particulars delivered, previously in chapter 7, has been added to Section 2, and the appendix containing exemptions and reliefs has been removed.
- "Chapter 3: Tax Reference Numbers" has been updated to include information with regard to married women who have PPS numbers with W as the ninth character, in section 1. The general background has also been updated in sections 1 and 2.
- "Chapter 4: Filing the Return": the general background has been updated. In addition, the Revenue agreement to exempt from mandatory e-filing has been removed from section 7. Information on tax reference numbers has been removed from section 12 as this information is included in chapter 3.
- "Chapter 5: Paying the Duty" has been updated to improve readability.
- "Chapter 6: Stamp Certificate" has been updated to remove information regarding expression of doubt and adjudication from section 1. The general background has been updated in sections 1, 7 and 8.
- "Chapter 7: Particulars Delivered (PD) Stamp" has been moved to "Chapter 2: Obligation to File a Stamp Duty Return".
- The new "Chapter 7: Further Guidance" now incorporates the content that was previously in chapter 8. A glossary has also been added.
- The "Administrative Procedures" manual is now fully FOI exempt and is not available to practitioners.

No. 017 Section 83D Residential Development Refund Scheme

Revenue's stamp duty manual "Residential Development Refund Scheme – Part 7: Section 83D" now reflects changes made to s83D SDCA 1999 by Finance Act 2022. Section 83D was introduced by Finance Act 2017 and provides for a stamp duty refund scheme where land that is chargeable at the non-residential rate of stamp duty is subsequently developed for residential purposes. The manual has been updated to reflect the extension of the relief until 31 December 2025.

No. 018 Country-by-Country Reporting – Data Access & Usage

Revenue has updated the manual "Country-by-Country Reporting: Data Access & Usage" at section 1.7 to include updated figures on country-by-country reporting (CbCR)

agreements in place. The timeframes in section 1.8 have also been updated to bring them in line with exchange deadlines in CbCR legislation.

No. 019 Special Assignee Relief Programme (SARP)

Revenue has updated the manual "Special Assignee Relief Programme (SARP)" to reflect the Finance Act 2022 amendments to s825C TCA 1997:

- The additional qualifying requirements applying to assignees who arrive in the State on after 1 January 2023 have been included. The Finance Act placed certain Revenue administrative requirements in relation to the SARP on a legislative footing, including the requirement for an employee to obtain a PPSN within 90 days of arrival. Paragraph 5 emphasises the importance of an employee's applying for the PPSN as soon as possible after their arrival in the State with the assistance of their employer, as appropriate, given the critical importance of providing the PPSN on the Employer Certification (Form SARP 1A). Failure to meet the PPSN requirements on time will jeopardise the employee's entitlement to the relief for the duration of his or her contract.
- Example 1 in appendix I has been amended to refer to the new minimum relevant income threshold of €100,000 applying to assignees who arrive in the State on or after 1 January 2023.
- A new appendix III has been included to provide a copy of the new Form SARP 1A Employer Certification to be completed in respect of new arrivals to the State from 1 January 2023.
- The manual notes the extension of the relief to the 2025 year of assessment.

No. 020 Gaming and Amusement Licence Compliance Procedures Manual

Revenue's "Gaming and Amusement Licences Compliance Procedures Manual" has been updated to include references to the Gaming and Lotteries (Amendment) Act 2019, in addition to minor corrections and edits.

No. 021 Geographical Indication for Irish Whiskey & Irish Poteen Verification Procedures Manual

Appendix 6 of Revenue's "Geographical Indication for Irish Whiskey & Irish Poteen Verification Procedures Manual" has been updated to clarify the use of "peated" malted barley as an ingredient of mash for Irish whiskey.

No. 022 The Liquor (Excise) Licence Compliance Procedures Manual

Revenue has updated the manual "Liquor (Excise) Licence Compliance Procedures Manual" with minor edits and corrections. Paragraph 2.2, regarding franchise arrangements, has also been amended to reflect the 2018 determination of the Court Appeal in the case of *Triode Newhill LHP Ltd v Superintendent Murray* [2018] IECA 356.

No. 023 Customs Export Procedures Manual

Revenue has updated the "Customs Export Procedures Manual" to reflect the new launch date for AES (Automated Export System) and the removal of Vietnam from the list of GSP (Generalised System of Preferences) countries.

The AES will go live on 21 March 2023 and will replace Revenue's AEP (Automated Entry Processing) system for:

- export declarations into AEP,
- export manifests into AEP eManifest and
- indirect exports into the Trans-European Export Control System (ECS).

There will be a short transition window, from 21 March to 21 May 2023, during which time export declarations can be lodged into AEP and AES. Indirect exports commenced in AEP before 21 May 2023 will continue to receive responses through AEP until 31 May 2023. AEP will close for new export declarations on 22 May 2023.

Vietnam has been removed from the list of GSP countries in paragraph 5.6.8 as it entered into a bilateral trade agreement with the EU and was removed from the GSP on 1 January 2023.

No. 024 Stamp Duty Tax and Duty Manual Section 81C: Farm Consolidation Relief Updated

Revenue's manual "Farm Consolidation Relief Part 7: Section 81C" has been updated to reflect the extension of relief under s81C SDCA 1999 to 30 June 2023.

The manual has also been updated to reflect that a new Agricultural Block Exemption Regulation (ABER) came into effect on 1 January 2023 (Commission Regulation (EU) No. 2022/2742), replacing the previous ABER (Commission Regulation (EU) No. 702/2014), which expired on 31 December 2022.

No. 025 Charges on Income for Corporation Tax Purposes

Revenue has updated the manual "Charges on Income for Corporation Tax Purposes" at section 2.2 to refer to the treatment contained in the manual "Payment and Receipt of Interest and Royalties Without Deduction of Income Tax" for relief from withholding tax provided for by double taxation treaties.

The manual has also been updated at section 3.4 to clarify that where a merger or division involves the dissolution of the investing company or the investee company, the fundamental conditions for relief, as provided by s247 TCA 1997, will not be satisfied and relief will cease to be available.

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

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	Topic	Court
01	**Corporation Tax – Loans in M&A Transactions: Loan Repayment and Deductibility of Early Repayment Charge**	Tax Appeals Commission
02	**Income Tax – Domicile Levy: Worldwide Income, Capital Allowances/Losses, Meaning of Income Tax**	Court of Appeal
03	**Income Tax – Domicile Levy: Worldwide Income, Gross or Net Rents, Rental Income Deductions**	Tax Appeals Commission
04	**Income Tax – Challenge to Expert Evidence, Grounds of Appeal, True and Full Disclosure, Reliance on Tax Adviser**	High Court
05	**Income Tax – Sole Trader's Transaction with Service Company: Deductibility of Payments, Purpose, Evidence**	Tax Appeals Commission

01 Loans in M&A Transactions: Loan Repayment and Deductibility of Early Repayment Charge

The appellant company in tax appeal **03TACD2023** was the target in an M&A transaction. The buyer and the seller had entered into a stock and asset purchase agreement (SAPA), which provided that the appellant would be acquired by the buyer for US$2.6bn on a debt-free basis.

At that time, the appellant owed US$988m in loans ("the original loan notes") to the seller group. Under the terms of the SAPA, those loans were to be discharged before completion. The original loan notes contained terms that allowed for early repayment and set out two alternative methods of calculating the amount payable by the appellant on early repayment.

The second method would see the appellant paying a sum equal to the present value of the remaining principal payments and interest. That sum was calculated at US$1.375bn, consisting of US$855m (discounted principal) and US$518m (early repayment charge).

Subsequently, the parties varied the terms of the SAPA to provide that the appellant would instead be acquired with the existing loans in place for US$1.25bn (i.e. US$2.625bn less the US$1.375bn debt). The debt would then be repaid by the appellant. The buyer's group agreed to finance the appellant to make that repayment, and an escrow agreement was put

in place that provided for the debt to the seller group to be repaid immediately after the sale.

After the transaction, the appellant company claimed a deduction against its profits for the US$518m paid in respect of the early repayment charge. Revenue challenged that deduction and raised an assessment.

The questions before the TAC were:

(1) Could the appellant claim a trading deduction for the $518m early repayment charge?

(2) Was that payment capital or revenue in nature?

(3) Was the quantum of the deduction for that payment (if allowed) US$518m or US$385m (i.e. the difference between the total payment made of $1.375bn and the principal balance (before being discounted) of US$988m)?

As regards the first question, the Commissioner accepted the appellant's evidence that its stated objects for entering into the refinancing transaction (which included, for example, to obtain more flexible terms) "could be considered objects which were for the purposes of the appellant's trade" [152]. However, the Commissioner held that to claim a trade deduction under s81 TCA 1997 "it is not sufficient for [the payment] to have been made for the purposes of the appellant's trade; it must have been 'wholly and exclusively' for the purposes of the appellant's trade" [153]. The Commissioner held, having regard to the original SAPA agreement (which provided for the appellant to be acquired free of debt) and the subsequent terms of the amended SAPA and escrow agreement (which provided for the repayment of the debt after completion), that:

> "the decision to discharge the Appellant's liabilities under the Original Loan Agreements, which resulted in the payment of $518 million now sought to be deducted, was made with the primary object of implementing and completing the [SAPA]. Put more simply, completion of the global purchase agreement was not merely the context in which the decision to refinance was reached; instead, the repayment...was...part and parcel of the agreement [for the sale of the shares] [165]."

It followed that the payment of US$518m was not wholly and exclusively laid out for the purposes of the appellant's trade and therefore that a deduction was not permitted per s81(2)(a) TCA 1997. The appeal was effectively dismissed after the Commissioner determined this first question, but he continued to address the remaining two questions.

As regards the second question, the Commissioner held that the facts were distinguishable from those in *Garrett Paul Curran v HMRC* [2012] UKFTT 517 (which dealt with the deductibility of advance payments of interest) as in that case the underlying loans continued in existence, whereas in the case before the TAC:

> "The underlying debt was extinguished by the payments made by the Appellant and that is, in my view, irreconcilable with the Appellant's argument that the $518 million was a payment of interest. As the Court of Appeal stated in [*Pike v Revenue and Customs Commissioners* [2014] STC 2549], interest is calculated by reference to an underlying debt and the discharge of that debt by the Appellant meant that it could have no further liability to interest [175]."

The Commissioner concluded that the US$518m payment was capital rather than revenue in nature.

The third question before the Commissioner concerned the quantum of the early repayment charge, the appellant arguing that it should be US$518m and Revenue that it should be US$385m. Revenue had called an expert witness on the accounting treatment, whose

evidence was summarised by the Commissioner as follows:

> "In essence, his evidence was that there had been only one transaction, namely the early redemption of the loan, and that this should have been reported as such, and a figure of $385 million recorded as the loss resulting from that transaction. His expert opinion was that it was inappropriate to 'bifurcate' the transaction into a gain on early loan redemption and interest payable on early loan redemption [183]."

The appellant did not call expert evidence on this point and instead sought to rely on the wording of the loan documents and the fact that its accounts had been audited by an accounting firm of "significant expertise and professional standing".

The Commissioner also noted that the other party to the transaction, the seller, had recognised the figure of US$385m in respect of the early repayment charge in its own accounts, which was consistent with the treatment set out by Revenue's expert. The Commissioner concluded that the appellant had failed to discharge its burden of proof that the amount claimed as a deduction (had it been deductible) should have been US$518m rather than US$385m.

02 Domicile Levy: Worldwide Income, Capital Allowances/Losses, Meaning of Income Tax

In ***Louis FitzGerald v Revenue Commissioners*** [2022] IECA 255 (judgment of Costello J, with Pilkington J and Allen J concurring), the appellant had been assessed to the domicile levy for the years 2010 and 2011. The domicile levy is charged on "relevant individuals", i.e. individuals who, among other criteria, have worldwide income of more than €1m and a liability to income tax of less than €200,000.

The appellant argued that he was not a relevant individual on the basis that his worldwide income was less than €1m (once losses and capital allowances had been factored in) and also that he had paid more than €200,000 in income tax (once USC was included). The appellant was unsuccessful on these grounds before both the TAC and the High Court and appealed their decisions to the Court of Appeal.

The questions before the Court of Appeal were:

(1) Should "worldwide income" for the purposes of the domicile levy be calculated after deduction of losses (augmented by capital allowances)? (Note that the periods covered by the assessment pre-dated the insertion of s531AA(1A) TCA 1997 by Finance Act 2017.)

(2) Should USC be regarded as a "liability to income tax in the State" for the purposes of s531AA TCA 1997 (i.e. so as to aggregate towards the €200,000 minimum annual tax)?

As regards the first question, s531AA defines "worldwide income" as "the individual's income, without regard to any amount deductible from or deductible in computing total income, from all sources as estimated in accordance with the Tax Acts and [excluding certain specified matters]".

The appellant argued that the losses from his hotel trade (as augmented by capital allowances) reduced each of his sources of income rather than being a deduction against total income and that the reference in s531AA to amounts deductible from total income should be construed as referring to deductions of the type referenced in s458 TCA 1997 (e.g. allowances for employing a carer for an incapacitated individual, qualifying nursing

home expenses and permanent health benefit contributions).

The court rejected the appellant's argument, holding that:

> "The definition of worldwide income directs that it be calculated without regard to any amount deductible in computing total income. On a plain reading of the section, the sum referred to in s. 381(5)(b) is – at best – a deduction in computing the person's total income for the year, though, more properly, it is to be regarded as such. It follows that if relief for trading losses is claimed by a taxpayer under s. 381, the losses are a deduction in computing total income and are not therefore deductible in arriving at worldwide income for domicile levy purposes. As a deduction in computing total income they are to be disregarded in calculating worldwide income [67]."

As regards the second question, the appellant argued that "income tax" is not defined in TCA 1997 and that, as USC is chargeable on an individual's income, USC should be considered income tax for the purposes of s531AA. The appellant also pointed to s3 TCA 1997, where "tax" is defined as "means income tax".

The court rejected these arguments, noting that "liability to income tax in the State" is defined in s531AA: "'liability to income tax', in relation to an individual and a tax year, means the amount of income tax due and payable by the individual for the tax year in accordance with the Tax Acts and in respect of which a final decision has been made". The court then held that:

> "Income tax is that which is payable in accordance with the Tax Acts, not otherwise. USC is not a tax charged by the Tax Acts as it is charged neither by the Income Tax Acts nor [by] the Corporation Tax Acts. Therefore, a straightforward reading of the definition of 'liability to income tax' excludes the USC. This conclusion cannot be circumvented by seeking to interrogate the meaning of 'income tax' while ignoring the definition of 'liability to income tax', the relevant phrase in the statutory provision under consideration. This means USC cannot come within para. (c) of the definition of relevant individual [74]."

The court made some additional observations on the differences between income tax and USC in support of its decision on that point and stated:

> "The two taxes are utterly distinct: there is a statutory framework for income tax and a separate code for USC and the mere fact that income tax and USC are each taxed on income does not make USC 'income tax' within the meaning of the definition of a relevant individual for the purposes of the domicile levy, or otherwise [75]."

The court dismissed the appeal.

03 Domicile Levy: Worldwide Income, Gross or Net Rents, Rental Income Deductions

One of the conditions for imposing the domicile levy is that the individual must have had "worldwide income" of more than €1m. Worldwide income is defined in s531AA(1) TCA 1997 as "the individual's income, without regard to any amount deductible from or deductible in computing total income, from all sources as estimated in accordance with the Tax Acts...".

In each of the years under assessment (2010, 2011, 2012, 2013, 2014 and 2016) the gross rental income of the appellant in tax appeal **14TACD2023** was almost matched by the repairs, allowable interest and other expenses associated with that rental income (for example, in 2010 his gross Irish rents were €2.9m and associated repairs, allowable interest and other

expenses totalled €2.8m). Revenue formed the view that the measure of worldwide income was taken before the deduction of the rental expenses (i.e. by reference to gross rents rather than net rental profit) and assessed the appellant to the domicile levy for each of the years in issue.

The question before the TAC was whether repairs, allowable interest and other expenses could be deducted from rental income in calculating “worldwide income”. The Commissioner held, in allowing the appellant’s appeal, that:

- Individuals are chargeable under Schedule D, Case V, on their net profits or gains rather than their gross income (ss18, 75 and 97 TCA 1997 were considered).
- Section 3 of TCA 1997 requires that the amounts for each individual source of income (under the schedular system) are then aggregated to determine the amount of the individual’s total income.
- The definition of total income then informs the calculation of worldwide income for the purposes of the domicile levy.
- It followed that worldwide income was calculated by reference to the net rents rather than the gross rents.
- Calculated on that basis, the appellant’s income did not render him a “relevant individual” in the years in question.
- In support of her decision, the Commissioner cited paragraph 37 of Egan J’s judgment in the High Court case of *Corcoran v Revenue Commissioners* [2021] IEHC 199 and emphasised the following excerpt from that paragraph: “I accept that, at least for the purposes of the definition of “world-wide income”, total income – as it appears in part (A) of that definition – cannot simply mean gross receipts”.

04 Challenge to Expert Evidence, Grounds of Appeal, True and Full Disclosure, Reliance on Tax Adviser

The appellant in ***Thomas McNamara v Revenue Commissioners*** [2023] IEHC 15 (Barr J) sold land in Tullamore town centre in 2007 for €42m. Revenue treated the disposal as being one of development land (i.e. at the date of disposal its development value exceed its current-use value) and raised assessments to disallow the use of (non-development land) capital losses against the gain that the appellant had made on the sale of the land.

The appellant was unsuccessful before the TAC, where the Commissioner agreed with Revenue that the land was development land. He appealed to the High Court by way of case stated. The questions before the High Court were:

(1) Had the Commissioner erred in not excluding Revenue’s expert valuation evidence?

(2) Had the Commissioner erred in not allowing the appellant to raise an additional ground of appeal at the hearing?

(3) Had the Commissioner erred in holding that the appellant had not made a true and full disclosure on his tax return, in circumstances where he relied on his professional tax adviser to prepare and file his return?

As regards the first question, the appellant argued that Revenue’s expert evidence should have been excluded on the basis that, among other things, the valuation report contained factual errors and omitted comparators and the author had not previously valued land in Tullamore, and had held discussions with Revenue before finalising his report. The appellant argued that in light of those deficiencies the expert evidence ought to

be considered as being unreliable and not impartial and should have been excluded.

The court reviewed the legal principles concerning the duties of expert witnesses (see paragraph 47 of the judgment for the "classic statement of the duties of experts") and then set out the circumstances in which expert evidence can be excluded:

> "Order 39, r.57(1) of the RSC, provides that it is the duty of an expert to assist the court as to matters within his or her field of expertise. This duty overrides any obligation to any party paying the fee of the expert. The decision in the [*Duffy v McGee* [2022] IECA 254] case establishes that where it can be shown that the expert witness has departed from the standard of independence and impartiality that is expected of the expert, his or her evidence can be excluded in its entirety [48]."

The court found that the Commissioner had not erred in allowing the evidence of Revenue's expert:

- It noted that the expert valuation report had been provided to the appellant in 2014 (the hearing before the TAC was in 2017) and that at that time the appellant had replied through his agent stating only that there were errors but not identifying what those errors were.
- It noted that the appellant's own expert witness did not prepare a valuation report and that his testimony before the TAC was confined to commenting on the perceived shortcomings in Revenue's valuation report.
- It noted that at the hearing before the TAC Revenue's expert had accepted that there were shortcomings in his report and during the hearing adjustments were made by the Commissioner (raising the current-use value from €13m to €20m).
- It noted that the expert had more than 20 years' experience in property valuation, had carried out valuations in other regional towns and had access to a national database of property values maintained by his firm.
- It noted that the valuation report was prepared in accordance with the relevant guidelines in place in 2014, which did not require comparators be used, and in any event evidence regarding comparators was introduced by both sides at the hearing.
- Finally, the court summarised the rules on expert witnesses and was satisfied that the Commissioner was correct to conclude that that there was no inappropriate interaction between Revenue and its expert.

The court placed emphasis on the failure of the appellant to raise its concerns regarding the Revenue valuation report until the hearing of the matter before the TAC:

> "The court is satisfied that any errors in Mr. Quinn's analysis were more than corrected by the adjustments that were made by the Commissioner to the CUV. The fact that these adjustments had to be made 'on the hoof', as it were, during the course of the hearing before the TAC, was solely due to the fact that the appellant chose to stay silent, when he was aware of the inaccuracies in the report for years prior to the appeal hearing. It had been open to the appellant to raise these issues well in advance of the appeal hearing, as early as 2014, when he received the report.
>
> Litigation and disputes such as this before the TAC are two-way streets. Parties cannot complain about an issue, which could have been resolved had they chosen to engage proactively with the process. The fact that the decision maker has to deal with issues 'on the hoof' during the course of the hearing was largely due to the appellant's inaction. The court is satisfied that the Commissioner acted in a fair and rational way in making the adjustments that she did [58–59]."

As regards the second question, s959I(6) TCA 1997 provides that a party cannot rely on any ground that is not specified in his notice of

appeal unless the Commissioner is satisfied that the ground could not reasonably have been stated in the notice of appeal.

At the hearing the appellant had sought to introduce a new ground of appeal, that the assessment was statute barred as having been raised beyond the time limit prescribed in the legislation. The appellant argued that he could not have included this ground at the time he submitted his appeal as the decision in *Revenue Commissioners v Droog* [2016] IESC 55 had not been published at that time.

The TAC held that it was the appellant who was out of time, as he had not raised that ground in either his notice of appeal or his amended notice of appeal. The TAC rejected the appellant's contention that he could not have done so earlier, noting that the *Droog* decision was not relevant to the question of whether the appellant could have raised a time limit argument in his notice of appeal (as the *Droog* decision concerned the question of whether the four-year time limit to raise an assessment applied to s811 TCA 1998 assessments and not assessments more generally).

The court agreed with the TAC's reasoning and held that the Commissioner was "entitled to find that the appellant was out of time to raise that as a ground of appeal at the hearing before her in 2017" [88].

The third question concerned whether the fact that the appellant had relied on a professional tax adviser could absolve him of the consequences of having not made a full and true disclosure in his tax return. Although the question was essentially redundant, given that it related to the time limit argument, which the appellant had omitted to include in his notice of appeal and so had been barred from raising at the hearing, both the TAC and the High Court addressed the matter in their decisions.

The appellant's argument is summarised by the court as follows:

> "The appellant appears to accept that errors had been made in his return, such that full and true disclosure had not been made. However, he submits that he should be relieved of the consequences of that, because he had relied on his accountant/tax adviser to make the return on his behalf [95]."

The court reviewed various English and Scottish decisions cited by the appellant in support of his position that a taxpayer should not be considered to have been negligent in circumstances where the taxpayer relied on the advice of a suitably qualified tax adviser in respect of complex tax matters. On reviewing those cases, the court noted that:

> "the situation is a little more nuanced than providing protection whenever a taxpayer relies on the advice of his accountant/tax adviser. In the decisions referred to by the appellant, the decision makers were careful to draw a distinction between circumstances where the accountant is merely a functionary, who makes a return on behalf of his client; and a situation where there is a complex question of tax law involved and upon which the taxpayer takes the advice of an accountant/tax adviser. In the former case, the taxpayer remains liable for the erroneous return. In the latter case, he may be able to avoid a finding of negligence, where he has relied on the advice given by the tax adviser [99]."

The court then noted that in the current matter:

> "There were a number of errors, which did not involve complex issues of interpretation of tax statutes, or complex issues of law. In these circumstances, the appellant cannot avoid the consequences of his erroneous return, by pointing to the fact that the return was submitted on his behalf by [the appellant's accountant] [102]."

The court concluded that the Commissioner was entitled to find that the appellant had not made a full and true disclosure in his return.

05 Sole Trader's Transaction with Service Company: Deductibility of Payments, Purpose, Evidence

The appellant in tax appeal **139TACD2022** was a sole trader (from the context, it appears that she was practising as a solicitor In 2014 a company (of which the appellant was a director and 99% shareholder) invoiced her €220,000 in respect of admin/consultancy services provided to the appellant's trade. The appellant claimed a deduction against her trade income for that invoice. Revenue disallowed the deduction and raised an assessment for €112,455.

The question before the TAC was whether the payment to the company was wholly and exclusively for the purposes of the appellant's trade. The evidence before the TAC was that:

- The appellant said that she had spent approximately 80% of her time on admin work in her trade and 20% on fee-paying work.
- Before 2012 the admin services had been performed by the appellant herself.
- From 2012 the appellant said that she provided those services to her trade as agent of her company.
- The company did not raise an invoice until 2014, when it invoiced for the sum of €220,000. That invoice was said to relate to several years' worth of services.
- The amount of that 2014 invoice represented approximately 66% of her trade income for that year.
- The company did not have a bank account in 2014.
- The company filed a corporation tax return for 2014 showing no sales; subsequently, that return was amended to show €220,000 in sales, before being revised again to show €60,000 in sales.
- On cross-examination:
  - The appellant, when asked about the rationale for setting up the company, said that she made a plan "to effectively put in a system of tax planning to provide for a pension for my retirement".
  - The appellant further confirmed that the structure was for tax planning: "I set up a tax planning exercise to avail of the best possible advantages that the law can give me to implement this, and I followed it, as far as I am concerned, in a conscientious manner".
  - When the appellant was asked whether her motivation for entering the agreement was "at least in a significant part,...to do things in a more advantageous way from the perspective of tax?", she agreed: "One hundred per cent, yes, and tax planning".

The Commissioner commented on the dearth of evidence provided by the appellant. Despite the fact that she bore the onus of proof, she had not provided:

- any evidence that the fees paid for the services constituted a reasonably quantifiable or commercially objective expense;
- any expert or valuation evidence;
- any evidence that the appellant/company could have commanded a sum of €220,000 on the open market for the supply of such services;
- adequate identification of the services provided; or
- details of how the fees were calculated, when they were paid or how they were paid.

The Commissioner noted that s81 TCA 1997 requires the expenditure to have been incurred wholly and exclusively for the purposes of the trade. She found that the appellant had not identified any benefit or gain to her trade from the expenditure that she had incurred on the services provided by the company:

“Post-acquisition of the services [redacted] operated in precisely the same manner as before. The non-[redacted]/admin work continued to be performed by the appellant and there was no advantage, added resource, efficiency or gain acquired by the [redacted] for the substantial expense incurred to [redacted] [37].”

The Commissioner held, in dismissing the appeal, that the expenditure had not been incurred wholly and exclusively for the purposes of the appellant’s trade. There was no identifiable benefit or advantage to the appellant’s trade, and the sole objective of the payment was to provide for the appellant’s pension.

Direct Tax Cases: Decisions from the UK and European Courts

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	Topic	Court
01	**Corporation Tax – Expenses of Management**	England and Wales Court of Appeal
02	**Income Tax – Interim Dividends**	UK First-tier Tribunal
03	**Income Tax – Settlement Payment**	UK First-tier Tribunal
04	**Corporation Tax – Business Incorporation**	UK First-tier Tribunal
05	**DAC6 – Legal Professional Privilege**	Court of Justice of the European Union

01 Corporation Tax – Expenses of Management

In ***Centrica Overseas Holdings Limited v HMRC*** [2022] EWCA Civ. 1520 the Court of Appeal (CoA) was unanimous in reversing the decision of the Upper Tribunal (UT) determining that adviser fees incurred by an intermediate UK holding company (COHL) in the Centrica Plc group were deductible expenses of management under the UK equivalent of s83 TCA 1997. The UT decision was reviewed in "Direct Tax Cases: Tax Appeals Commission Determinations", *Irish Tax Review*, 34/4 (2021).

The facts were that an intermediate holding company in the Centrica group claimed management expenses for some professional advisers' fees incurred in connection with the disposal of a Dutch business (Oxxio) that was held through a Dutch BV. HMRC disagreed, however, and argued that the expenses were non-deductible. The First-tier Tribunal (FTT) and the UT each considered the matter, before HMRC appealed to the CoA, on two issues:

- Did the relevant fees constitute "expenses of management" for the purposes of the UK equivalent of s83 TCA 1997?
- If so, were they nonetheless not deductible for corporation tax purposes on the basis that they were of a capital nature?

The CoA held that the FTT was correct in its analysis of what constituted expenses of management when it found that all three sets of professional fees were expenses of managing the investments of COHL. In concluding that the disputed expenses were management expenses, the CoA agreed with the UT that:

> "there is a distinction between expenses incurred in deciding whether to acquire or dispose of an asset [which are expenses of management], and expenses incurred on the 'mechanics of implementation' once that decision has been taken [which are not]."

In other words, the nature of the expense is key, rather than when they were incurred.

The second question was whether these fees were capital in nature. The CoA found that the test in this context is the same as that for the distinction between capital and revenue with respect to trading businesses. The court then went on to draw a distinction between the first question, whether something is an expense of management, and what in its view was a separate question, whether that expense is capital in nature. Based on that approach, it found that all of the disputed expenditure was capital and therefore could not be deducted as an expense of management. This was based on the fact that a commercial decision was taken in 2009 to dispose of the Oxxio business, with the purpose of the subsequent professional advice being to determine exactly how that was to be achieved.

02 Income Tax – Interim Dividends

In ***Gould v HMRC*** [2022] UKFTT 431 the First-tier Tribunal (FTT) held that an interim dividend paid to two shareholders on different dates was taxable on the dates of payment, not the earlier date of declaration. The decision meant that the dividend was taxed in different tax years for each shareholder.

The appellant was one of two brothers who owned Regis Group, a property investment group. After a series of divestments, the board of directors of a holding company in the group resolved to pay an interim dividend of £40m. It was also agreed that the two brothers would receive their dividends on different dates.

The difference in timing was primarily for tax-planning purposes. The appellant's brother would have been taxed at an effective tax rate of 30.56% if he had been taxed on the dividend in 2015–16, compared to an effective rate of 38.1% in tax year 2016–17. The appellant, however, required that the dividend be paid in the tax year 2016–17, as he would be non-UK resident in that year and therefore not be liable to UK tax on the dividend. Ultimately, the appellant's brother received his dividend on 5 April 2016, and the appellant received his on 16 December 2016.

HMRC challenged the timing of the appellant's dividend and concluded that he was "entitled to the interim dividend of £20m at the earlier date of 5 April 16". It was common ground between HMRC and the appellant that an interim dividend, in contrast to a final dividend, is normally not regarded as "due and payable" (and therefore taxable) when it is declared; rather, it becomes taxable only when it is actually paid. For the purposes of the Corporation Tax Acts, under s4 TCA 1997 a dividend is treated as paid on the date when the dividend becomes "due and payable". HMRC argued, however, that the appellant's dividend became due and payable when his brother received his dividend, as at that point the appellant was able to enforce the payment of his own dividend.

The FTT considered a number of arguments, the principal one being whether there was an enforceable debt. HMRC argued that the dividend was due and payable on the date that the appellant could have enforced a payment to himself. Based on its reading of Article 104 of the company's constitution, HMRC highlighted that "all dividends shall be declared and paid equally" and argued that this applied to both final and interim

dividends. The taxpayer argued that whereas final dividends are declared and paid, interim dividends are merely paid. Therefore, HMRC's reading of Article 104 was incorrect. The FTT agreed with the taxpayer and found that the payment of the interim dividend to the appellant's brother did not create an amount due and payable to the appellant on that same date. This effectively decided the appeal in the taxpayer's favour.

03 Income Tax – Settlement Payment

In ***Mrs A v HMRC*** [2022] UKFTT 421 (TC) the First-tier Tribunal found that an amount paid to an employee under a settlement agreement was taxable as normal employment earnings under UK legislation broadly similar to s127 TCA 1997.

Mrs A was a senior retail operations manager for her employer. She initiated legal proceedings against her employer, wherein she alleged she had been harassed, bullied and victimised by the owner of the business. In exchange for withdrawing the proceedings, Mrs A settled out of court for a payment of £1.1m. The settlement amount was broken down in the agreement: £45,000 was in compensation for "injury to feelings and aggravated damages", and the balance was classified as "compensation for the termination of your employment and any and all claims you have or may have against the Employer". Mrs A also agreed to be bound by certain confidentiality and non-disclosure obligations.

Payroll taxes were operated on the whole of the settlement amount (except for the first £30,000 - the UK equivalent of s123 TCA 1997 exempts up to £30,000 of a payment which is paid in connection with the termination of employment). Mrs A subsequently claimed repayment of the income tax deducted. HMRC argued that the compensation amount was taxable as a termination payment under the UK equivalent of s123 TCA 1997. HMRC further argued that the payment came within the provisions of the UK equivalent of s127 TCA 1997. As in the UK, s127 takes precedence over s123.

The FTT dismissed Mrs A's appeal, determining that "any undertaking which restricts the individual's conduct or activities and is given in connection with their employment is within the scope of the [UK equivalent of s127 TCA 1997]". There was no doubt that the agreement not to pursue claims or proceedings was a restrictive undertaking within the UK equivalent of s127. The payment was made in respect of the restrictive covenants given by Mrs A in relation to not pursuing any legal claims against her employer. It was held that a restrictive undertaking does not have to relate to the individual's conduct or activities in the course of their employment.

Furthermore, the court held that had the payments not been considered to be payment for a restrictive undertaking, they would have been taxable as a termination payment under the UK equivalent of s123 TCA 1997.

The FTT's conclusion meant that the taxpayer's ultimate tax liability was actually higher than the liability HMRC had originally sought. As the payment was considered to fall within the UK equivalent of s127 TCA 1997, the £30,000 exemption provided for in the UK equivalent of s123 TCA 1997 did not apply.

04 Corporation Tax – Business Incorporation

In ***2 Green Smile Ltd v HMRC*** [2023] UKFTT 15 (TC) the First-tier Tribunal (FTT) determined that there was a *de facto* transfer of a business (including the goodwill) from a partnership to the company on 1 December 2014, meaning that all income generated from the dental business after that date belonged, beneficially, to the company. The date of transfer was critical, as the company would be able to claim a deduction for amortisation in its tax computations in relation to any goodwill acquired before 3 December 2014. No deduction would be available where the goodwill was acquired after 7 July 2015, as HMRC argued, due to subsequent legislative changes.

Before December 2014, two partners ran a dental practice partnership. They resolved to incorporate the partnership. There was an oral agreement between the partnership and the company on 30 November 2014 pursuant to which the partnership would transfer its business and all of its assets to the company on and from that date.

The transfer included not only goodwill but also premises. However, the FTT held that any contract or agreement purporting to dispose of an interest in land that is not in writing is unenforceable. The question then arose of whether the lack of a written contract for the transfer of the premises, which comprised one of the assets of the business, impacted the enforceability of the oral agreement that purportedly transferred another asset of the business (the goodwill) to such an extent as to render the oral agreement unenforceable.

The FTT held that there was a *de facto* transfer of the business (goodwill included) on 1 December 2014, even if there was no legally binding agreement. The company could therefore claim a deduction for the goodwill amortised.

The FTT observed that the evidence adduced made it abundantly clear that before 30 November 2014 there was a settled intention by the partners, and the company, to transfer the whole of the business to the company on and from 1 December 2014. Both contemporaneous and subsequent documentary evidence supported the FTT's conclusion.

05 DAC6 – Legal Professional Privilege

In an answer to a preliminary request from the Belgian Constitutional Court, the Court of Justice of the European Union (CJEU) held that the obligation for a lawyer to inform other intermediaries involved is not necessary and infringes the right to respect for communications with his or her client (***Orde van Vlaamse Balies and Others v Vlaamse Regering*** C-694/20).

Two professional bodies representing lawyers brought actions before the Belgian Constitutional Court. They argued that the requirement to notify other intermediaries of their reporting obligation under the EU mandatory disclosure rules (DAC6) would constitute a breach of legal professional privilege. The Belgian Constitutional Court referred the matter to the CJEU to clarify the issue.

The CJEU decided that the obligation to notify laid down by the Directive infringes the right to respect for communications between a lawyer and their client. In its judgment, the court referenced Article 7 of the Charter of Fundamental Rights of the European Union, which protects the confidentiality of all correspondence between individuals and

affords strengthened protection to exchanges between lawyers and their clients. That specific protection afforded to lawyers' legal professional privilege is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. Other than in exceptional situations, clients must have a legitimate expectation that, without their consent, their lawyer will not disclose to anyone that they are consulting him or her.

The court observed that the amendment made in 2018 to the Directive forms part of international tax cooperation aimed at contributing to the prevention of the risk of tax avoidance and evasion, which constitutes one of the objectives of general interest recognised by the EU. However, the notification obligation on a lawyer subject to legal professional privilege is not necessary to attain that objective. All intermediaries are required to file that information with the competent tax authorities. No intermediary can claim that he or she was unaware of the reporting obligations, which are clearly set out in the Directive.

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

International Tax Update

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01 BEPS: Recent Developments

02 US Tax Developments

03 EU Tax Developments

04 Germany: Upper House Approves Bill that Would Reduce Scope of Extraterritorial Taxation

05 Germany: Amended Real Estate Transfer Tax Rules

06 Italy: 2023 Budget Law Enacted

07 Hong Kong: Legislative Council Passes FSIE Regime

08 UAE: Newly Issued Corporate Tax Law

09 Colombia: Tax Reform Enacted

10 Cyprus: Withholding Tax Applies to Payments Made to Non-cooperative Jurisdictions

11 Romania: Implementation of Accounting Directive for EU Public County-by-Country Reporting from 1 January 2023

01 BEPS: Recent Developments

EU adopts Pillar Two Directive

On 15 December 2022 the European Council formally adopted the Directive on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, the Pillar Two Directive. This followed the announcement by the Council on 12 December 2022 that political agreement to implement Pillar Two had been reached.

The Directive was published in the *Official Journal of the European Union* on 22 December 2022 and thereby entered into force on 23 December 2022. EU Member States must transpose the Directive into domestic laws by 31 December 2023. The income inclusion rule

will take effect in 2024, and the undertaxed profits rule in 2025.

Consultations with the Department of Finance on the implementation of the Directive into Irish law are expected to occur during 2023, and the proposed Irish legislation will likely be included in the Finance Bill of 2023.[1]

OECD Pillar Two: Information return and safe harbours published

On 20 December 2022 the OECD released its public consultation document on the GloBE information return. On the same date it also released guidance on *Safe Harbours and Penalty Relief (Pillar Two)* and a public consultation document on tax certainty. Both public consultation documents remained open for comments until 3 February 2023.

GloBE information return

The OECD is currently working on developing a standardised information return, recognising the need to strike a balance between providing tax authorities with adequate information and the potential administrative burdens for businesses. Efforts thus far have centred on identifying a comprehensive set of data points necessary for a group to calculate the additional top-up tax liability under the OECD model rules, including:

- general information about the group (determined by consolidated financial statements) and filing entity;
- corporate structure;
- effective tax rate (ETR) computation and top-up tax computation; and
- top-up tax allocation and attribution.

The deadline for filing the information return is 15 months after the year-end, extended to 18 months for the first year in which a group is in scope. Therefore the first filing deadline for companies with a 31 December 2024 year-end should be 30 June 2026.

Safe harbours: Transitional CbC reporting safe harbour

Following from the public consultation and calls by various stakeholders for safe harbour rules, transitional safe harbour rules have been put forward by the OECD. Those rules will apply for years up to the year beginning on or before 31 December 2026 (i.e. a period of three years for most groups). The transitional safe harbour uses information from a business's country-by-country (CbC) report and/or financial statements to determine whether its operations in a country meet any of the three tests:

- *De minimus* test: The business reports total revenues of less than €10m and profit before income tax of less than €1m in its CbC report for a country.
- Effective tax rate test: The business has a "simplified ETR" for a country that is equal to or greater than the "transition rate" for the year. The transition rate is 15% for years beginning in 2023 and 2024, increasing to 16% and 17% for years beginning in 2025 and 2026, respectively.
- Routine profits test: The business's profit before income tax in a country is equal to or less than the "substance-based income exclusion amount" (as calculated under the OECD model rules).

Where the transitional safe harbour applies and any of these tests are satisfied, the top-up tax for that country will be zero.

Potential permanent safe harbours: Simplified calculations

The OECD report also lays out a plan for the future development of long-term safe harbours, known as "simplified calculations safe harbours,". These seek to decrease the number of computations and adjustments that a business is required to make. The plan envisions that future guidance would establish simplified calculation rules that would allow businesses to demonstrate for a country that:

1 See also Policy and Representations Monitor in this issue.

- the GloBE income is equal to or less than the amount of the substance-based income exclusion;
- revenue is less than €10m, and income (profits) is less than €1m (i.e. that the country qualifies for the *de minimus* exclusion in the OECD model rules); or
- the effective tax rate is at least 15%.

The OECD Inclusive Framework is also considering a safe harbour for businesses that prepare a qualified domestic minimum top-up tax calculation under local rules.

OECD releases technical guidance for implementation of Pillar Two rules

In early February the OECD released technical guidance on the implementation of the global minimum tax, *Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two)*. The OECD hopes that the release of this guidance will ensure coordinated outcomes and greater certainty for businesses ahead of the 2024 implementation of the Pillar Two rules. The guidance includes general guidance on the scope, operation and transitional elements of the rules, which will allow members of the Inclusive Framework to implement their domestic legislation in a globally coordinated manner. Some of the items addressed in the guidance are:

- In computing a jurisdictional ETR for Pillar Two purposes, CFC (controlled foreign company) taxes paid at, say, a parent level but relating to the profits of a subsidiary are pushed down to the subsidiary. This is relatively straightforward where the CFC taxes are calculated on an entity-by-entity basis, but questions arose where the CFC taxes are calculated on a worldwide basis – e.g. the US GILTI (global intangible low-taxed income) regime does not calculate on an entity-by-entity or jurisdiction-by-jurisdiction basis but on a worldwide basis. Accordingly, questions arose regarding whether GILTI is a CFC tax and, if it is, how the GILTI tax is to be allocated to each jurisdiction in order to calculate the Pillar Two ETR for each jurisdiction. The OECD guidance states that GILTI is a blended CFC tax for the purposes of Pillar Two and provides a formula to allocate the GILTI taxes between countries as an interim measure.
- There is significant commentary on the rules that apply to assets (e.g. intellectual property) transferred after 30 November 2021 and before the GloBE rules apply. The commentary suggests that "transfer" should be interpreted quite widely and could include transactions such as licences and migrations of residence. On the other side, where tax is paid by the transferor on the transfer of the asset, there may be an ability to step up the value of the asset for Pillar Two purposes in the transferee entity taking account of the tax paid by the transferor, subject to a cap of 15%.
- In computing the GloBE income of an entity, the starting point is the individual accounts that are included in the group consolidated accounts. Concerns were raised that in certain cases these individual accounts do not include deferred tax. Instead, all deferred tax is calculated at consolidated level. The guidance states that such deferred tax can be pushed down to the individual entities.
- In some cases, debt issued can be treated as debt in the issuer/debtor company and as equity in the creditor company. In the issuer company, interest on such debt may not be deductible but, nonetheless, would reduce accounting profits. In the creditor company, the interest is treated as a dividend and goes through equity. The OECD guidance includes rules to prevent asymmetrical treatment in these circumstances.
- The GloBE rules contain several monetary thresholds expressed in euro. Although many jurisdictions may implement the GloBE rules based on these euro-denominated amounts, some may choose to implement the rules with the amounts denominated in local currency. Where monetary thresholds in the GloBE rules are expressed in domestic legislation in a non-euro currency, the guidance provides that these thresholds will need to be rebased annually.

There is some commentary on the qualified domestic minimum top-up tax (QDMTT), and the guidance states that any CFC taxes attributable should not be taken into account in calculating the covered taxes for the ETR calculation to determine whether a QDMTT arises.

A revised version of the OECD Commentary, due to be released later in the year, will incorporate the *Administrative Guidance*. The original Commentary was released in March 2022. The OCED will continue to release guidance on the rules to assist with the implementation of the GloBE rules.

South Korea introduces global minimum tax under Pillar Two

On 23 December 2022 the Korean National Assembly passed the 2022 Tax Revision Bill. The Bill legislated for the introduction of a global minimum tax regime, including provisions for an undertaxed profits rule (UTPR), that will apply to companies that comprise multinational groups with consolidated sales of at least €750m during two of the previous four business years. Of note is that the UTPR applies for accounting periods commencing on or after 1 January 2024 rather than 1 January 2025, which is what is set out in the OECD rules. Therefore, unless a change is made to the South Korean rules (and there may be political pressure for such), any top-up tax for 2024 as a result of the UTPR would be allocated solely to South Korea.

Singapore and Hong Kong Pillar Two Rules from 2025

On 14 February 2023, Singapore announced that it would implement the GloBE rules and a Qualified Domestic Minimum Top-up Tax (QDMTT) from 2025.

On 22 February 2023, the Hong Kong SAR government announced that it would implement the OECD's Pillar Two GLoBE rules and a QDMTT from 2025.

Implementation in 2025 is noteworthy as it is one year later than many other jurisdictions, including most of Europe, the UK, Japan, and South Korea, all of which are expected to implement the GloBE rules as from 2024.

OECD Pillar One Amount A: Digital services taxes and relevant similar measures

On 20 December 2022 the OECD released a document for public consultation regarding Pillar One – Amount A that includes draft provisions for a multilateral convention (MLC) on the removal of digital services taxes (DSTs) and other similar measures. The MLC will coordinate the introduction of Amount A of Pillar One with the removal of all DSTs and other similar measures. Once the MLC is in effect in a country, DSTs should no longer be able to be applied. However, countries that continue to impose a DST or similar measure, or that do not withdraw a tax listed in Annex A of the report, will not receive Amount A tax allocations of taxable profit. The general definition of a DST or relevant similar measure is a tax that meets the following conditions:

- the application of the tax is determined by reference to the location of customers or users;
- the tax is applicable in practice "exclusively or almost exclusively" to non-residents or foreign-owned businesses as a result of revenue thresholds, exemptions for businesses subject to domestic corporate tax or other restrictions of scope; and
- the tax is not treated as an income tax under domestic law.

The rules are intended to come into effect from 2024, in line with the implementation of the Amount A rules reallocating profits to market countries. The OECD published the comments received at the end of January 2023. More than 30 responses were published from a variety of stakeholders, including jurisdictions, businesses, industry and trade associations, and professional services organisations.

ATAD3: European Parliament makes amendments

In previous articles we covered the proposed ATAD3 Directive (often referred to as the

Unshell Directive). The draft Directive is aimed at combating tax avoidance using "shell" entities that are tax resident in the EU but have little substance. On 17 January the European Parliament adopted its amendments to the draft ATAD3 Directive. Under the draft Directive, an entity that fails a series of gateway tests would have additional reporting requirements and may lose certain benefits afforded by its EU-tax-resident status. The amendments included small reductions in the thresholds below which reporting is not required and penalties based on total assets of an undertaking. The European Council must consider the position adopted by the Parliament. EU Member States must unanimously agree to adopt the Directive. Transposition into domestic law by Member States by 30 June 2023 had been originally proposed.

Mexico: Approval of MLI with reservations and notifications published

On 22 November 2022 Mexico's official gazette published the agreement to approve the OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). Additionally, through this agreement, Mexico's reservations and notifications to the MLI were approved.

02 US Tax Developments

Treasury and IRS release initial CAMT guidance

The Inflation Reduction Act (IRA), signed into law by President Biden on 16 August 2022, included a 15% corporate alternative minimum tax (CAMT) on "adjusted financial statement income" of applicable corporations. The CAMT is effective for taxable years beginning after 31 December 2022. On 27 December 2022 the Department of the Treasury and the Internal Revenue Service released Notice 2023-7, which provided interim guidance on time-sensitive issues and announced their intention to issue proposed Regulations that will be consistent with the notice and address the application of the CAMT.

03 EU Tax Developments

DAC7 implementation update

Amending Directive to the 2011 Directive on Administrative Cooperation (2021/514) (DAC7) extends the automatic exchange of information to apply to digital platforms that provide a platform for the sale of goods, the rental of immoveable property (e.g. accommodation), the provision of personal services and the rental of any mode of transport. Some EU Member States (e.g. Belgium, France and Ireland) already had some reporting requirements. These will apply for 2022 (with reporting in 2023) but should thereafter be replaced with the new DAC7 requirements.

Ireland

Finance Act 2022 contains revised DAC7 provisions and applies from 1 January 2023, with the first reporting by 31 January 2024. Accompanying Regulations have been published, and Revenue guidance is currently being finalised.

Finland

The President of Finland ratified legislation on 29 December 2022 for implementation of DAC7 into national law. The legislation has effect from 1 January 2023.

Belgium

On 15 December 2022 legislation was approved by the Belgian Chamber of Representatives to implement DAC7 from 1 January 2023. The legislation is in line with the EU Directive, but it also extends the application of the Directive to sellers and service providers that are resident in certain non-EU jurisdictions. The list of those non-EU jurisdictions will be made available by the Belgian authorities in due course.

France

The French tax authorities published guidelines in early January on the DAC7 legislation (which was enacted in 2022). The guidelines provide clarifications on the scope of the DAC7 rules, the due diligence procedures applicable to reporting platform operators, and the reporting requirements and procedures applicable to reporting platform operators.

The guidelines also provide two forms that platform operators active in multiple Member States must submit to the French tax authorities to register their activity in France or notify in which Member State they fulfil their reporting requirements. Additional guidelines on the penalties applicable to non-compliant platform operators will also be published.

Germany

Germany implemented DAC7 legislation at the end of December. In line with the Directive, the DAC7 provisions for in-scope digital reporting platforms will be effective from 1 January 2023 (reporting for the first time by the end of January 2024).

Netherlands

At the end of December the legislation to implement the provisions of DAC7, in line with the EU Directive, was adopted by the Dutch Senate. The legislation was then effective from 1 January 2023.

DAC8 proposal requires service providers to report crypto-asset users

In early December 2022 the European Commission proposed new tax transparency rules for service providers facilitating transactions in crypto-assets for EU customers. The proposal is by way of an amendment to Council Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC) and is referred to as DAC8. It is intended to complement the Markets in Crypto-Assets (MICA) Regulation, which provides the conditions for access to the EU market for crypto-assets, and anti-money-laundering rules. The European Commission launched a public consultation on the proposal; the closing date for feedback was 8 February 2023.

d. Tax authorities are constrained in their ability to ensure that taxes are paid on cross-border crypto transactions due to the lack of information available on those transactions. DAC8 is consistent with the OECD's Crypto-Asset Reporting Framework and amendments to the OECD Common Reporting Standard published in October 2022. DAC-8 would require all crypto-asset service providers to report transactions of EU clients regardless of their size or location. Reporting of both domestic and cross-border transactions would be required. Additionally, financial institutions would have to report on e-money and central bank digital currencies.

Separate from reporting on crypto-assets, DAC8 would broaden the scope of automatic exchange of information for advance cross-border rulings for high-net-worth individuals. For this purpose, a high net worth individual Is a person who holds a minimum of €1m in financial or investable wealth or assets under management (excluding the individual's primary residence). The requirement would be for Member States to share information on advance cross-border rulings issued, amended or renewed for high-net worth individuals between 1 January 2020 and 31 December 2025.

DAC8 would also establish a minimum level of penalties for serious cases of non-compliance – for example, failure to report despite administrative reminders.

DAC8 must be submitted to the European Parliament for consultation and to the European Council for adoption, subject to unanimous approval. It is expected that the

reporting requirements under DAC-8 relating to crypto-assets, e-money and digital currencies would be transposed by 31 December 2025, with a view to entering into force on 1 January 2026. It is understood that all countries which have agreed the OECD Crypto-Asset Reporting Framework will adopt a similar theme.

04 Germany: Upper House Approves Bill that Would Reduce Scope of Extraterritorial Taxation

The Annual Tax Act 2022, approved by the German Parliament in December 2022, includes a significant reduction in the scope of German extraterritorial taxation with respect to intellectual property (IP) where German-nexus IP is due to rights registered in Germany. The changes impact royalty payments between non-residents (offshore receipts in respect of intangible property, or ORIP) and IP transfers by non-residents (extraterritorial capital gains taxation, or ETT).

The changes provide relief for taxpayers, especially for payments between unrelated parties. However, related-party payments may still result in complexities for affected taxpayers. As of 1 January 2023, related-party payments will require a thorough analysis to determine whether treaty protection applies, including examination of the limitation-of-benefits provision, German anti-treaty-shopping rules and domestic rules for hybrid entities. If treaty protection is established, the ORIP/ETT rules will not apply.

05 Germany: Amended Real Estate Transfer Tax Rules

The Annual Tax Act 2022 also approved amended real estate transfer tax (RETT) rules. The RETT rules had previously been amended in 2021, with RETT being triggered on the closing date of a share transaction where at least 90% of the shares in a company holding (directly or indirectly) German real estate are transferred. Under the amendments, approved by the Upper House of Parliament on 16 December 2022 and published in the *Federal Gazette* on 20 December, non-compliance or late filing of RETT notifications with respect to share purchase transactions could result in adverse RETT implications (such as RETT being charged twice on the same transaction, at both signing and closing). It is important that those involved in such transactions (including shareholders indirectly holding German real estate) are mindful of the compliance deadlines.

06 Italy: 2023 Budget Law Enacted

Italy's Budget Law for 2023, published on 29 December 2022, contains various tax provisions that may impact multinational companies with operations in Italy. These generally apply from 1 January 2023 and include changes to the definition of a permanent establishment (relating to individuals (asset managers) who manage investments in Italy on behalf of non-resident investment vehicles), the tax treatment of inbound dividends, the introduction of land-rich rules for certain capital gains from transfers of company shares and the resolution of certain assessment procedures with the Italian tax authorities. The law also includes measures to reduce administrative penalties for voluntary correction of tax violations, a temporary solidarity contribution for 2023 for certain industries and modifications to the calculation of the solidarity contribution for 2022, which may result in additional tax liability for some entities in 2022.

07 Hong Kong: Legislative Council Passes FSIE Regime

In our last article we covered the key features of the Hong Kong foreign-source income exemption (FSIE) regime. Hong Kong SAR's Legislative Council passed the relevant legislation on 14 December 2022, which is effective from 1 January 2023. The law provides that specified foreign-source income will be deemed taxable in Hong Kong SAR unless certain conditions are met.

The EU published an updated list of non-cooperative jurisdictions for tax purposes on 14 February 2023. Hong Kong SAR remained on annex II of the revised list (Grey List) despite its implementation of the foreign-source income exemption (FSIE) regime. In early December last year, the EU had issued updates on its guidance on FSIE regimes, requiring all passive income types to be subject to the economic substance requirement. The updates came about a week before the FSIE legislation was passed in Hong Kong SAR. As of 31 December 2022, the committed date, this new legislation in Hong Kong SAR did not include the updates from the EU. Therefore, the EU now considers the scope of the FSIE regime in Hong Kong to not be wide enough.

08 UAE: Newly Issued Corporate Tax Law

The United Arab Emirates (UAE) issued Federal Decree-Law No. 47 of 2022 on the Taxation of Corporations and Businesses on 9 December 2022, which is the law for the introduction of a federal corporate tax regime in the UAE following an announcement to that effect in early 2022.

- The new regime will become effective for applicable business profits arising in financial years starting on 1 June 2023.
- There is a tax-free threshold of AED375,000, with a 9% corporation tax rate for any income over this threshold.
- A 0% rate will continue to apply to qualifying income earned by Qualified Free Zone Persons (with the 9% rate apply to non-qualifying income earned by such persons).
- The law includes reliefs for transactions such as transfers within a qualifying group and business restructuring relief, as well as exemptions for domestic dividends and a participation exemption for dividends and capital gains.
- The new regime will apply to a taxable person, which is defined as a UAE resident or a non-resident who has UAE-sourced income and income attributable to a permanent establishment in the UAE.
- The law also sets out certain exempt persons, such as government entities, qualifying public funds and qualifying public-benefit entities.
- Companies are required to submit a tax return every year to the tax authorities no later than nine months from the end of the relevant tax period.
- The regime also allows companies to form tax groups to reduce the administration burden associated with the new corporate tax law. In this case, the parent company must file a tax return on behalf of the tax group.

09 Colombia: Tax Reform Enacted

On 13 December 2022 the President of Colombia, Gustavo Petro, signed tax reform proposals into law. The new legislation includes significant income tax changes for corporations and individuals, carbon tax amendments and increased measures to promote compliance.

For international corporations, key changes include an increase in the withholding tax on dividends and branch remittances to non-residents, a new 15% minimum effective tax rate (to be calculated in line with the Pillar Two GloBE rules), an increase in the corporate income tax surcharge for certain sectors and the introduction of the concept of “significant economic presence” (SEP).

Colombia is the latest country to introduce the SEP concept. It will be triggered by maintaining a “deliberate and systematic interaction” with users or clients in Colombia and obtaining gross income of at least 31,000 UVT from sales or the provision of services to users located in Colombia. From 1 January 2024 individuals and companies with a SEP in Colombia will be subject to income tax on income derived by the SEP from the sale of goods or the provision of certain digital services to clients or users in Colombia. Withholding tax of 10% should be deducted by the payer. Alternatively, individuals/companies with an SEP in Colombia may opt to file an income tax return and pay tax at a rate of 3% on total gross income derived from the sale of goods or the provision of digital services from abroad to Colombian users.

10 Cyprus: Withholding Tax Applies to Payments Made to Non-cooperative Jurisdictions

As from 31 December 2022 Cyprus has imposed withholding tax (WHT) on certain payments, such as dividends, interest and royalties, made to recipient companies that are resident in jurisdictions that are listed in Annex I of the EU list of non-cooperative tax jurisdictions (referred to as the “black list”) or that are incorporated or registered in a jurisdiction included in Annex I and are not tax resident in any other jurisdiction that is not included in Annex I. There are certain exceptions to the WHT (30% for interest, 10% for royalties and 17% for dividends) for interest paid in relation to debt listed on a recognised stock exchange or dividends paid in respect of shares listed on a recognised stock exchange.

The list, which contains countries that have not complied with EU tax standards, was introduced by the EU in December 2017 and was most recently updated on 4 October 2022. Annex I currently includes 12 jurisdictions: American Samoa, Anguilla, Bahamas, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, Turks and Caicos, US Virgin Islands and Vanuatu.

11 Romania: Implementation of Accounting Directive for EU Public Country-by-Country Reporting from 1 January 2023

The EU Public Country-by-Country Reporting Directive requires multinational groups with revenues of more than €750m to disclose publicly corporate income tax information relating to their operations in EU Member States on a country-by-country basis. The Directive requires that Member States implement reporting no later than for fiscal years commencing on or after 22 June 2024. The general expectation is that it would

apply from 2024 onwards. However, the Directive has been transposed into domestic law in Romania with effect for fiscal years commencing on or after 1 January 2023. Therefore, in-scope multinational groups with Romanian subsidiaries with calendar year-ends will, it appears, have to request and publish a country-by-country report for 2023, containing the information required under the Directive, by 31 December 2024. This accelerates the reporting timeline for such groups.

VAT Cases & VAT News

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VAT Cases

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01 Provision of Medical Care in Exercise of Medical and Paramedical Professions: CJEU Judgment

On 24 November 2022 the CJEU delivered its judgment in the case of ***CIG Pannónia Életbiztosító Nyrt v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*** C-458/21, which related to the exemption for the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State (Article 132(1)(c) of VAT Directive). A dispute arose between CIG Pannónia Életbiztosító Nyrt, a Hungarian insurance company, and the Hungarian Appeals Directorate on the application of the exemption to services provided under a health insurance contract.

CIG supplies a health insurance product to provide medical care abroad in respect of five serious illnesses (except where it is an acute illness or where the insured's illness has yet to be examined by a health care professional). CIG entered into an agreement with a Spanish company, Best Doctors, to enable it to provide the insurance services abroad.

Best Doctors provided two services: the IC service (Inter Consultation service), where its doctors review the medical information of the insured person to assess whether they are entitled to the insurance service), and the FBC service (Find Best Care service), where if the insured qualifies, it is responsible for all administrative formalities – e.g. making appointments with the providers of medical services; organising medical treatment, hotel accommodation and travel; providing a customer assistance service and verifying whether the medical treatment is appropriate; paying medical claims – but it is not responsible for covering transport and accommodation

costs or health care costs. Under the agreement, CIG makes an annual payment to Best Doctors whether the services of Best Doctors are used or not. CIG received invoices from Best Doctors and did not account for VAT. An inspection of its VAT returns led to the imposition of VAT and penalties.

CIG argued that the services received from Best Doctors qualified for the exemption under Article 132(1)(c) on the basis that the IC service has a therapeutic purpose in that it directly and unequivocally has a diagnosis aim and the FBC service is ancillary to that diagnostic activity. The Directorate argued that the services were only indirectly linked to the therapeutic aim and therefore did not qualify for exemption.

The question posed to the CJEU was whether Article 132(1)(c) must be interpreted as meaning that services consisting of verifying the accuracy of an insured person's diagnosis of serious illness, in order to find the best possible health care with a view to the insured person's recovery and to ensure, where covered by the insurance contract and where the insured person so requests, that the medical treatment is provided abroad, are covered by the exemption provided for in that provision. Article 132(1)(c) requires the satisfaction of two conditions – the service constitutes medical care and the service is carried out in the exercise of the medical and paramedical professions. By reference to previous case law, the court reiterated that the concept of medical care is intended to cover services that have as their aim the diagnosis, treatment and, in so far as possible, cure of diseases or health disorders (purposive condition). It reviewed both the IC service and the FBC service in this context.

With reference to the IC service, this comprised Best Doctors' confirming or invalidating the diagnosis made by the insured person's doctor in relation to one of the five serious illnesses covered by the insurance contract, i.e. providing an expert medical report. The court indicated that the purpose of such a service is not the protection of the health of the person (including its maintenance or restoration) but is really to enable another party to take a decision that has legal consequences for the person concerned. Although there may be an indirect contribution to the protection of the health of the person, the principal purpose of the service is to fulfil a legal or contractual condition in another person's decision-making process. The court noted that the expert report was the main purpose of the IC service and, although therapeutic implications may be indirect, the service does not qualify for the exemption.

With reference to the FBC service, the court noted that this service comprises a number of different elements (which were highlighted above) and that the purpose of the service was to ensure the organisation of the logistics linked to the medical care provided abroad rather than its having an aim of protecting, including maintaining or restoring, human health. Therefore the service is not considered to be the provision of medical care and does not qualify for the exemption. This case highlights the need to consider carefully the exemptions applicable in the medical sphere, particularly where some elements of the service are outsourced.

02 Supply of Retail Vouchers to Employees under Reward Scheme: CJEU Judgment

The CJEU handed down its judgment in the case of ***GE Aircraft Engine Services Ltd v The Commissioners for His Majesty's Revenue and Customs*** C-607/20 on 17 November 2022 in relation to undeclared output VAT on the value of retail vouchers provided by GEAES to its employees under the company's recognition and reward programme. The main VAT Directive provision that required interpretation was Article 26(1), which treats certain transactions as a supply of services for consideration, namely:

"(a) the use of goods forming part of the assets of a business for the private use of a taxable person or of his staff or, more generally, for purposes other than those of his business, where the VAT on such goods was wholly or partly deductible and (b) the supply of services carried out free of charge by a taxable person for his private use or for that of his staff or, more generally, for purposes other than those of his business."

GEAES is a UK company belonging to the GE group.

The GE group operated an employee reward programme under which any employee could nominate a colleague for a reward in line with the eligibility conditions and the ranking system. Depending on the ranking, prizes could be a cash payment, retail vouchers or a certificate of recognition. This case concerned the award of retail vouchers. A retail voucher was redeemed by the employee by choosing one retailer from a website listing the referenced retailers. GEAES had accounted for VAT on the reverse-charge basis on the acquisition of the vouchers from GE HQ in the US and took an input credit. It was also noted that the retailers accounted for VAT on the redemption of the vouchers.

HMRC raised assessments on GEAES and 19 other GE group members as it was of the view that output VAT was due on the value of the retail vouchers because the provision free of charge of retail vouchers to the employees was a transaction coming within Article 26(1)(b) and any business purpose for rewarding the vouchers was irrelevant.

GEAES argued that the award of the vouchers was not a taxable supply as the reward programme was linked to its economic activities and the advantage for the employee was secondary to this. In its view, a distinction must be drawn between the economic aim pursued by it by means of the award of retail vouchers, free of charge, and the private use made of them by employees. GEAES became the lead case for all entities.

The questions referred to the CJEU were examined together by the court – does a supply of services consisting, for a business, of offering retail vouchers to its employees under a recognise-and-reward programme fall within the scope of Article 26(1)(b)?

In considering the questions, the court outlined the purpose/objective of Article 26. Article 26(1) treats certain transactions for which no consideration is received by the taxable person as a supply of services for consideration. The purpose of the provision is to ensure equal treatment between taxable persons and final consumers where goods or services in respect of which input VAT was deducted are acquired by a taxable person for own private use or own staff. The court noted that to determine whether Article 26(1)(b) applies in this case, it had to consider all of the circumstances of the reward programme. The purpose of the programme was to improve employees' performance and thereby increase profitability. The vouchers allowed the employee to obtain goods or services from the referenced retailers, and the court noted that "the obtaining of such a retail voucher, by an employee nominated under that programme, by its nature is no more than a document evidencing the obligation assumed by the referenced retailers to accept that retail voucher, instead of money, at its face value".

It also noted that there was no intervention by GEAES in the choices made by the employee in acquiring the goods or services (so they were for the employee's own private use). But the actual award of the vouchers was not for the employee's private use as there was no certainty that they would receive the vouchers. The cost of the vouchers was borne by GEAES, but its motivation was to increase turnover through improved employee performance.

The court noted, then, that the personal advantage derived by the employees appeared to be merely incidental to the business requirements. Subject to checks to be carried out by the referring court, the court was of the view that the award programme was intended

to increase the performance of the employees and to lead to the proper functioning and profitability of the business. It had also noted that the retailers had accounted for VAT on the value of the retail vouchers. Therefore it held that the award of the retail vouchers did not fall within the scope of Article 26(1)(b) and that the principle of fiscal neutrality was not infringed. This case is relevant to situations where certain transactions are entered into for no consideration but could still be treated as being a supply of services for consideration.

03 Triangulation: Invoicing Requirements – Reverse-Charge Narrative: CJEU Judgment

The CJEU delivered its judgment in the case of ***Luxury Trust Automobil GmbH v Finanzamt Osterreich*** C-247/21 on 8 December 2022. The case centred on the interpretation of Article 42(a) of the EU VAT Directive, which deals with the place of supply for intra-Community acquisitions, together with Article 197(1)(c), which deals with the accountable person, and Articles 219a and 226, relating to invoicing and the required content of invoices.

The case arose out of a VAT claim by Luxury Trust Automobile GmbH (LTA). LTA, an Austrian company, was a broker and seller of luxury cars to both EU and non-EU customers. In 2014 a UK supplier sold a number of vehicles to LTA, which in turn sold them to a Czech company, Msro (which was considered to be a missing trader). The vehicles were transported directly from the UK to the Czech Republic. Each entity quoted its own VAT number of its Member State of establishment. LTA issued invoices quoting the three VAT numbers and indicated that the transaction was an exempt intra-Community transaction. LTA filed its VIES returns and included the Czech VAT number on the return for triangulation purposes. After an audit, LTA was informed that the transactions did not qualify for triangulation simplification as the invoices did not transfer liability to the purchaser (i.e. the phrase “reverse charge” was not included on the invoice). LTA was treated as making an intra-Community acquisition in Austria and was assessed to Austrian VAT with no deduction. LTA corrected the invoices subsequently, but the invoices may not have been issued to the purchaser.

The tax authority argued that the triangulation simplification measure did not apply as the invoices were not correct at the time of issue and could not be remedied after the event. In its view the intra-Community acquisition was made by LTA in Austria. LTA submitted that the invoicing requirements should be governed by Czech law as that law did not require a reference to transfer of the VAT liability (unlike Austrian law).

A number of questions were referred to the CJEU. The first was whether, where an invoice indicates exempt intra-Community triangular transaction, this means that the invoice recipient is liable to account for the VAT, i.e. whether the wording “reverse charge” must be included on the invoice. The second question related to the amendment of the invoice – whether the invoice can be amended to apply retroactively, the recipient must receive the invoice for the amendment to be effective, and the amendment applies from date of original invoice. The final question related to which Member State’s invoicing rules applied, those of LTA or the customer.

The court made a number of preliminary comments in relation to triangulation, highlighting that it is a derogation from the rules relating to intra-Community transactions. The triangulation simplification measure operates under both Articles 40 and 42 so that it exempts the intra-Community acquisition made by Party B in Member State 2 and transfers liability for the intra-Community acquisition to Party C (final party) in Member State 3 so that Party B is not required to identify itself in Member State 3.

In answering question 1, the court considered the context of Article 42 and the objectives pursued

by that provision and noted that it is a derogation from Article 41 and that the derogation is subject to two cumulative conditions. Article 42(a) sets out the basic condition for triangulation – that the acquisition in a triangulation situation is VATable as per Article 40 – and Article 42(b) sets out the formal conditions so that proof of taxation in Member State 3 (where the goods are transported to) is to be adduced. Article 42 details and supplements the conditions of application of triangulation by reference to Article 141, the purpose of which is three-fold – Party B avoids having to register in Member State 3, VAT on the intra-Community acquisition is payable by Party C, and double taxation is avoided. The court noted in this context that Party B cannot substitute other wording on the invoice – the wording must be "reverse charge" for the purposes of the derogation and of the express provision in Article 226(11a). In the context of LTA, then, the invoice must include the "reverse charge" narrative to shift the liability for the intra-Community acquisition to the final customer, Msro in this case.

In considering question 2, the court referred to earlier case law in relation to entitlement to input VAT, where a refund or deduction of input VAT is to be allowed even if the formal conditions are not satisfied but the substantive conditions are. It indicated that the invoice cannot be corrected if the condition for derogation in the first place is not met. One of the mandatory conditions of the simplification measure is to transfer liability to the end customer, and if the invoice is not correct at the outset to shift this liability, then it cannot be corrected subsequently.

In the context of question 3, the court noted that the person designated as the person liable for VAT was not validly effected as the words 'reverse charge' were missing on the invoice. It commented that the requirements of the EU Directive cannot vary from Member State to Member State. It is for the referring court to interpret the provisions applicable to the dispute at issue and therefore the court did not provide a reply to question 3.

This case highlights the importance of ensuring that VAT invoices are valid and contain the correct details as required by the Directive and domestic VAT legislation, particularly in cases where the liability to account for VAT is shifted from the vendor to the purchaser.

Rebate Payments for Medical Products – Entitlement to VAT Repayment: High Court

The point at issue in the case of ***The Revenue Commissioners v Novartis Ireland Ltd*** [2022] IEHC 642 was whether volume-based discounts granted/rebate payments made by Novartis to private health insurance companies (PHICs) constitute a reduction in the consideration received by it in respect of the supply of the product and whether Novartis is entitled to repayment of VAT.

Novartis supplies a medical product (Lucentis), which is ultimately administered in hospital by clinicians to patients. Novartis supplies the medical product to its wholesaler, Allphar, which then distributes it to hospitals. It entered into various agreements with PHICs. With respect to the payment flow, Allphar pays Novartis, the private hospitals pay Allphar, and the PHICs pay the private hospitals. Novartis pays Allphar for the distribution service and makes rebate payments to private hospitals and the PHICs. The medical product is included in the schedule of benefits of the PHIC and is supplied at the ex-factory price, which is the price paid by the wholesaler and the hospitals – a mark-up is not imposed by the wholesaler. The rebate payments are made after the supply of the medical product to both hospitals and PHICs. Novartis had argued that the discounts granted to PHICs constitute a reduction in the consideration received by it for the supply of the medical product and that therefore it is entitled to a repayment of VAT.

Novartis also makes rebate payments to hospitals, and Revenue allows those

discounts to be treated as a reduction in the consideration received by Novartis. At the Tax Appeals Commission (TAC), the Commissioner noted that Novartis grants discounts to private hospitals and PHICs and that it has contractual agreements that provide for volume-based discounts for the medical product with PHICs and with private hospitals. The Commissioner found that the rebate payments constituted a reduction in the consideration received by Novartis in respect of the supply of the medical product and that it was entitled to a repayment of the VAT.

The case was then referred to the High Court, where Revenue submitted that the supply chain links Novartis with its wholesaler and ends with the hospitals and therefore that the insurers were outside that supply chain. Revenue submitted that consideration for VAT purposes in relation to the supply of a product was the payment or proceeds received less the discounts offered. If a discrete payment was made to third parties (which, it argued, the insurers were), then this did not affect the amount to be considered for VAT purposes.

The court did not accept this argument, and it deemed the contractual agreements between Novartis and the insurers to be integral to the supply chain, being essential to the ultimate payments for the product supplied. The court agreed with the findings of the TAC and held that the rebate payments by Novartis to the insurers constituted a reduction in the consideration received by it for its supply via Allphar to the hospitals and that it was entitled to relief by repayment of VAT. A request by Revenue to the court to consider making a reference to the CJEU was declined.

05 Incorrect Assessments: TAC Determination

TAC determination **16TACD2023** was published on 20th January 2023. The TAC had to determine whether assessments raised by Revenue were correct. The appellant was engaged in the business of selling goods such as fertiliser, coal and agricultural feed, in addition to the haulage of sheep and cattle, but has ceased trading. Revenue commenced an audit of the appellant's books and records in 2016, which included a review of the sales and purchases listings for 2012–2015. There were a number of delays and difficulties in obtaining outstanding books and records, and Revenue raised assessments for both income tax and VAT for 2012–2014. The assessments were appealed by the appellant on the basis that the assessments were incorrect.

The Commissioner stated that the burden of proof rests on the appellant to prove on the balance of probabilities that an assessment to tax is incorrect. It was noted that the appellant, being the person with access to all of the facts and documents relating to his own tax affairs, is bound not only to retain documentation in accordance with the tax legislation but also to produce such documentation as may be required in support of the appeal so as to meet the burden of proof.

In this case, the TAC indicated that the appellant did not demonstrate that the assessment is incorrect and did not bring forward any books or records to demonstrate that the assessment is incorrect. The Commissioner would have considered records or books if they had been produced to determine the accuracy of the assessment raised by Revenue, but that did not occur. The appellant did not succeed in proving, on the balance of probabilities, that the assessments raised were incorrect. It was determined that the appellant failed in his appeal and did not succeed in showing that the tax is not payable.

06 Refund of Input VAT – EVR Procedures: TAC Determination

TAC determination **30TACD2023** was published on 16 February 2023. The case dealt with the time limits for reclaiming VAT under the Electronic VAT Refund (EVR) mechanism (formerly referred to as Eighth Directive claims) for refunds of VAT to persons not established in the Member State in which the VAT was incurred. The appellant is established in and trades in Northern Ireland and is UK VAT registered. The refund sought related to the calendar year 2021, and the appellant sought information from Revenue regarding the relevant deadline for submitting a claim. The appellant was informed that the deadline is 30 June 2022 for input VAT relating to goods.

The appellant also sought information relating to the deadline for claims relating to 2020 and was required to provide additional detail on the reason for the delay in submitting a claim for 2020. The appellant indicated that after Brexit there were issues with the HMRC portal and then the deadline was changed from 30 September 2021 to 30 June 2021, but 31 March 2021 was referred to under the Withdrawal Agreement. This, together with staffing issues, resulted in a missed deadline. Revenue had accepted claims from companies trading under the NI Protocol up to 30 September 2021. The claim for 2020 was refused, and the appellant appealed that ruling. The appellant argued that there was confusion over the deadlines and also submitted that HMRC was acting as agent for the respondent in relation to EU VAT refund claims (but there was no detailed argument provided on this point).

In relation to the relevant deadline, the Appeal Commissioner found that for the appellant's 2020 claim, the deadline was 30 September 2021. The appellant submitted that it had made various attempts to lodge a claim for 2020 but did not have documentary evidence to support this. The Commissioner stated that the burden of proof rests with the appellant to prove that on the balance of probabilities the VAT is not payable. The Commissioner did not accept that the appellant discharged the burden of proof in relation to its claim that it attempted to submit an application for a refund of VAT incurred in 2020 before 30 September 2021.

07 Transactions Connected with Fraudulent Evasion: TAC Determination

The TAC determination **31TAC2023** is published on 23 February 2023 and related to assessments raised by Revenue on the basis that the appellant knew or should have known that it was participating in transactions connected with the fraudulent evasion of VAT and was liable for the VAT forgone. Revenue contended that the appellant had acquired goods from a number of missing traders and sold goods to other EU traders who had not correctly accounted for VAT on the transactions in circumstances where the appellant knew or ought to have known this. The determination in this case is split into two parts – the first deals with the appellant's contention that its right to defence under EU law was breached by the respondent, and the second relates to whether the appellant knew or ought to have known that it was involved in transactions connected with the fraudulent evasion of VAT. The determination contains detailed evidence as regards the background facts and evidence provided at the hearing.

In light of the evidence provided, the Commissioner was satisfied that the respondent breached the appellant's right to defence. It was noted that the respondent explicitly refused to allow the appellant to respond to the allegations before the assessment was

raised against it and instead said that any such response could be provided in the context of an appeal to the TAC. But the Commissioner stated that the appellant was entitled to submit its observations on the allegations and that the respondent was obliged to consider these observations before deciding whether to raise an assessment. In this case, the respondent bore the burden of proof, and the Commissioner indicated that the evidence proffered by the respondent was to be disregarded, with there being no valid evidence before the TAC. The assessments were, accordingly, reduced to zero.

The second part of the determination deals with a review of the evidence provided in relation to assessing whether the appellant knew or ought to have known that it was involved in transactions related to fraudulent evasion. Despite the assessments' being reduced to zero, this element of the case was dealt with in the event that the determination that the appellant's right to defence was breached was incorrect.

If the Commissioner's determination that the appellant's right to defence was breached is incorrect, he believes that it would be unfortunate for the parties – in particular, the two witnesses who gave lengthy oral evidence at the hearing – to have to rehear the matter. Therefore, he considered it appropriate to set out what his determination would have been had he found that the appellant's right to defence had not been breached. Consequently, the remainder of Part 2 of the determination considers the entirety of the evidence put before the Commissioner to conclude whether the appellant knew, or should have known, that it was involved in transactions connected to VAT fraud.

The Commissioner agreed that there were four questions that needed to be satisfied for the liability for the missing VAT to be attributed to the appellant: Was there a tax loss? If so, did this loss result from a fraudulent evasion? If there was a fraudulent evasion, were the appellant's transactions that were the subject of the appeal connected with that evasion? If such a connection was established, did the appellant know or should it have known that its transactions were connected with the fraudulent evasion of VAT? The Commissioner did not make a finding in respect of the first three questions but assumed that they were met so that the fourth question could be focussed on. As with the first part above, this part of the determination provides a detailed analysis of the evidence given. The Commissioner indicated that he would find that the respondent had failed to demonstrate that the appellant knew or should have known that its transactions with the various traders were connected with fraud. The TAC has been requested to state and sign a case for the opinion of the High Court.

VAT News

Ireland

Revenue eBrief No. 015/23, published on 20 January 2023, relates to VAT zero rating of Covid-19 testing kits. The eBrief confirms the application of the zero rate of VAT to the supply of Covid-19 in-vitro diagnostic medical devices (testing kits). The zero rate applies where the kits conform with the essential requirements of all relevant European Medical Device Directives. This applies from 1 January 2023 and is a temporary measure provided on an administrative basis until the appropriate legislative provisions are enacted.

Revenue eBrief No. 236/22 was published on 30 December 2022 and relates to the VAT treatment of printing and printed matter. The Tax and Duty Manual has been updated to provide for the new zero rate of VAT on newspapers. This measure took effect on 1 January 2023 as a result of changes introduced in Finance Act 2022.

Revenue eBrief No. 224/22, which was published on 22 December 2022, related to the VAT treatment of dental services. The Tax and Duty Manual has been updated and sets out the VAT treatment of professional dental services, supplies by dental technicians and the VAT treatment of dental arrangements between principal dentists and associate dentists.

EU

The European Commission published its proposals in relation to "VAT in the Digital Age" on 8 December 2022. 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. There are significant changes on the way for businesses – with a move to real-time digital reporting based on e-invoicing for cross-border transactions, updated rules for passenger transport and short-term accommodation platforms, and a proposal for a single VAT registration across the EU. The details of the proposals can be found at https://taxation-customs.ec.europa.eu/taxation-1/value-added-tax-vat/vat-digital-age_en.

Accounting Developments of Interest

Aidan Clifford
Advisory Services Manager, ACCA Ireland

Ten-Year Audits and Sole Practitioners

When an auditor has been the engagement partner for an audit client for ten or more years, the Ethical Standards (ES) suggest that there is a risk to the auditor's independence and objectivity arising from this long association. There are different rules for listed clients, but for unlisted clients the ES require that the auditor consider their position and apply safeguards to reduce the threats from long association to a level where independence would not be compromised.

There is a common misconception that in the case of a sole practice the only available options for long-association risk are audit firm rotation or to have an external audit file review performed by another auditor. This is not correct. The ES at paragraph 3.4 lists four possible safeguards, but it is important to note that the ES uses the word "may" and this is not a throwaway use of that word. The ES does not use "must" or "should", and therefore the list of four possible safeguards in paragraph 3.4 is an example list and not exhaustive; other options are available. The International Auditing and Assurance Standards Board uses the words "must", "should" and "may" very carefully, and auditors should not read more into a word's meaning than was intended by the standard's author.

The ten-year anniversary of an unquoted company audit is a reflection point requiring the auditor to reflect on their long-association risk and to document both the reflection and the approach that the auditor plans to apply to manage this risk. The risk can be addressed by the rotation of the engagement partner or responsible individual (an employee holding statutory audit status), rotation to a different audit firm or external file reviews, as per paragraph 3.4, but it can also be a consultation and review or may require no action/safeguard. The ES also requires that the firm discuss and agree the safeguards with the audit client and document this discussion and agreement.

A consultation and review is a discussion with another auditor on the possibility that an independent third party might question an auditor's independence and objectivity because of the long-association risk. In many cases there will be no threat to independence or objectivity arising from long association, and therefore no safeguards are required. In some cases, perhaps where there are also fee-dependence issues or particularly complex judgements are required where there are threats, the only appropriate safeguards might be audit engagement partner rotation, rotation to another audit firm or hot-file reviews. The key, as with all audit requirements, is to document the potential risks, the reason why a particular safeguard is appropriate, and the discussion with and agreement of the client to the proposed controls.

When drafting the firm's ISQM manual, a practice needs to ensure that the manual allows the firm to consider safeguards other than just external file reviews or audit partner rotation. Some

proprietary audit quality manuals automatically default to external file reviews only. The manual also needs to allow the firm to consider a consultation and review or the option of not applying any controls in appropriate circumstances. Any long-association safeguards would need to be set in the context of the existing safeguards regarding matters such as the provision of non-audit services and to include, for example, cycle reviews of completed audit engagements.

Credit Union Amendment Bill 2022

The underlying business model for credit unions is challenging although the recent increase in interest rates has improved things for the average credit union, there are still structural issues. The new Bill addresses some of the issues, including allowing credit unions to come together to form shared service entities that will allow them to offer enhanced services and potentially operate at a reduced cost.

The legislation places more emphasis on strategic planning, allows the manager to be on the board, reduces the number of board meetings required and reduces the administrative burden on the board. The board oversight committee will also be required to meet only every two months rather than the current monthly meeting requirement.

Proposed Changes to FRS 102

The Financial Reporting Council has issued draft amendments to FRS 102. The proposed changes include a new model of revenue recognition in FRS 102 and FRS 105 and a new model of lease accounting in FRS 102.

What does it mean?

- How and when revenue is recognised will change for some companies. Companies with simple business models will not see a change, but software, leasing and sales contracts delivered over time or sales with complex terms of trade may change when and how they recognise a sale.

- Operating leases (other than certain short-term and low-value leases) will all convert to finance leases. This aligns FRS 102 with the lease accounting required under IFRS, although the FRS 102 model is a simplified version of the IFRS requirement.

- New guidance is provided on calculating fair value to align with IFRS 13.

- The option for the first-time use of FRS 102 of using IAS 39 instead of the financial instrument options in FRS 102 is removed (this was not a widely used option).

The alignment with IFRS will be welcomed by most accountants; however, the lease accounting requirements will be a challenge for some with, for example, large vehicle lease portfolios.
The exercise to convert operating leases to finance leases is time-consuming and will result in additional liabilities and assets being recognised on balance sheets. The proposed effective date of the amendments set out in the FRED is 1 January 2025. FRS 102 is based on the IFRS for SME standard, issued by the International Accounting Standards Board, and that standard is undergoing a regular update as well.

Small Practices Using Digital Tools and Apps

The International Federation of Accountants (IFAC) has undertaken research in Ireland and the UK on digitisation for small and medium practices (SMPs). It is generally accepted that an SMP that chooses not to digitise will not survive, although it is also incredibly easy for an SMP to choose the wrong digital pathway and waste its investment.

The survey was led by Gail McEvoy, Technical Adviser for the IFAC Small and Medium Practices Committee and a practitioner based in Drogheda. Some of the findings are:

- SMPs have embraced their online presence and are using social media. However, many still have some way to go on the digital journey.
- The bigger the practice, the more digitally advanced it is.
- A number of challenges were identified, the greatest of which was client buy-in. Clients were reported to be unable or unwilling to do things differently.
- However, the more digitally enabled practices reported significant benefits in productivity, flexibility and overall attractiveness of the practice to new recruits, and to existing and potential clients.

Online bank confirmations, client document upload facilities, bank transaction downloads, RBO and beneficial ownership searches etc. were all efficiently managed by various applications but at a substantial cost. At the same time, the technology being used was reducing the number of times that a client had to be physically visited and therefore reducing travel expenses. The practice decided to start including a technology outlay fee on its client bills, replacing what used to be a substantially higher travel expenses outlay amount. It reports that it had no push-back from clients on this approach and was able to recover the practice digitisation costs spread out over the client base where those digital application were used.

Ukraine Credit Guarantee Scheme

This is another loan scheme for SMEs, including primary producers and small mid-caps (defined as businesses with up to 499 employees). To qualify for the scheme, the borrower will have to declare that costs have increased by a minimum of 10% on their 2020 figures and that the loan is being sought specifically as a result of difficulties being experienced due to the Ukraine crisis.

Transparent and Predictable Working Conditions

The Transparent and Predictable Working Conditions Directive has been implemented by Statutory Instrument 686 of 2022. The new requirements include:

- more complete information on the essential aspects of the work, which is to be received early by the worker in writing;
- a limit to the length of probationary periods at the beginning of a job (12 months for public servants and 6 months for other);

- the right to seek additional employment, with a ban on exclusivity clauses and limits on incompatibility clauses;
- the right to know in a reasonable period in advance when work will take place;
- anti-abuse legislation for zero-hours contract work;
- the right of employees to request to be transferred to a form of employment with more predictable and secure working conditions where available and to receive a reasoned written reply; and
- the right to receive mandatory training, cost-free, that is required to carry out the work for which the employee is employed.

Financial Reporting Decisions

The Irish Auditing and Accounting Supervisory Authority (IAASA) has published a compendium of financial reporting decisions, with commentary on IAS 36: Impairment of Assets, IAS 37: Provisions, Contingent Liabilities and Contingent Assets, IFRS 8: Operating Segments, the ESMA Guidelines on Alternative Performance Measures and the Transparency (Directive 2004/109/EC) Regulations 2007.

Politically Exposed Persons

The Government has published guidelines on the meaning of "prominent public functions". Before this guidance, there was uncertainty about who was and was not a PEP, and the guidelines make this much clearer. This will assist firms to identify PEPs when conducting their risk assessment. The guidelines clarify, for example, that a county councillor is not a PEP unless he or she is also a member of the governing body of a political party.

Sustainability Disclosures

The Department of Enterprise, Trade and Employment (DETE) held a webinar in January on the Corporate Sustainability Reporting Directive (CSRD).The webinar dealt with the CSRD and the European Sustainability Reporting Standards (ESRS) arising from it. The DETE also launched a public consultation on Member State options contained in the CSRD

Disclosures under the ESRS will shortly become mandatory for Irish businesses. The implementation dates are based on company size, with the first companies coming in scope next year. The ESRS are as complex as IFRS to implement and will require some planning and data capture.

Are Tips Wages?

The relevant Revenue manual includes this guidance: "Gratuities from customers (for example, service charges in hotels, tips in restaurants) **paid to the employer** and subsequently paid out to an employee should be included in pay for the income tax week or month in which they are paid out [emphasis added]". Tips paid in cash directly to the employees should be included by

the worker themselves in their own annual tax return. Cash gratuities paid directly to the staff member never came within the scope of PAYE, so employer PRSI was not due on the payment, and therefore they are administratively easier for employers.

Before the Payment of Wages (Amendment) (Tips and Gratuities) Act 2022, an employer would have deducted normal PAYE tax, USC, employee PRSI and credit card commissions on tip payments made by card. Before the Act, an employer could have also deducted any amount from the tips for processing cost or employer PRSI. However, once the Act is commenced, no deduction from the tips may be made except normal PAYE tax, USC, employee PRSI and credit card commissions. This means that tips processed by an employer will result in the employer's having, in most cases, an additional 11% of the tip's cost to pay over to Revenue in employer PRSI.

Rent Collection Services

A number of accounting practices have been approached by their property-owning clients asking if the accountant will use their client account to collect rent on the client's behalf. The Property Services Regulatory Authority (PSRA) has confirmed that pure collection of rent is not a regulated activity, and an accountant may do this on a client's behalf. A professional body will require that such activities are covered by a letter of engagement, that all of the transactions are processed through a client account and that the client money is accounted for correctly. It is recommended that a separate client rent account be opened for each client to avoid comingling of funds. Accepting rental deposits or acting as a rental agent is a regulated activity and requires authorisation from the PSRA.

Protected Disclosures (Amendment) Act 2022

On 1 January 2023 the Protected Disclosures (Amendment) Act 2022 came into force in Ireland for all public and private organisations with 50 or more employees. A wider scope of categories of worker will be protected, including volunteers, board members, shareholders and job applicants. The burden of proof in this legislation is with the employer and not the employee. The Act requires that businesses in scope establish, maintain and operate internal reporting channels and procedures for the making of protected disclosures.

Most employers already have either a formal or an informal "speak up" policy, but from 1 January the requirements have been tightened up and the process will need to be reviewed to manage the area carefully and respond to reports appropriate

Cashflow Management in 2023

A recession is being predicted by many economists, and therefore now is a good time to take precautions.

- Businesses need to send out revised terms and conditions of trade to all customers and include an "all sums due" retention-of-title clause. Including a retention-of-title clause in an invoice is ineffective; it must be in a terms-of-trade letter sent before doing business.

- Directors need to be advised that if their business is suffering trading difficulties they need to meet often to discuss their business's survival plans and document their meetings. The directors

need to be able to show that they acted honestly and responsibly or they face restriction or disqualification.

- Keep PAYE and PRSI payments up to date; unpaid directors' payroll deductions may be disallowed in the director's personal tax return.

- Try to keep all Revenue returns and payments up to date. If Revenue debt has been kept up to date, it is more likely to cooperate with a Small Company Administrative Rescue Process if such a procedure is entered into.

Defined-Contribution Pensions and IORP II

All pension schemes must meet the full requirements of the IORP II Directive from 1 January 2023 onwards. However, the Pensions Authority has confirmed that if a formal commitment was made before 1 January 2023 to wind up a group defined-contribution pension scheme and transfer the assets of the scheme to a master trust or to PRSAs, the trustees will not be required to meet the new IORP II requirements provided that the transfer will be completed, and the scheme wound up, by the end of 2023. The deadline extension does not appear to be available to defined-benefit schemes.

UK Anti-Money-Laundering Reporting

The latest edition of the UK Financial Intelligence Unit's SARs Reporter Booklet is now available. The booklet provides some examples of the work of law enforcement agencies in utilising SARs (suspicious activity reports) intelligence in investigations.

Auditor Scepticism and Support for Smaller Audit Firms in the UK

The Financial Reporting Council (FRC) in the UK has published a new report setting out examples of good practice to improve auditor scepticism and challenge.

The FRC also announced new supervision measures to support smaller audit firms seeking to grow their share of the audit market without compromising audit quality.

Irish Audit Reports Reference Change

Most auditors include the description of an audit in their standard audit report; however, some simply reference the standard description on the website of the Irish Auditing and Accounting Supervisory Authority (IAASA). The IAASA has recently redesigned its website, and therefore where a reference is made, the reference needs to change to https://iaasa.ie/publications/description-of-the-auditors-responsibilities-for-the-audit-of-the-financial-statements/. On the redesigned website, the auditing standards have moved to https://iaasa.ie/auditing-and-assurance-standards/.

Legal Monitor

Philip McQueston
Of Counsel, A&L Goodbody

Selected Acts Signed into Law from 1 November 2022 to 31 January 2023

No. 47: Planning and Development and Foreshore (Amendment) Act 2022

This Act amends the Planning and Development Act 2000 in relation to the efficient discharge of the business of An Bord Pleanála. The Act allows An Bord Pleanála to facilitate and accelerate the provision of housing on lands owned by local authorities and certain State authorities and provides that certain housing development on such lands be exempted development. The Act also amends the Foreshore Act 1933, which allows for the granting of leases and licences in respect of foreshore belonging to the Irish State.

No. 38: Credit Guarantee (Amendment) Act 2022

This Act amends the Credit Guarantee Act 2012 and establishes a Ukraine Credit Guarantee Scheme in response to the economic difficulties resulting from the aggression against Ukraine by Russia. The scheme allows businesses to avail of additional finance in light of the economic challenges caused by the war.

No. 44: Finance Act 2022

The Budget Statement for 2023 was announced on 27 September 2022. Finance Act 2022 includes legislation to implement the tax policy changes announced. The Act provides for the imposition, repeal, alteration and regulation of taxation, of stamp duties and of duties relating to excise and customs.

Selected Bills Initiated from 1 November 2022 to 31 January 2023

No. 6 of 2023: Remuneration Information and Pay Transparency Bill 2023

The purpose of this Bill is to make further and better provision for equality between employed persons by providing for transparency in respect of matters relating to remuneration and to amend the Employment Equality Acts 1998 to 2021 for that purpose.

No. 114 of 2022: Gambling Regulation Bill 2022

The purpose of this Bill is to provide the framework for a robust regulatory and licensing regime for the gambling sector in Ireland. The Bill provides for the establishment and statutory functions of a body to be known as the Gambling Regulatory Authority of Ireland for the purposes of licensing and regulating betting, gaming, certain lotteries, and the sale or supply of products or services related to gambling. The Bill includes measures to repeal the Totalisator Act 1929, the Betting Act 1931 and the Gaming and Lotteries Act 1956, which currently provide the regulatory framework for gambling in Ireland.

No. 112 of 2022: Credit Union (Amendment) Bill 2022

The purpose of this Bill is to provide for the establishment of corporate credit unions and to amend the requirements and qualifications for membership of credit unions in order to grow credit union lending through the expansion

of services and encourage further community development. The Bill proposes to alter the scope of permitted investments by credit unions, provide for changes to the governance of credit unions and set a maximum interest rate on loans by credit unions. The Bill also amends the Credit Union 1997 Act to achieve the objective of promoting collaborative efforts among credit unions and to improve services by widening of the range of products and services available.

Selected Statutory Instruments from 1 November 2022 to 31 January 2023

No. 565: Planning and Development (Amendment) (No. 2) Regulations 2022

These Regulations amend the Planning and Development Regulations 2001 to enable Irish Water to apply for planning permission for infrastructure on land where it is not the landowner but where it would be the intention for Irish Water to compulsorily acquire the land in the event that planning permission is granted.

No. 571: Finance Act 2021 (Section 33(1)) (Commencement) Order 2022

This Order provides for the commencement of s33(1) of the Finance Act 2021, a measure providing for the digital gaming tax credit incentive.

No. 575: Consumer Credit (Amendment) Act 2022 (Commencement) Order 2022

This Order provides for the commencement of the Consumer Credit (Amendment) Act 2022. The Act amends the law in relation to providers of high-cost credit, including regarding the licensing of such persons, and for that purpose amends the Consumer Credit Act 1995. The Act also allows the Minister for Finance to set the maximum interest rate at which a high-cost credit loan can be provided.

No. 576: Consumer Credit Act 1995 (Section 98A) (Maximum Interest Rates) Regulations 2022

These Regulations provide for a 1% maximum rate of simple interest chargeable per week in respect of a loan. It provides for a maximum rate of simple interest chargeable per year of 48% and for a maximum rate of nominal monthly interest chargeable on an outstanding balance of 2.83%.

No. 585: Solicitors Professional Indemnity Insurance (Amendment) Regulations 2022

These Regulations provide for the minimum terms and conditions of professional indemnity insurance for solicitors and registered lawyers in Ireland.

No. 596: Consumer Rights Act 2022 (Commencement) Order 2022

This Order provides for the commencement of the Consumer Rights Act 2022. The Act amends and consolidates the law relating to rights and remedies in contracts between traders and consumers for the sale of goods and the supply of digital content and digital and other services, and gives effect to EU Directives on certain aspects concerning contracts for the supply of digital content and digital services.

No. 665: Value-Added Tax Consolidation Act 2010 (Section 46(5)) Order 2022

This Order amends sub-clause (ii) of paragraph 11(4)(a) of Schedule 2 to the Value-Added Tax Consolidation Act 2010 (which provides for the extension of the zero rate of VAT to certain goods used in in the delivery of Covid-19-related health care services) by the substitution of “30 June 2022” for “31 December 2021”.

No. 684: Finance Act 2022 (Sections 100, 101 and 102) (Commencement) Order 2022

This Order specifies the date for ss100, 101 and 102 of the Finance Act 2022, which provide for the Temporary Business Energy Support Scheme (TBESS), to come into effect. The commencement date is 18 December 2022. The TBESS provides that qualifying businesses can claim for 40% of the increases in their energy bills, subject to a monthly cap.

No. 686: European Union (Transparent and Predictable Working Conditions) Regulations 2022

These Regulations transpose into Irish law an EU Directive on Transparent and Predictable Working Conditions in the European Union. The Regulations include a range of minimum requirements to protect workers.

No. 704: European Union (Access to Anti-Money Laundering Information by Tax Authorities) (Amendment) Regulations 2022

These Regulations amend the European Union (Access to Anti-Money Laundering Information by Tax Authorities) Regulations 2021, which transposed into Irish law the EU Directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

No. 705: Mandatory Automatic Exchange of Information (Platform Operators) in the Field of Taxation Regulations 2022

These Regulation transpose EU Directive 2011/16, as amended by EU Directive 2021/514, (DAC7) into Irish law. The Regulations extend the scope of the existing provisions on exchange of information and administrative cooperation between the Member States by requiring digital platforms to collect and report information on the income realised by sellers offering certain services. This allows tax authorities to collect and automatically exchange such information.

No. 706: European Union (Administrative Cooperation in the Field of Taxation) (Amendment) Regulations 2022

These Regulations amend the European Union (Administrative Cooperation in the Field of Taxation) Regulations 2012 and give effect to DAC7 changes relating to group information requests between Member State tax authorities.

No. 711: Finance Act 2022 (Section 29(1)) (Commencement) Order 2022

This Order commences s29 of the Finance Act 2022, which provides for certain changes to measures relating to relief for increases in stock values for qualifying farmers.

No. 712: Finance Act 2022 (Section 30(1)) (Commencement) Order 2022

This Order commences s30 of the Finance Act 2022, which provides for certain changes to measures relating to capital allowances for slurry storage.

No. 713: Finance Act 2022 (Section 73(1)) (Commencement) Order 2022

This Order commences s73 of the Finance Act 2022, which provides for certain changes to stamp duty farming relief measures.

No. 714: Finance Act 2022 (Section 97(1) (Commencement) Order 2022

This Order commences s97 of the Finance Act 2022, which provides for certain changes to a measures relating to relief for farm restructuring.

No. 715: Finance Act 2022 (Section 48(1)) (Commencement) Order 2022

This Order commences s48 of the Finance Act 2022, which provides for certain changes to alcohol products tax on beer brewed in small breweries; clarification of self-certification requirements applying to Irish small independent producers seeking reduced rates of alcohol products tax in other Member States; and reduced rates of alcohol products tax on cider and perry produced by small independent producers.

No. 10: Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Investment Firms) Regulations 2023

These Regulations impose obligations on investment firms that hold client assets or enter into title transfer collateral arrangements with clients. The Regulations contain revised client asset requirements that will apply to MiFID (Markets in Financial Instruments Directive) investment firms and credit institutions (collectively defined as investment firms) and will come into effect in respect of MiFID investment firms on 1 July 2023 and for credit institutions on 1 January 2024.

Tax Appeals Commission Determinations

Catherine Dunne
Barrister-at-Law

Determinations of the Tax Appeals Commission Published from 1 November 2022 to 31 January 2023

Income Tax

152TACD2022

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

154TACD2022

Appeal regarding the treatment of a qualified adult in payment of State pension

s2 SWCA 2005; s112 SWCA 2005; s126 TCA 1997

Case stated requested: Unknown

155TACD2022

Appeal regarding relief in respect of a deed of covenant entered into between the appellant and his wife

s792 TCA 1997

Case stated requested: Unknown

158TACD2022

Appeal regarding tax treatment of AVC

s774 TCA 1997

Case stated requested: Unknown

160TACD2022

Appeal regarding treatment of Temporary Wage Subsidy Scheme payments

s28 Emergency Measures in the Public Interest (Covid-19) Act 2020

Case stated requested: Unknown

161TACD2022

Appeal regarding entitlement to be assessed jointly with a former spouse and application of a variety of credits and reliefs

s1017 TCA 1997

Case stated requested: Unknown

165TACD2022

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: No

05TACD2023

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

08TACD2023

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

09TACD2023

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

14TACD2023

Appeal relating to the definition of "world-wide income" when applying the domicile levy

s531AA TCA 1997

Case stated requested: Unknown

Corporation Tax

03TACD2023

Appeal regarding deductibility of an expense under s81 TCA 1997 for the purposes of calculating profits chargeable to corporation tax

s81 TCA 1997

Case stated requested: Unknown

CGT

164TACD2022

Appeal regarding date of disposal for CGT purposes

s542 TCA 1997

Case stated requested: Unknown

22TACD2023

Appeal regarding the relevant date for the disposal of an asset

s542 TCA 1997

Case stated requested: Yes

23TACD2023

Appeal regarding application of retirement relief

s598 TCA 1997

Case stated requested: Unknown

CAT

18TACD2023

Appeal regarding a charge to CAT arising from the taking of gifts of property

s4 CATCA 2003; s5 CATCA 2003; s53A CATCA 2003

Case stated requested: Yes

21TACD2023

Appeal regarding dwelling-house relief

s86 CATCA 2003

Case stated requested: Unknown

Stamp Duty

20TACD2023

Appeal regarding application of the four-year statutory limitation period

s159A SDCA 1999

Case stated requested: Unknown

VAT

151TACD2022

Appeal regarding assessment to VAT on disposal of sites and application of the four-year statutory limitation period

S22 VATCA 2010; s76 VATCA 2010; s119 VATCA 2010

Case stated requested: Unknown

159TACD2022

Appeal regarding the imposition by Revenue of customs duty and VAT on the importation of statues and ironworks from China for use in a monastery

Regulation 1186/2009/EC

Case stated requested: Unknown

01TACD2023

Appeal regarding entitlement to the repayment of VAT paid on professional service fees supplied in connection with the sale by a receiver of tonnage and kilowatts in the context of commercial sea fishing

s2 VATCA 2010; s3 VATCA 2010; s5 VATCA 2010; s20 VATCA 2010; s22 VATCA 2010; s26 VATCA 2010; VAT Regulations 2020 (S.I. 639 of 2010)

Case stated requested: Yes

02TACD2023

Appeal regarding transaction connected with the fraudulent evasion of VAT where second-hand cars were treated as intra-Community supplies versus margin scheme goods

s87 VATCA 2010

Case stated requested: Unknown

04TACD2023

Appeal regarding application of the four-year statutory limitation period

s99 VATCA 2010

Case stated requested: Yes

06TACD2023

Appeal regarding VAT treatment of betting in a members' club

s2 VATA 1972; s3 VATCA 2010; Article 135 Council Directive 2006/112/EC; Article 13.B Sixth Council Directive 77/388/EEC

Case stated requested: Yes

Customs and Excise

166TACD2022

Appeal against a Binding Tariff Classification (BTI) issued by Revenue in relation to "Reusable Incontinence Fixation Pants"

Council Regulation (EEC) No 2658/87; Commission Implementing Regulation

Case stated requested: Unknown

19TACD2023

Appeal regarding customs duties that arose after the opening of a post-clearance intervention in relation to the importation of second-hand motor vehicles by the appellant that were the subject of a claim under Great Britain Preferential Origin and Returned Goods Relief

Council Regulation (EU) 952/2013; Article 208 of Implementing Regulation (EU 2015/2447); Trade and Cooperation Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland; Council Regulation (EEC) No. 2648/87

Case stated requested: Yes

Income Tax and PRSI

150TACD2022

Appeal regarding payments made under the Temporary Wage Subsidy Scheme for a domestic child carer

s28 Emergency Measures in the Public Interest (Covid-19) Act 2020

Case stated requested: Unknown

Income Tax and USC

149TACD2022

Appeal regarding application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

153TACD2022

Appeal regarding treatment of rental income for USC and PRSI purposes

s959A TCA 1997; s959B TCA 1997

Case stated requested: Unknown

Income Tax, VAT and PREM

11TACD2023

Appeal regarding assessment to tax where the appellant failed to maintain proper books and records as required

s886 TCA 1997

Case stated requested: Unknown

Income Tax and VAT

16TACD2023

Appeal regarding assessment to tax where the appellant failed to maintain proper books and records as required

s886 TCA 1997; s84 VATCA 2010

Case stated requested: Unknown

PAYE

156TACD2022

Appeal regarding the application of tax credits in respect of dependent children

s462 TCA 1997

Case stated requested: Unknown

162TACD2022

Appeal regarding application of Single Person Child Carer Credit (SPCC)

s462B TCA 1997

Case stated requested: Unknown

163TACD2022

Appeal concerning a payment of a director that constituted a capital repayment of a director's loan

s884 TCA 1997; s985 TCA 1997

Case stated requested: Unknown

VRT

157TACD2022

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

s133 Finance Act 1992

Case stated requested: Unknown

07TACD2023

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

s135D Finance Act 1992

Case stated requested: Unknown

15TACD2023

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

s133 Finance Act 1992

Case stated requested: Unknown

Artist's Exemption

12TACD2023

Appeal regarding artist's exemption

s195 TCA 1997

Case stated requested: Unknown

Covid Restrictions Support Scheme

148TACD2022

Appeal against a refusal by Revenue to allow the appellant to register for and avail of the Covid Restrictions Support Scheme

s484 TCA 1997; s485 TCA 1997

Case stated requested: Unknown

17TACD2023

Appeal against a refusal by Revenue to allow the appellant to avail of the Covid Restrictions Support Scheme

s484 TCA 1997; s485 TCA 1997

Case stated requested: Unknown

10TACD2023

Appeal against a refusal by Revenue to allow the appellant to avail of the Covid Restrictions Support Scheme

s484 TCA 1997; s485 TCA 1997

Case stated requested: Yes

13TACD2023

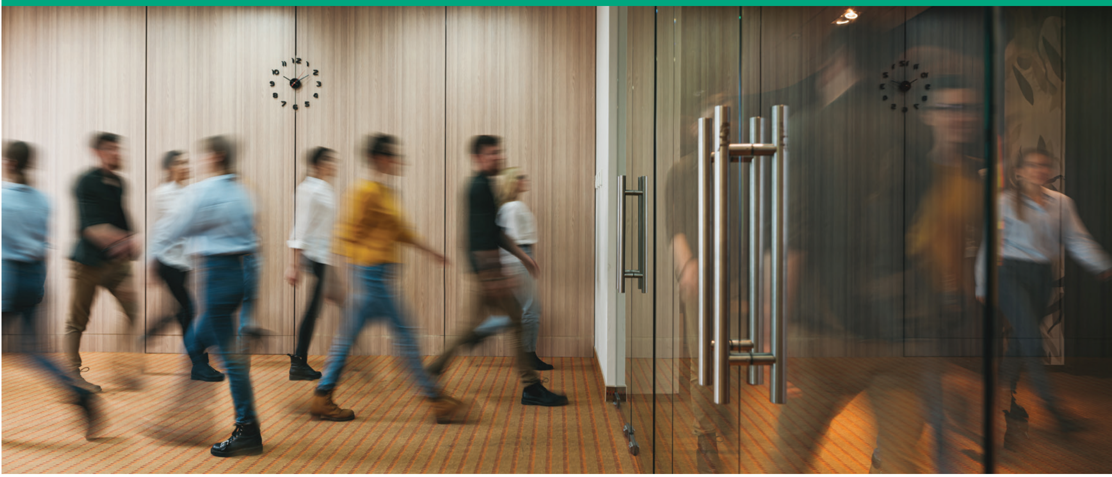
Appeal against a refusal by Revenue to allow the appellant to avail of the Covid Restrictions Support Scheme

s484 TCA 1997; s485 TCA 1997

Case stated requested: Unknown

Pat O'Brien
Senior Consultant, BDO

Employment Tax Matters: Finance Act 2022



Introduction

The Finance Act 2022 contains no fewer than thirteen provisions that relate directly or indirectly to employment tax matters. These include provisions that introduce fundamental changes to the PAYE system itself, as well as changes to the Key Employee Engagement Programme (KEEP), pensions, the Special Assignee Relief Programme (SARP) and the Foreign Earnings Deduction. Although some of these items would merit an article in themselves, what follows is, of necessity, an overview of the relevant provisions. Given their significance, it is likely that they will be revisited in *Irish Tax Review* in the coming year.

Sections 4 and 5: Exemption for Certain Covid-19-Related Payments and Statutory Redundancy Payments

Section 4 exempts from taxation payments made under the Covid-19 Death in Service Ex-Gratia Scheme for Health Care Workers. This is a non-statutory scheme administered by the Minister for Health. The exemption covers both income tax and USC and is effective from 1 January 2023; however, provision is also made for retrospectively exempting any such payments made before that date.

Section 5 provides for some technical amendments to the legislation (s203 TCA 1997) governing the exemption of payments under the Redundancy Payments Act 1967. These confirm existing exemptions, as well as exempting "Covid-19 related lay-off payments" made under s32A of the Act. The latter provision is effective from 19 April 2022.

Section 7: Small Benefit Exemption

The Minister for Finance, in his Budget Speech on 27 September, announced what for many employees was to be an early Christmas present. This came in the form of an increase from €500 to €1,000 in the amount that can be given tax-free to an employee under the small benefit exemption provided for in s112B TCA 1997. The change was given immediate affect by way of a Financial Resolution, which is now incorporated in s112B.

Apart from increasing the permitted amount, the amendments to s112B also provide that within the overall limit of €1,000 per employee per annum, up to two separate qualifying awards can be made each year. The changes are introduced by an amendment to the definition of a "qualifying incentive", which provides (1) for the increase in the overall value of the exemption to €1,000 and (2) for the provision of the incentive on not more than two occasions in any tax year.

A new definition, that of "relevant incentive", is added, which sets out the qualifying conditions and limitations of the scheme. These repeat the conditions previously found in the definition of "qualifying incentive" in s112B(1), i.e. that the incentive is given in the form of a voucher or benefit and, in the case of a voucher, may only be used to purchase goods and services and cannot be redeemed for cash. The incentive is subject to the overall condition that it does not form part of a salary sacrifice arrangement.

It is understood that some queries have been raised by practitioners at TALC concerning the application of the section. These include whether the opportunity to provide a first qualifying incentive in the year may be said to be "used up" if an incidental benefit of trivial value, e.g. an Easter egg, is provided earlier in the year or, indeed, in cases where a fully taxed benefit is provided before the exempt benefit. It is also not entirely clear how the provisions of s112B interact with those governing PAYE settlement agreements in s985B TCA 1997 (where the employer settles the liability on small and irregular benefits in an annual settlement). Further clarification on these aspects would be welcome.

Section 8: Amendments to the Cycle to Work Scheme

Section 8 amends the exemption for the provision of bicycles in s118(5G) TCA 1997 by introducing a new category, that of "cargo bicycle" (a type of oversized bicycle with a box at the front for transporting passengers or goods). The amendment provides for an increased exemption of €3,000 for the provision of such bicycles. The general exemption for other bicycles remains at €1,500.

Section 9: New Reporting Requirements for Certain Payments to Employees

Section 9 inserts s897C in TCA 1997 to introduce a new reporting requirement for employers. The section, which will require employers to report details of certain non-taxable payments made to their employees, is subject to a Commencement Order and will also require amendments to the PAYE Regulations.

The "reportable benefits", details of which will be required to be reported under the new provisions, are:

- a small benefit provided under s112B TCA 1997,
- a remote working daily allowance and
- a travel and subsistence payment.

The proposed requirement is a significant departure from the general principles of the PAYE scheme, which hitherto generally required

employers to report only details of payments that were chargeable under Schedule E.

At a TALC meeting last October, Revenue stated that it anticipates that reporting will commence in January 2024, with a consultation on implementation of the new requirements lasting *c*. 12 months. Since then, Revenue announced the commencement of the consultation process in eBrief No. 12/2023, which stated that:

> "Revenue is now seeking the engagement of Employers, Software Providers and Agents in the implementation of this reporting requirement. Further information, together with a link to a survey, has issued through their ROS inbox allowing stakeholders to provide information on their current processes that will assist us in the design of this new reporting obligation."

It should be noted that the consultation process relates only to the manner, rather than the principle, of implementing these new requirements. The primary legislation provides limited information on what, how and when details of reportable benefits are to be provided. At present the definition of travel and subsistence payments is limited to "a payment to an employee by his or her employer in respect of expenses of travel or subsistence incurred by the employee, where no tax is deducted". No distinction is made between, for example, per diem-type payments (largely used by public service bodies) and receipted reimbursement (which is more common for private sector businesses). It remains to be seen whether these two forms of reimbursement will be treated differently. The legislation grants Revenue authority to issue Regulations specifying such details and the form in which they are to be provided as it "deem[s] appropriate". The level of detail required may therefore be considerably more granular than the principal legislation suggests.

It is fair to say that this new requirement will represent a significant increase in the burden imposed on employers by way of PAYE and other reporting requirements. The specified information is not something that can be automatically extracted from payroll records and will require a separate process. Although employers are already required to provide details of such payments to Revenue on request, this is a very different proposition from providing such information routinely on a month in, month out basis. In many organisations different departments and systems generate this information – for example, it is common for expense payments to be dealt with by the finance function rather than payroll or HR. It is clear that once the system has been implemented, Revenue will be in receipt of very large amounts of data concerning employee expenses. This begs the further question of what will be done with it. It is to be hoped that the consultation process will be comprehensive and wide-ranging and that due regard will be given to the concerns of employers, whose cooperation is fundamental to implementing this new reporting requirement.

Sections 14–16: Key Employee Engagement Programme

The Act extends the KEEP to the end of 2025 and increases the overall company limit for qualifying share options from €3m to €6m. Provision is also made for the commencement of the changes introduced by the Finance Act 2019 that were subject to commencement by Ministerial Order. These include extending the application of the relief to companies that operate through certain group structures, extending the relief to qualifying part-time employees and bringing existing shares into the scope of the relief, which hitherto applied only to new shares.

Section 17: Foreign Earnings Deduction

The relief under s823A TCA 1997 is extended for a further three years to 2025.The relief under s823A TCA 1997 is extended for a further three years to 2025. The extension to the timeline for availing of the relief is welcome. No further countries have however been

added to the existing list of 'relevant states' i.e. those countries to which trips may qualify as 'qualifying days' for the purposes of the relief.

Section 18: Special Assignee Relief Programme

The relief has been extended for a further three years to 2025. There are also a number of changes to s825C TCA 1997, both to the relief itself and to the operational requirements for availing of it. In the first category, the qualifying income requirement has been raised from €75,000 to €100,000 per annum. In the second category, there is now a statutory requirement for the assignee to have obtained a personal public service number (PPSN). The employer must confirm that this condition has been met in the employer notification (made on Form SARP1A), which must be filed within 90 days of the employee's arriving in the State. The employer must also have complied with all of the normal requirements of the PAYE Regulations relating to the commencement of an employment.

Although the PPSN requirement is fairly innocuous on its face, in practice it significantly increases the risk for assignees, their employers and their advisers and may result in the loss of the relief for the entire period of five years for which it may be granted. Revenue has strictly applied the 90-day time limit, and applications for SARP relief made outside that time period are generally refused. Where a PPSN cannot be provided within the 90-day limit – a factor that for a number of reasons may be outside the control of the assignee – the qualifying conditions to be a "relevant employee" would not be met and therefore the relief would not be granted. Employers (and their advisers) will need to carefully monitor the time limits in SARP cases to avoid such an eventuality. Given present delays in the issuing of PPSNs by the Department of Employment Affairs and Social Protection, this is a matter of concern. It is to be hoped that the Department will take all necessary steps to ensure that the PPSN application process does not result in unnecessary delays and that an escalation process is put in place for urgent cases.

Section 19: Pension Matters

Section 19 places lump sum payments from foreign pension arrangements on the same footing as those paid from Irish pension schemes. A "foreign pension arrangement" is an arrangement established in, or entered into under the law of, a territory other than the State that is established for the purpose of providing relevant retirement benefits and is not a relevant scheme mentioned in s790AA TCA 1997. A new s200A TCA 1997 provides that lump sums from such schemes will be exempt up to the current limit of €200,000. As with Irish schemes, any excess between €200,000 and €500,000 will be taxed at the standard rate only. Any amount in excess of €500,000 will be liable to income tax at the higher rate, as well as USC. The charge will, however, be under Case III of Schedule D rather than Case IV. The charge on excess lump sums will apply only to foreign lump sums received on or after 1 January 2023. However, where the individual has received a domestic lump sum (i.e. from an Irish approved scheme) before that date, the exemption available will be reduced by the amount of the exemption already availed of.

Conclusion

As may be seen from the foregoing, employment taxes continue to grow in importance. The numerous changes in the Finance Act 2022 bring both opportunities and risks for employers and employees. Meanwhile, the "post-Modernisation" PAYE system continues to evolve into something very different from what it was just a few short, but quite eventful years ago. Given the technology now available, it seems entirely likely that we will see further significant changes in the years ahead.

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Revenue's Code of Practice for Compliance Interventions

Introduction

The Revenue's new Code of Practice for Revenue Compliance Interventions ("the Code") came into effect on 1 May 2022. This Code superseded the previous Code of Practice for Revenue Audit and Other Compliance Interventions, which was drafted in 2015 (hereafter referred to as "the previous Code").

The Code was redrafted to reflect the introduction of Revenue's new Compliance Intervention Framework, which also came into force on 1 May 2022. The Code provides a set of guidelines on the components of, and principles underpinning, the new framework.

The most fundamental changes to the Code relate to Revenue's revised classification of compliance interventions under the new framework and taxpayers' ability to make a qualifying disclosure upon notification of same. Revenue also took the opportunity to refine and streamline the broader aspects of the Code. Although many of the key provisions remain unchanged, there are a number of important amendments that taxpayers and practitioners should be aware of.

In this article we explore the core components of the Code and the new framework. While the new framework is still very much in its

infancy, we also assess some of the early trends to emerge.

Rationale for the Change

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

This statement, included in Revenue's "Statement of Strategy 2021 to 2023", which was published in January 2021, was a clear indication that changes were coming. In some ways, it should have been no surprise. Revenue is continually evolving its structure and refining its approach in an effort to confront non-compliance. For example, in recent years we have seen enhancements to its data analytics capabilities, a shift to e-audits and a realignment of its operating structure.

That said, the key components of Revenue's Compliance Intervention Framework had been in place since 2010 without much formal modification. The landscape has changed a lot since then:

- **Scope of non-audit interventions**: The nature and application of non-audit interventions have evolved. For example, "aspect queries" were originally designed to focus on a specific aspect of a tax return. More recently, it was not uncommon for aspect queries to span multiple tax heads and lead to multiple information requests, in many ways morphing into quasi-audits.
- **Risk profiling and data analytics**: Revenue now has access to vast quantities of data relating to the taxpayers' affairs, and this has evolved significantly in recent years. Although a large proportion of this data is provided by taxpayers themselves in respect of their own affairs, Revenue is deriving increasing amounts of information on its case base from third-party sources such as foreign tax authorities, financial institutions and third-party returns. Revenue has invested significantly in its analytics resources to optimise the use of this data in risk profiling taxpayers. This means that Revenue is now far better equipped to identify the higher-risk taxpayers in its case base.
- **Real-time reporting**: The introduction of real-time reporting, and more recently the administration of Covid-19 supports, has given Revenue access to a huge volume of taxpayer data that is being used to generate real-time insights into taxpayer behaviour and risks. This has resulted in the upstreaming of interventions.
- **Co-operative Compliance Framework (CCF)**: CCF was relaunched in 2017 to facilitate the development of a relationship between Revenue and large corporates based on trust and transparency from both parties. Voluntary tax compliance is at its core. CCF has reshaped the way participating companies manage their compliance risk and how Revenue interacts with them.

The above are just some examples of the types of measures that Revenue has introduced to confront non-compliance. In light of these developments, it was important that Revenue's suite of compliance interventions and the principles underpinning them were fit for purpose in the current landscape.

Overview of New Compliance Intervention Framework

The framework reflects Revenue's graduated response to risk and non-compliance, while providing taxpayers with a mechanism to regularise any tax underpayments. It places an increased onus on taxpayers to proactively self-review their tax filings and voluntarily disclose errors to Revenue.

The framework applies to all taxes and duties but specifically excludes customs, with customs interventions instead dealt with under the EU Customs Code and EU legislation.

The framework comprises three graduated levels: Level 1, Level 2 and Level 3. Each level is

considered below in the context of its objective, the types of interventions falling within that level and taxpayers' ability to make a qualifying disclosure.

Level 1

Objective

Level 1 interventions are designed to support compliance by reminding taxpayers of their obligations and providing them with the opportunity to correct errors without initiating a more in-depth intervention. These interventions are typically reserved for cases where Revenue has not engaged in any detailed examination of a taxpayer's affairs.

Intervention types

Level 1 interventions include non-filer reminder notifications, real-time prompts to taxpayers during the making of returns, requests to self-review on specific issues and engagement under the CCF. In the authors' experience since the introduction of the new code , examples of the types of requests categorised as Level 1 are:

- standard VAT repayment checks;
- requests for tax computations;
- general queries on reporting anomalies in returns (e.g. monthly payroll submissions, completion of PA1 (postponed accounting) field on VAT returns);
- requests for back-up to support relief claims (e.g. R&D tax credit, stamp duty reliefs); and
- requests for companies to carry out a review of returns eligible for debt warehousing (as part of Revenue's general debt warehouse compliance programme).

It should also be noted that "profile interviews" are considered a Level 1 intervention. Under the previous framework, profile interviews were used by Revenue to appraise a set of taxpayer risks and to determine whether a Revenue audit was warranted.

However, the definition of a profile interview has changed in the Code, and they will serve a different purpose under the new framework. A profile interview will now be used by Revenue to familiarise itself with a taxpayer rather than to appraise any particular risks. Where Revenue identifies a compliance risk during a profile interview, it may initiate a Level 2 or Level 3 intervention (discussed below), so it is important that taxpayers treat these meetings seriously and are adequately prepared.

Notification

Although Revenue may write directly to a taxpayer to notify them that they are subject to a Level 1 intervention, it has also suggested that it could use the media or other public fora to advise a group of taxpayers of particular areas that should be reviewed.

Disclosure position

Where a taxpayer is notified of a Level 1 intervention, they will still have the opportunity to make an "unprompted qualifying disclosure". Taxpayers can also avail of the "self-correction without penalty" mechanism if tax returns are amended within the required timeframe.

Level 2

Objective

Level 2 interventions are used by Revenue to confront compliance risks based on the circumstances and behaviour of the taxpayers concerned. They could range from an examination of a single issue in a return to comprehensive tax audits.

Intervention types

Level 2 comprises two types of interventions:

- audits and
- risk reviews.

Readers will be very familiar with the concept of Revenue audits. The audit process and underlying protocols remain largely unchanged under the new Code (apart from some helpful changes to timelines, which we discuss below).

A **"risk review"** is a new type of intervention. It represents the most significant change in

the new framework and one that will require a mindset shift for taxpayers and advisers alike.

A risk review is primarily a desk-based intervention that is focused on a particular issue(s) in a tax return or a risk identified from Revenue's Risk Evaluation, Analysis and Profiling System (REAP). The risk review notification will set out the issue(s) and period for review, together with any additional information requested by Revenue.

In many ways, a risk review replaces an aspect query, which no longer exists under the new framework. There is, however, one fundamental difference. When a taxpayer was notified of an aspect query, they could still make an unprompted qualifying disclosure in respect of tax underpayments. This option to make an unprompted qualifying disclosure is not available upon notification of a risk review.

In the authors' experience since the introduction of the new Code the majority of risk review notifications are targeted at specific risks within a tax head. In some cases the notifications helpfully set out why exactly Revenue perceives that there is a risk. This is typically driven by an inconsistency between tax returns and other data sources available to Revenue, such as financial statements, information received from another tax authority, returns filed by other taxpayers or property registers.

A risk review will commence 28 days after the date of notification. A taxpayer can still make a **prompted qualifying disclosure** in respect of tax underpayments up until the commencement of the risk review. It is important to note that the disclosure must include all underpayments in respect of that particular tax head for the period in scope (and not just the particular issue that is the subject of the risk review). Failure to disclose any such underpayments at this point will likely give rise to higher penalties and could increase the risk of publication in Revenue's Tax Defaulters' List.

So although Revenue sees a risk review as a targeted intervention designed to focus on a very specific risk, it actually requires a very wide-ranging review from a taxpayer. This is best illustrated by way of an example.

Example

On 1 February 2023 Company A is notified of an employment tax risk review in respect of the tax treatment of termination payments in its 2022 returns. From that date, Company A no longer has the opportunity to make an unprompted disclosure on employment tax for 2022. Company A can still make a prompted qualifying disclosure but has only 28 days in which to do so unless an extension is sought.

To make sure that any qualifying disclosure is correct and complete, Company A must ensure that all employment tax underpayments relating to 2022 are disclosed. This means that it will not be sufficient to review only the treatment of termination payments; rather, the company will have to review other risk areas, including expense reimbursements, staff benefits, contractors, company cars and share rewards.

Notification

Revenue will write directly to a taxpayer (and any linked tax adviser) to notify them that they have been selected for a Level 2 intervention.

The notification letter will clearly indicate that it is a Level 2 compliance intervention and will set out the type intervention, i.e. risk review or audit. The letter will set out the issue(s)/tax head(s) and period(s) within the scope of the intervention.

Disclosure position

Where a taxpayer is notified of a Level 2 intervention, they will no longer have the ability to make an unprompted qualifying disclosure. A taxpayer can still make a **prompted qualifying disclosure** in respect of tax underpayments up until the commencement of the intervention.

A taxpayer can request an additional 60 days to prepare the prompted qualifying disclosure but must do so within 21 days from the date of notification of the intervention. This can be done through the submission of a Notice of Intention.

Level 3

Objective

Level 3 interventions are focused on tackling what Revenue perceives as high-risk practices and cases displaying risks of suspected fraud and tax evasion.

Intervention types

Level 3 interventions are in the form of "Revenue investigations". The investigation process and underlying protocols remain largely unchanged under the new Code.

Notification

Revenue will write directly to a taxpayer (and any linked tax adviser) to notify them that they have been selected for a Revenue investigation. The letter should include the wording "Notification of a Level 3 Compliance Intervention – Revenue Investigation".

In some cases an investigation may commence with an unannounced visit to the business

premises. In such cases a notification letter will be provided to the taxpayer.

Disclosure position

In line with the current framework, a taxpayer will not have the ability to make any form of qualifying disclosure once notified of an investigation.

Escalation of Interventions

The tiered intervention levels in the framework reflect Revenue's graduated response to confronting non-compliance. However, Revenue has been clear that its interactions with taxpayers will not be in the form of a sequential escalation starting at Level 1.

The type of intervention initiated by Revenue will be determined by the nature and scale of the risks identified. For example, if Revenue has identified a broad base of risks across a range of a taxpayer's returns, this could result in the immediate initiation of a Level 2 intervention.

That said, Revenue has noted that, in some instances, interventions can be escalated to a higher level. This could occur, for example, where a taxpayer that is subject to a Level 1 intervention does not engage with the process or rectify any anomalies (as perceived by Revenue) in their tax return. In this scenario, Revenue may decide to escalate the case to a Level 2 intervention, in which case the taxpayer would no longer have the opportunity to make an unprompted disclosure.

Similarly, where Revenue is dissatisfied with a taxpayer's engagement in dealing with a risk review or wants to examine a qualifying disclosure made, the case could be escalated to an audit. Although a risk review and an audit are both Level 2 interventions (and therefore come with the same disclosure entitlements), it is important to remember that an audit is typically a far more invasive and time-intensive process. So it is advisable for taxpayers and advisers to carefully manage the risk review process to mitigate the risk of escalation.

Regularising Tax Defaults

Chapter 2 of the Code sets out the range of opportunities for taxpayers to self-review, self-correct and make unprompted qualifying disclosures. Taxpayers may regularise their tax affairs in a number of ways, each of which requires the taxpayer to satisfy various qualifying criteria to be in a position to avail of them:[1]

1 Diagram replicated from chapter 2.1 of the Code.

These opportunities were contained in chapter 3 of the previous Code, and the conditions to be complied with remain largely unchanged.

The features of these opportunities include:

- **Self-correction without penalty**: This applies where the taxpayer notifies Revenue within the applicable time limit and provides a computation of the correct tax and statutory interest. The benefit of self-correction without penalty will not be available where Revenue has notified a taxpayer of a Level 2 or Level 3 compliance intervention for the particular period.
- **Correcting an innocent error**: Where a tax default is not deliberate and is not attributable to a taxpayer's failure to take reasonable care in complying with his or her tax obligations, a correction can be made without penalty. Statutory interest will apply.
- **Technical adjustment**: A default of liability to tax or duty may arise in circumstances where the taxpayer did not act either carelessly or with deliberate intent (e.g. differences in legislative interpretation). In such cases, a tax-geared penalty should not apply. Interest will, however, apply for the period of the underpayment.
- **No loss of revenue claim**: In circumstances where Revenue is satisfied that no loss of revenue has occurred due to a failure to operate the tax system correctly, it will not seek to collect the tax amounts in question, where certain conditions can be satisfied. Liability to a penalty may still apply. Statutory interest may be sought, but this will be limited to any period during which there was a temporary loss of revenue.

Perhaps the most material difference in this part of the Code, as already outlined, is that an unprompted qualifying disclosure will be accepted only where Revenue is satisfied that it has been voluntarily furnished before Revenue has issued a notification of intention to commence any Level 2 or Level 3 compliance interventions in relation to any matter included in the disclosure. This includes Level 2 risk reviews, which will inevitably restrict a taxpayer's capacity to make an unprompted qualifying disclosure in interventions that may previously have been dealt with by way of an aspect query.

Risk Review and Revenue Audit

Chapter 3 of the Code provides an overview of the procedures involved in conducting Level 2 interventions. The procedures for the conduct of a Revenue audit are largely similar to those in the previous Code. An audit is usually carried out at the taxpayer's principal place of business and in the presence of the taxpayer and their agent, where relevant. However, it is acknowledged that during the Covid-19 pandemic compliance interventions were by and large conducted remotely. Section 3.2.1 of the Code states that:

> "In cases where data can be provided electronically, audits may continue to be carried out remotely using video conferencing facilities. The concept of an audit is the same regardless of whether it is carried out in person on site or remotely using video conferencing facilities."

In the authors' experience, "on-site" audits have yet to recommence at anywhere near pre-pandemic levels, and it is not clear when this is likely to change.

The procedures for pre-audit meetings are set out in section 3.2.3.3 of the Code and, helpfully, it is clarified that they are carried out before the audit has commenced and therefore do not affect a taxpayer's entitlement to make a prompted qualifying disclosure. Although these meetings are generally arranged by Revenue to facilitate access to, and provide an understanding of, a client's software systems, they might also afford an opportunity to engage with Revenue to clarify issues such as the focus of the audit and potentially tease out technical issues.

The Code states that most risk reviews will be desk-based and the majority will be carried out by way of correspondence. Visits will be scheduled only where necessary to conclude the risk review effectively. The notification is broadly similar to the audit letter and will set out the scope and period involved. As already mentioned, risk reviews will commence 28 days after the date of the notification.

Finance Act 2021 Changes

Finance Act 2021 contained a number of legislative changes that have been reflected in the Code. These were outlined in detail in *Irish Tax Review*, Issue 1 of 2022,[2] but in summary the main provisions are:

- Penalties will not be charged for technical adjustments, for innocent errors and in cases where total tax defaults are less than €6,000 and are in the careless rather than deliberate behaviour category of default.
- The prohibition on (1) mitigation of penalties and (2) a taxpayer's capacity to make a qualifying disclosure in offshore cases has been removed.
- A settlement will not be published when the tax underpayment made or refund incorrectly claimed is less than €50,000. Previously, any settlement where the combined tax, interest and penalty exceeded €35,000 was publishable.

Practical Tips for Practitioners

Practitioners assisting clients with the preparation of qualifying disclosures should bear the following in mind when advising clients in connection with Revenue interventions:

- The first, and perhaps most important, step is to be aware of the various methods by which a disclosure can be made and to be familiar with the timelines and procedures involved. When a client receives notification of an intervention, the "Level" should be clearly stated on the correspondence, whether that is delivered by letter, a message via MyEnquiries etc. An informed decision should then be made in conjunction with the client to determine the appropriate course of action.
- Cooperation with a compliance intervention remains critically important in mitigating potential penalties in any tax settlement. Section 2.17 of the Code contains a list of factors indicating full cooperation and of factors demonstrating lack of cooperation. Prompt payment of the intervention settlement liability (including by way of an agreed phased payment arrangement) is an indicator of cooperation. However, inability to pay is not listed as an indicator of failure to cooperate, and a taxpayer should never suffer an additional penalty or sanction by virtue of not having sufficient funds to discharge a liability fully.
- If at all possible, practitioners should avoid situations where a perceived lack of cooperation results in Revenue's writing to a taxpayer and their agent, where relevant, advising that the behaviour in question does not constitute full cooperation. This could potentially put a practitioner in a difficult position if a client feels that they have incurred an unnecessary additional penalty

2 Mark Barrett, "Finance Act 2021 and the Code of Practice for Revenue Compliance Interventions", *Irish Tax Review*, Issue 1 of 2022.

due to the actions of their agent and for reasons outside of their control.

- Revenue may accept a disclosure as a qualifying disclosure where it is signed "by or on behalf of the taxpayer". Under no circumstances should an agent ever sign a disclosure on behalf of a client: it is the client's disclosure, not the agent's, and an agent can therefore never be certain that they are in possession of all relevant facts.
- There may be situations where absolute certainty cannot be achieved on the extent of a taxpayer's liability to be included in a disclosure. This might be the case where, for example, records have not been retained for GDPR compliance reasons or a substantial number of years are involved, making access to information difficult. This should not necessarily mean, however, that a taxpayer is precluded from making a qualifying disclosure in such circumstances.
- An appropriate letter of engagement should be in place to capture the obligations of both the taxpayer and the practitioner. If an existing letter of engagement does not sufficiently cover the relevant areas, a bespoke letter should be put in place before providing any advice to the client on the conduct of the intervention.

Reassessing the Merits of the Cooperative Compliance Framework

As mentioned above, all interactions between Revenue and companies participating in CCF should fall into Level 1. This safeguards a company's ability to self-correct or make an unprompted qualifying disclosure.

For those companies whose tax affairs are dealt with by Revenue's Large Corporates Division or who have the option of participating in Medium Enterprises Division's new pilot CCF programme, the new framework could increase the attractiveness of CCF.

The merits of joining CCF need to be considered by each company in the context of its own profile. It is also important to recognise that CCF brings with it certain obligations for companies, such as an annual risk review meeting, conducting self-reviews and having a tax control framework in place.

In considering their position, it would be beneficial for companies to read the findings of Revenue's review of CCF,[3] which was published recently. The review provides insights into the operation of CCF, the profile of participating groups and the practical experience of participants. Overall, Revenue has concluded that participating groups are generally satisfied with CCF.

Conclusion

Failing to avail of an opportunity to make an unprompted or prompted qualifying disclosure can have significant implications for both a taxpayer and their adviser. All practitioners should therefore take time to familiarise themselves with the workings of the new Code. In particular, a practitioner should be aware that the Compliance Intervention Framework is now part of the fabric of the Code and know what this means in terms of the process and timelines for making a qualifying disclosure.

The inability to make an unprompted qualifying disclosure once a taxpayer has been notified of a risk review is a "game changer" and represents a major departure from the opportunity previously available for aspect queries.

The Representations team in the Irish Tax Institute will continue to keep members apprised of how the new Code is evolving in practice.

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

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Temporary Business Energy Support Scheme: Overview of Rules and Key Points for SMEs

Background

Small and medium enterprises (SMEs) dominate the Irish economic landscape, accounting for a significant percentage of business enterprises in the private business economy; they employ 1.06m people, accounting for 68.4% of employment in the private business economy[1] As Covid-19 receded, recovery was strongest among small businesses, with tax receipts from SMEs increasing by 80% compared to 2020. However, having bounced back from the pandemic, SMEs are under pressure due to challenges such as rising energy, transport and operational costs. The SME community is bracing itself for a difficult working environment if costs continue to increase. Irish business owners are feeling the impact of rising costs, according to the Enterprise Nation

1 Significance of the SME sector in the Irish economy – Jim Power, 25th May 2020.

Quarterly Small Business Barometer, with 71% of entrepreneurs saying that the crisis would "reduce the profitability" or "severely reduce the profitability" of their businesses this year.

In his address on Budget Day (27 September 2022) the Minister for Finance, Paschal Donohoe TD, noted a number of specific pressures on the Irish economy, driven in part by rising inflation and an imbalance between demand and supply as the economy reopened after Covid-19. He also noted that SMEs are the backbone of the Irish domestic economy and that the sector requires a range of supports as it deals with specific concerns. As part of the core announcements made by the Minister, we saw the introduction of the Temporary Business Energy Support Scheme (TBESS), which aims to provide supports to businesses that have experienced significant increases in their electricity and gas costs, providing for a cash payment equal to 40% of specified eligible costs to a qualifying business.

Scope of the Relief

For a business to be a "qualifying business" and come within the scope of the relief, it must first be an "eligible business", i.e.

- it carries on a trade or profession, either solely or in a partnership, and
- it is not a credit institution or financial institution.

The above includes charities carrying on a trade that would be chargeable to Case I of Schedule D but are otherwise exempt. It also includes bodies of persons established for the purpose of promoting athletic or amateur games or sports carrying on a trade or profession that would be chargeable under Case I/II but are otherwise exempt. Accordingly, businesses that are engaging in "non-trading" activities, such as the rental of property or investment-type activities, are outside the scope of the TBESS.

To be a "qualifying business", the business must meet a number of administrative conditions:

- it must comply with all tax registration, payment and return obligations;
- it must be eligible for a tax clearance certificate;
- it must be an eligible business during the claim period, and intend to continue to be an eligible business following the end of the claim period; and
- it must satisfy certain conditions relating to electronic registration and claim requirements.

Second, a business must meet the energy costs threshold in relation to the "claim period", referring to a calendar month falling within the specified period (period commencing on 1 September 2022 and ending on 30 April 2023[2]). For example, the period 1–30 September 2022 is to be treated as a claim period for the purposes of the scheme. A "reference period" is also an important concept in the context of the TBESS and refers to the calendar month that falls 12 months before the claim period. For example, in relation to a specified period running from 1 September 2022 to 30 April 2023, a reference period is a calendar month falling between September 2021 and April 2022. If a business has a claim period of 1–30 September 2023, the corresponding reference period would be 1–30 September 2022.

To meet the energy costs threshold in respect of either the electricity or the gas costs of the business, the business must have experienced an increase of 50% or more in the average unit price of its electricity or gas in a claim period compared with the same period in the previous year. It is important to remember that in determining whether the energy costs threshold has been met, this assessment must be done separately for electricity and gas bills, i.e. the electricity and gas bills are not aggregated to form one assessment of the energy costs threshold.

2 Per Ministerial order made on 23 February 2023, the specified period is set to expire on 30 April 2023, and not 28 February 2023 as previously provided for in legislation.

Although an assessment of the energy costs threshold requires an analysis of the electricity or gas bill unit price compared to the electricity or gas bill reference unit price, Revenue guidance confirms that, in practice, Revenue will calculate the relevant unit price for the bill once the business has entered the relevant details from the bill via the Revenue Online Service (ROS) portal.

Where an eligible business has met the energy costs threshold, the next step is to identify the relevant electricity or gas bill. The identification of a relevant electricity/gas bill depends on the billing cycle of the qualifying company, referring to either:

Billing cycle	Relevant electricity or gas bill
Where the billing period covered by the TBESS electricity/gas bill begins on or before the beginning of the claim period and ends on or after the end of the claim period	The TBESS electricity or gas bill issued to the business
In any other case	The TBESS electricity or gas bill with a billing period that falls wholly or partly within the claim period

For example, where a qualifying business receives an electricity bill covering the billing period 1–31 October 2022, this corresponds with the claim period; the "relevant electricity bill" therefore refers to the bill that was issued for October 2022. The identification of the correct bill is essential to completing a claim under the TBESS as it dictates the eligible costs on which relief may be calculated.

Identifying the Eligible Cost

Where the relevant electricity/gas bill has been identified, the qualifying business should identify the "eligible cost" in respect of which relief should be calculated. The legislation underpinning the TBESS provides the formula for identifying the eligible cost in respect of a relevant electricity or gas bill. The formula in both cases is:

A – B, where

A = the relevant electricity/gas bill amount

B = the reference electricity/gas bill amount

As with the energy costs threshold, it is important to remember that the assessment of eligible costs must be done separately for electricity and gas.

Identifying the relevant electricity or gas bill amount

Although a business may have already identified the relevant electricity or gas bill earlier in the process, this is not to be confused with the "relevant electricity bill amount" or "relevant gas bill amount". The latter are to be identified using specific formulae, which vary depending on the billing cycle of the business – the rationale being that in practice a business may not be issued with a bill that corresponds exactly to the calendar month. For example, it is entirely possible for a business to receive an electricity bill covering the period from 1 September to 15 October 2022. As the TBESS operates on a calendar-month basis, it is therefore necessary to time apportion the amount in the billing period so that it corresponds to a claim period (i.e. a calendar month). In some instances a qualifying business may have incurred electricity/gas charges that are not treated as wholly and exclusively for the trade or profession of the qualifying business being carried on. The calculation of the relevant electricity/gas amount requires the qualifying business to remove amounts not incurred wholly and exclusively for the purpose of the trade or profession.

Identifying the reference electricity or gas bill amount

In identifying the reference electricity or gas bill amount, the business must, again, use specific formulae depending on whether the billing cycle falls into one of four categories:

- Option 1: Where the business has been issued with a TBESS electricity/gas bill with a billing period that begins on or before the first day of the reference period and ends on or after the last day of the reference period.
- Option 2 (where Option 1 does not apply): Where the business has been issued with two or more TBESS electricity/gas bills that together have a billing period that includes all of the reference period.
- Option 3 (where Options 1 and 2 do not apply): Where the business has been issued with one or more TBESS electricity/gas bills that together have a billing period that includes only part of the reference period.
- Option 4: Where the qualifying business has a new electricity account/new gas connection.

Under each of the above options, the business must refer to a specific formula to assess the correct reference electricity or gas bill amount. As with the adjustments required to the relevant electricity or gas bill amounts, where a business has incurred charges that are not treated as wholly and exclusively for purposes of the trade or profession, the reference electricity or gas bill amount must be subject to an adjustment. As with the assessment of the energy costs threshold, Revenue guidance confirms that, in practice, Revenue will carry out the necessary calculations and apportionments to determine the eligible cost in relation to an electricity or gas bill.

The Relief Available

On making a claim, a qualifying business will be entitled to an amount equal to 40% of the eligible cost, referred to as the "temporary business energy payment" (TBEP). Where a person makes a claim for the payment, any deduction available under s81 TCA 1997 for expenses incurred on the electricity or gas bills must be reduced by the amount of the payment received. The TBEP shall not be taken into account in computing taxable profits or gains of the trade or profession for the chargeable period and therefore should be treated as a non-taxable receipt in the hands of the qualifying business. An amount of TBEP payable to a qualifying business is treated as an overpayment of corporation tax or income tax for the purposes of s960H(2) TCA 1997; accordingly, the TBEP payable may be set against any amount of tax outstanding and payable by the qualifying business.

The relief is subject to specific limitations, which outline that the aggregate amount that may be claimed by a qualifying business in respect of any claim period may not exceed €10,000; the monthly cap for the TBEP is therefore €10,000. Per Ministerial order made on 23 February 2023, with effect as on and from 1 March 2023 the monthly cap for TBEP is increased to €15,000. This monthly cap of €10,000 (€15,000 as on and from 1 March 2023) may, however, be increased where a qualifying business operates across multiple locations. This refers to instances where a business has multiple electricity accounts, each with its own MPRN and electricity supply address, but the maximum amount of the increased cap is €30,000 per month. Per Ministerial order made on 23 February 2023, the amount of €30,000 is increased to €45,000. This increase took effect as on and from 1 March 2023.

Claimants should also bear in mind the overall cap that exists on supports available in line with the Temporary Crisis Framework, which limits the total amount of relief (including the TBESS and other forms of aid) as follows:

- €250,000 (where the undertaking is active in the production of agricultural products),
- €300,000 (where the undertaking is engaged in the production, processing and marketing of fishery and agriculture products) or
- €2,000,000 in any other case.

Where a qualifying business is carried on as part of a partnership trade or profession, a claim for the TBEP is to be made by the precedent partner on behalf of the partnership and each of the partners in the partnership. The maximum amount of any claim made in respect of the qualifying business is subject to the limits previously outlined. Where a claim is made, each partner in the partnership will be deemed to have claimed a portion of the TBEP in line with their applicable partnership percentage in the claim period.

Administration, Practicalities and Penalties

A claim for the TBEP must be made no later than four months from the date on which the claim period ends. Therefore, for the claim period ended 31 December 2022, qualifying businesses must make a claim for the payment on or before 30 April 2023. The claimant is also required to log on to ROS and register as a person to whom the TBESS applies. As part of this registration, a person is required to provide specific information, including the name, address, tax reference number and description of the trade or profession being carried on by the qualifying business. Details of the electricity and gas accounts, as well as the start and end dates of the billing period in respect of each, are required to complete the registration process. A person who makes a claim for the TBEP is required to maintain records for the purpose of determining whether the requirements of the section are met and must provide such records to Revenue on request. The records must be retained for a period of 10 years from the date on which the claim period ends.

Where a business makes either an invalid claim or a claim for an amount in excess of that to which it was entitled, the business is required to notify Revenue of same and to repay the invalidly claimed or overclaimed amount. Failure to do so can result in interest accruing at a daily rate of 0.0219%, and penalties can apply under s1077F TCA 1997. Lastly, businesses should be aware that it is an offence to knowingly or wilfully deliver any incorrect return or statement or to aid, abet or assist another person in so doing.

Revenue Obligations and Powers

Notwithstanding existing provisions regarding taxpayer confidentiality, Revenue is required to publish the following details on its website:

- the name of the qualifying business,
- the address of the qualifying business and
- the total amount of the TBEP paid to the qualifying business.

Revenue is also permitted to consult with an energy supplier to obtain further information where it has reason to believe that a claim is either invalid or in excess of the permitted amount. This may be effected by serving on the energy supplier a notice to provide the specified information; failure to provide the requested information within the period specified in the notice will result in the energy supplier being liable to a penalty of €1,000.

Checklist for Businesses

As noted in current Revenue guidance, the ROS portal will assist businesses in calculating the specific formulae and identifying key components of the relief such as the energy costs threshold and the eligible costs. However, this should not replace proper due diligence by businesses to ensure that they meet all relevant conditions of the scheme. In particular, specific administrative requirements need to be followed to ensure that the relief is available – aside from merely registering for the TBESS and obtaining electricity or gas bills, businesses should consider adopting a simplified checklist to ensure that all procedures are followed.
For example:

- Is the business carrying on a trade or profession (either solely or in a partnership)? If the business is unsure of its trading status, this should be addressed as a priority.
- Has the business complied with all obligations in respect of registration for, payment of and furnishing of returns relating

to tax? For example, if the business has any outstanding VAT returns, Forms 46G etc. it should consider addressing this as a priority.

- Is the business eligible for a tax clearance certificate throughout the claim period?
- Is the business an eligible business throughout the claim period, and does it intend to be an eligible business following the end of the claim period?
- Has the business satisfied all electronic claim and registration requirements? In particular, has the business provided the required information listed, including name, address, tax reference number and description of the trade or profession carried on?
- Does the business have up-to-date electricity and gas bills for the claim and reference periods, and can these be provided to Revenue on demand?

As with all claims for relief, a business should always adopt the mantra "Fail to prepare, prepare to fail". Revenue eBrief No. 219/2022 of 21 December 2022 provides detailed guidance on the TBESS, including worked examples and clarifications on commonly asked questions, while Revenue eBrief No 44/23 of 1 March 2023 provides for updated guideline on the enhancements made to TBESS on foot of the Ministerial orders made on 23 February 2023.

Other Tax Incentives and Reliefs for Growth

Aside from the TBESS, other relevant tax levers are in play for SMEs that not only need to weather the current storm but also have growth plans for the near future. Although many companies may view tax purely as an additional cost, tax levers can be critical in addressing a variety of business challenges.

A core consideration for many SMEs and start-ups is how to attract and retain key talent, with the Key Employee Engagement Programme (KEEP)[3] a possible feature of a company's hiring strategy. The aim of the KEEP is to help smaller firms that cannot compete with larger firms in cash remuneration terms to attract and retain talent in a challenging labour market.
The extension of the KEEP to the end of 2025, coupled with key technical changes reflected in Finance Act 2022, will be of interest to SMEs that wish to expand their labour force and consider whether the KEEP represents an opportunity to compete effectively with the remuneration packages offered by larger companies and multinationals.

Another core lever in providing greater cash-flow for a business is the research and development (R&D) tax credit.[4] The regime provides for a tax credit equal to 25% of qualifying expenditure on R&D activities. Previously, the credit was offset against current- and prior-year corporation tax liabilities followed by repayment in three instalments, but Finance Act 2022 changes this repayment option. Going forward, Finance Act 2022 introduces a three-year fixed schedule, allowing for a claim to be made in three instalments (50% in year 1, 30% in year 2 and the balance of 20% in year 3). A company will have an option to call for payment of its eligible R&D tax credit relating to the second or third instalments or to request it to be offset against other tax liabilities, and existing caps on the payable element of the credit are being removed. Although the amendments do not alter the quantum of credit available over time, they change manner in which repayment is effected and thus may accelerate the cash refund available to companies. R&D can be an expensive process, and figures from the Tax Strategy Group papers released ahead of Budget 2023 suggest that larger companies make up a greater proportion of the costs of the credit.

Although many will be in "wait and see" mode regarding the changes, they may represent an opportunity for real growth in the SME sector.

3 See also article by Kim Doyle & James McMahon, "Share Remuneration: An Alternative Benefit for Employees".
4 See also article by Damien Flanagan & Cian Smith, "Finance Act Measures Updating R&D Tax Credit, KDB and Digital Games Tax Credit".

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Taxation Considerations on Transitioning to Emergency Accommodation

Introduction

Rarely a week goes by without a reference to housing, homelessness and the difficulties faced by those seeking suitable accommodation in the State. In fact, the "housing crisis" and "homelessness crisis" have consistently been at the forefront of issues facing Irish society for the past decade. The acuteness of these issues can perhaps be illustrated with one simple statistic – the number of people who are homeless and relying on emergency homeless accommodation in Ireland in November 2022 was 11,542, up from 3,607 just eight years previously.[1] This of course does not take into consideration the additional pressure placed on State accommodation resources by those

1 Focus Ireland, https://www.focusireland.ie/knowledge-hub/latest-figures/.

seeking international protection from war and/or acts of persecution,[2] which has been significantly compounded by the war in Ukraine.

Successive Government Ministers have grappled with the growing crises and the ability of the State to deliver accommodation services either directly via State-owned property or through contracted arrangements via local authorities, housing bodies or the International Protection Office (IPO). The significant and rapid growth in demand for what many refer to as "emergency accommodation" has forced the Government to look to the private sector to assist. Many business owners have sought to transition from traditional models of hospitality and/or property rental to the provision of emergency accommodation services for security of income. While some are looking at this as a temporary measure, others are looking at a more permanent change to their business model. This article provides an analysis of some of the key considerations to bear in mind when transitioning to the provision of emergency accommodation services.

What Is Emergency Accommodation?

Although the term "emergency accommodation" is widely used to describe the nature of short-term accommodation used to serve those who are homeless or do not have any alternative sources of accommodation available to them, interestingly, there is no definition of the term in statute.[3] The Housing Act 1988 (as amended) defines the term "homeless" and describes accommodation by reference to that term but makes no reference to "emergency accommodation". Contracts dealing with emergency accommodation tend to refer to "temporary accommodation" or "accommodation services".

Many of these contractual arrangements provide for the provision of additional services as part of the overall contract, such as laundry, security, reception/concierge, transport (where not based near public transport routes), catering and administration. Generally, these services are bundled into a set price per person (or per room) under the contract, and prices are generally stated as being VAT-inclusive.

With the increasing take-up of contractual arrangements for emergency accommodation by private sector businesses and the breadth of services required to be provided under these contractual arrangements without any similar breakdown in pricing structure, there has been some ambiguity regarding the appropriate treatment of such services from a taxation perspective, in particular VAT. This has prompted Revenue to issue an updated Tax and Duty Manual on "Emergency Accommodation and Ancillary Services" (November 2022). Notwithstanding the foregoing and the ambiguities that arise, we will, for convenience, continue to refer to such services as "emergency accommodation".

Types of Emergency Accommodation

It is useful for the purposes of this article and the analysis that follows to categorise the types of accommodation that may be used as emergency accommodation:

- State-owned – these properties are owned directly by the State and either are managed directly or have the management outsourced to a private operator.
- Residential – these consist of what are typically referred to as "own-door" units and can be apartments, houses or bedsits.
- Hotel or guesthouse – these are typically buildings designed for the purpose of the provision of hospitality.
- Direct provision centres – these are purpose-built or converted buildings designed for

2 Refer to s7 of the International Protection Act 2015 for the complete definition of this term.

3 Although the Health (Inspection of Emergency Homeless Accommodation and Asylum Seekers Accommodation) Bill 2021, which is still at Initiation Stage in the Dáil, does not, of itself, define emergency accommodation, it provides some broader meaning to the term and what might be included in its ambit.

accommodating refugees and those seeking international protection.

Considerations When Transitioning to Emergency Accommodation

Status of income

Whether income from a contract with a local authority, a housing body or the IPO will be regarded as trading (Case I), rental (Case V) or passive (Case IV) will ultimately depend on the contractual arrangements between the parties and the nature of the services provided. In general, the provision of the full suite of services required under an IPO-type contract would typically be regarded as trading; however, the longer-term rental of residential units to a single housing body that may use them for emergency accommodation would, more likely than not, be regarded as Case V.

Commencement of a new trade

Further consideration is required for those carrying on a trade of hotel or guesthouse keeping and looking to transition fully to the provision of emergency accommodation of whether in fact there is a discontinuance of the old trade and a commencement of a new one. Generally, under contractual arrangements for emergency accommodation there is a single customer (the IPO, local authority or housing body) with a requirement for exclusivity of use of a certain number of bedrooms (or, in some cases, the entire property), and even where contracted bedrooms may be vacant, the hotel owner will not be permitted to offer them to the general public. In addition, the nature of the related services and obligations imposed under the contractual arrangements for emergency accommodation can, in many cases, be quite different from those that apply when operating a hotel or guesthouse. In general, there is a lower staffing requirement for emergency accommodation, but certain staff may be required to be more highly skilled/trained.

Whether the existing trade discontinues and/or a new trade commences depends very much on the nature of the contract, the type of services provided and the terms of such services, and therefore careful consideration of the specific circumstances is required. It is not possible to analyse all potential permutations under this heading given the nuances in applying the "badges of trade" and case law precedent. Indeed, there is already extensive and varied commentary on this topic: readers are referred to an interesting discussion in "'Same Trade'?: Impact on Carry-Forward of Trading Losses" by Anne Hogan and Tom Power in *Irish Tax Review*, Issue 4 of 2015. Readers are also referred to some of the more fundamental cases in this area:

- *Gordon & Blair Ltd v IRC* [1962] 40 TC 358 dealt with a company that had been trading as a brewer, ceased its brewing operations and began to sell beer supplied to its own specifications by another brewery.
- *Boland v Davis* [1925] I ITR 86 dealt with a case where the taxpayer company carried on a business of milling and baking and temporarily ceased milling activities for a period of nine months.
- *Cronin v Lunham* [1985] III ITR 363 concerned a taxpayer who was carrying on a trade of pig slaughtering and meat processing. It ceased its slaughtering and manufacturing facilities and was subsequently sold. The purchaser then recommenced the slaughtering operations. The trade was held to be temporarily discontinued, but the judgment turned on what happened with machinery and equipment and staff and the underlying intentions of the taxpayer when it initially ceased, i.e. it had always intended to cease only temporarily.

The above is, of course, not an exhaustive list, and there are a variety of cases in this area that should help to provide some guidance on whether a trade has been discontinued and/or a new trade commenced.

Where a new trade is commenced, losses carried forward from the previous trade will not be available to be offset against profits

arising from the new trade.[4] However, if there are current-year excess trading losses, the loss-making trade may offset some or all of those losses against the corresponding basis period of the profit-making trade. If the existing trade is permanently discontinued, terminal loss relief may be available.

Capital expenditure

Almost all of the contracts (or tender applications for contracts) require declarations from the owner to the effect that buildings are fully compliant with planning and fire regulations. Upgrading an older building to modern fire regulation standards can require significant capital expenditure before sign-off by the local fire officer.

Some of the contracts for the provision of services through the IPO require the provision of certain self-catering-type facilities such as cooking, laundry and cleaning. There can be a significant cost to installing such facilities, particularly in smaller hotels and guesthouses, which may have only centralised services that are not suitable for use by residents and may not have adequate capacity in the existing footprint of the building to add more facilities.

Some contractual arrangements may require a minimum number of beds or units to be provided, and in some cases the division of larger rooms to meet this minimum quota will incur capital expenditure.

Capital allowances

In general, the capital expenditure incurred may qualify for plant and machinery wear-and-tear allowances of the trade of the business under normal rules.

In the case of buildings that qualified for industrial buildings writing-down allowances, further consideration is required. On the basis that the building will no longer be in use for a qualifying purpose – i.e. a trade of hotel, guesthouse or holiday hostel keeping – no annual writing-down allowances will be available to the person holding the net relevant interest in the building. Where the building is subsequently used for a qualifying purpose – for example, after the contractual term has ceased –industrial buildings writing-down allowances should be available. However, note that there is a notional deduction of writing-down allowances in the period of temporary disuse.

Example 1: Industrial buildings allowances

George constructed a new hotel in 2018 for €10m and immediately put the building to use in a hotel trade carried on by him. George makes up his accounts to 31 December each year. On 1 June 2022 George entered into a contract with IPO to provide emergency accommodation and related services for a term of two years. George's entitlement to industrial buildings allowances is as follows:

Actual allowances

Periods ended 31 Dec. 2018–31 Dec. 2021 inclusive	€400,000 each period
Periods ended 31 Dec. 2022–31 Dec. 2023 inclusive	€nil

Notional allowances

Period 1 June 2022 to 31 May 2024	€800,000

Actual allowances

Periods ended 31 Dec. 2024–31 Dec. 2042	€400,000 each period
Total actual allowances	= €9,200,000
Total notional allowances	= €800,000

Generally, where a building that qualifies for industrial buildings allowances continues to be in use, even where that use is not a qualifying use, there is no immediate requirement to calculate a balancing adjustment. The wording

4 Losses brought forward are ring-fenced for use only against profits arising from the same trade – s382(1) TCA 1997 refers.

in s280(1) TCA 1997, "ceases altogether to be used", would seem to suggest that the building would need to be permanently disused rather than undergo a change of use to trigger a balancing adjustment.

Ancillary services

As noted above, the contractual arrangements generally require the provision of ancillary services in addition to accommodation services. Although in many cases those carrying on existing businesses already have staff employed or at least are familiar with the requirements of employing staff, those looking to employ individuals for reception duties, security, catering etc. will have an obligation to register those individuals as employees and to ensure that they operate payroll taxes on any payments to them. Business owners also need to be aware of their legal obligations as employers with respect to employing staff, particular with regard to working hours (part-time versus full-time), holidays and sick pay (which is on a statutory footing with effect from 1 January 2023).

The analysis of contractor vs employee is outside the scope of this article; however, it is pertinent to raise it as part of this section as a consideration, in particular where the business does not normally provide such ancillary services and intends to provide the services on a temporary or short-term basis only.

VAT treatment

The use of State-owned property for emergency accommodation is outside the scope of VAT. For all other types of emergency accommodation, there can be significant VAT implications to consider.

At the outset, it should be noted that any own-door unit that is subject to a waiver of exemption from VAT and is used for emergency accommodation will be chargeable to VAT at the standard rate. So remember to consider whether a waiver could apply when using an own-door unit for emergency accommodation, as VAT exemption, issues with VAT deductibility and CGS adjustments will not be relevant to such properties while the wavier applies.

VAT legislation provides that any letting of accommodation that is provided "as a temporary dwelling for emergency residential purposes" is exempt from VAT and is not a letting in respect of which an option to tax can be exercised (s97(4)(e) Value-Added Tax Consolidation Act 2010 (VATCA 2010)). It is therefore clear that the use of any own-door unit for emergency accommodation is exempt from VAT.

Rooms in hotels, guesthouses and hostels are collectively referred to as "hotels" throughout the VAT sections of this article. Hotels, or rooms in a hotel, that are contracted to the State for exclusive use as emergency accommodation, and are not available as guest/hotel accommodation to the general public, are treated for VAT purposes as an exempt supply of emergency accommodation. In practical terms, this means that the accommodation must not be made available to the public for any other use during the period of the contract with the State, and no other income should be generated by the provider from the use of the accommodation under contract to the State. The VAT-exempt treatment of hotels contracted to the State for use as emergency accommodation will apply to the proportion of the property used for emergency accommodation.

The supply of accommodation in direct provision centres is also exempt from VAT as a supply of emergency accommodation.

Ancillary services for VAT purposes

Providers of emergency accommodation can be required to provide a wide range of other services under contracts with the State, including laundry, security, reception and administration services. For VAT purposes, ancillary supplies are supplies that are capable of being supplied only in the context of the better enjoyment of the principal supply. Ancillary supplies are typically not physically or economically dissociable from

the principal supply. VAT is charged on the full consideration at the rate applicable to the principal supply. Therefore, ancillary supplies relating to the supply of emergency accommodation will be treated as exempt from VAT.

Taxable catering services

Revenue does not view catering services as ancillary to the supply of emergency accommodation, as confirmed in paragraph 6 of the TDM on Emergency Accommodation and ancillary services[5]. Catering services must therefore be treated as a separate taxable supply for VAT purposes.

Any provider that is not already VAT-registered must register for and charge VAT at the appropriate rate once turnover from taxable supplies of catering services exceeds, or is likely to exceed, the VAT registration threshold for services (being €37,500 in any continuous 12-month period).

Providers should ensure that they can separately identify consideration from taxable supplies of catering services and exempt supplies of emergency accommodation. This will ensure that the correct amount of output VAT is accounted for to Revenue on taxable supplies, as well as being important when looking at VAT deductibility of costs.

VAT deductibility

Providers typically incur significant and varied costs in connection with contracts to supply emergency accommodation, whether initial capex or ongoing costs. VAT deductibility on costs is determined by a taxpayer's intention at the time when a cost is incurred. Costs incurred for the purposes of exempt supplies of emergency accommodation and ancillary services will not give rise to any entitlement to input VAT recovery. However, VAT on costs incurred for the purpose of providing taxable catering services will be deductible in full.

Costs that cannot be directly attributed to emergency accommodation or catering services specifically, as they relate to the entire business on an overall basis, are called "dual-use inputs". A proportion of VAT on dual-use inputs may be reclaimed. Legislation provides that, in the first instance, the deductible pro rata of VAT on dual-use inputs should be based on the proportion that taxable turnover bears to total turnover. However, if the "turnover method" does not (1) correctly reflect the extent to which the dual-use inputs are used in the business and (2) take into account the full range of the taxpayer's activities, the taxpayer is permitted to use any basis of calculation, provided it takes these two points into consideration. Providers whose only business activities are supplies of emergency accommodation and catering services will likely find that the turnover method is the appropriate one to use.

Capital Goods Scheme adjustments: "big swing" adjustment for providers

For the purposes of this section, it is assumed that the reader has an understanding of the Capital Goods Scheme (CGS). For own-door units that have already been used for VAT-exempt residential lettings, no CGS adjustment is triggered when the unit is used for emergency accommodation, as the provider would have had no entitlement to input VAT recovery in respect of the previous VAT-exempt use.

However, providers need to be aware of the CGS implications of using a hotel for emergency accommodation services. If a provider does not hold any capital goods in a hotel, using that hotel to provide emergency accommodation services will not give rise to any CGS adjustment. As a slight aside, we would caution any hotel owner/provider that acquired their property under transfer-of-business relief (the sale being otherwise taxable or exempt) to be aware that even though they may not have paid VAT on the purchase price,

5 https://www.revenue.ie/en/tax-professionals/tdm/value-added-tax/part03-taxable-transactions-goods-ica-services/Services/services-emergency-accommodation-and-ancillary-services.pdf.

this does not mean that they do not hold a capital good in the property acquired.

If a hotel has previously been used for taxable supplies of hotel and guest accommodation and is then diverted to use for supplies of emergency accommodation, a CGS adjustment will be triggered for a provider that holds a capital good in the hotel. The adjustment will be either an annual adjustment or a “big swing” adjustment, depending on the proportion of the hotel put to VAT-exempt use in that interval.

An annual adjustment (s64(3) VATCA 2010) is (generally) 1/20th (or 1/10th, for a refurbishment capital good) of the VAT comprised in a capital good and is payable to Revenue as additional output VAT in the taxable period following the end of an interval.[6]

A big swing adjustment (s64(4) VATCA 2010) is triggered if there is a change of **more than** 50 percentage points in the deductible use of the hotel in any interval as compared to the first interval (the “initial interval proportion of deductible use”). A big swing adjustment is based on VAT comprised in the unexpired portion of the adjustment period for that capital good and is payable as output VAT in the taxable period following the end of the interval in which the adjustment arises.

Example 2: Big swing adjustment for provider

Take George’s hotel in the above example, which was developed to completion in October 2018 at a cost of €10m plus VAT of €1.35m. Since the hotel opened, turnover has been 60% from supplies of taxable hotel accommodation and 40% from taxable catering services and bar receipts. If George entered into a contract with the State in, say, January 2022 to use the entire hotel to provide emergency accommodation and related services for a term of two years, a big swing adjustment would be triggered at the end of that interval, as the taxable use of the hotel has changed by more than 50 percentage points from the initial interval (which was 100%). The big swing adjustment will be triggered even if the 60:40 turnover split continued in 2022.

As George’s capital good relates to the entire hotel building, including bedrooms, the restaurant and the bar, he needs to identify what proportion of VAT comprised in the capital good relates to the bedrooms, as only that proportion of the capital good has been used for VAT exempt activities.

If George treats VAT comprised in the capital good as a dual-use input, using the turnover method of apportionment, 60% of the VAT is referable to the bedrooms, with 40% of relating the restaurant/bar.

A big swing adjustment under s64(4)(a) VATCA 2010 is calculated using the formula (C – D) x N, where

C = reference deduction amount = (€1,350,000 x 60%) / 20 = €40,500

D = interval deductible amount = €40,500 x 0% = €0

N = number of full intervals remaining in adjustment period plus 1 = 16

(€40,500 – €0) x 16 = €648,000 = adjustment amount

George is liable to pay the adjustment as output VAT in the VAT return period immediately following the end of the interval in which it is triggered. As the interval ends on 31 December 2022, the adjustment is payable to Revenue by 19 March 2023, being the due date for the filing of the January/February 2023 taxable period (which is the taxable period immediately following the interval in which the adjustment is triggered).

It should be noted that if George had entered into the contract with the State towards the

6 Capital goods do not always have exactly 10 or 20 intervals; they can have any number of intervals up to 20.

end of 2022, he may not trigger a big swing adjustment until 2023, as the proportion of taxable use in 2022 may not differ by more than 50 percentage points from the initial interval of deductible use. In such a scenario, a standard annual adjustment might arise for 2022 (reflecting the proportion of exempt use for emergency accommodation), with the big swing adjustment triggered only at the end of the next interval, on 31 December 2023 (assuming that the hotel is used for VAT exempt use throughout 2023).

If George had created refurbishment capital goods in the years after the initial construction of the hotel, CGS adjustments would also be required to be made for any such refurbishment capital goods. Also, it could be that some capital goods relate to bedrooms or bedroom wings only, in which case all the VAT comprised in the capital good would be relevant for any capital goods scheme adjustments. Other capital goods may be exclusively referable to a bar / restaurant areas which would only be used for taxable supplies and would need to be taken into consideration when calculating any CGS adjustments relating to supplies of emergency accommodation.

Options to tax: termination and CGS adjustments for landlords

Legislation provides that an option to tax a lease is automatically terminated when the property is used, or to be used, for residential purposes, including emergency accommodation (s97(1)(d)(v) VATCA 2010). The VAT implications of emergency accommodation therefore impact landlords that lease hotels to operators, as well as the operators themselves.

Where an operator uses a hotel that it leases and that is subject to an option to tax to emergency accommodation services, the landlord's option to tax the hotel lease is automatically terminated with immediate effect. This will impact all leases in a lease chain that have exercised an option to tax, not just the final lease granted directly to an operator.

On the termination of the landlord's option to tax the hotel lease, the landlord is deemed to make a VAT-exempt disposal of the hotel and immediately reacquire it. As the deemed disposal is exempt from VAT, this triggers a potential CGS clawback of VAT for any landlord that holds a capital good in the hotel (s64(6)(b) VATCA 2010). The clawback adjustment is payable to Revenue as output VAT in the VAT return period in which the exempt disposal is deemed to take place.

Landlords should ensure that they have sufficiently robust VAT clauses in a lease to indemnify them against having to pay such a VAT cost where the tenant causes a termination of the landlord's option to tax.

Example 3: Termination of landlord option to tax

We go back to George's hotel development but assume that he developed the hotel with the intention of leasing it to a hotel operator under a 10-year lease with a term commencement date of 1 November 2018 at an annual rent of €100,000 plus VAT. The lease includes an option to tax. The tenant (hotel operator) traded as a hotel for a number of years but then entered into a two-year contract with the State in March 2022 to use the entire property to supply emergency accommodation services.

George's landlord option to tax is automatically terminated in March 2022, when the hotel is diverted to VAT-exempt use for emergency accommodation services. He is deemed to have made a VAT-exempt disposal of the hotel and immediately reacquired it. The option to tax will be terminated over the entire lease even if the hotel operator has a 60:40 turnover split between hotel accommodation and catering services/bar receipts.

George's CGS adjustment is calculated under s64(6)(b) VATCA 2010 using the formula (B x N)/T, where

B = total reviewed deductible amount = €1,350,000

N = number of full intervals remaining in adjustment period plus 1 = 16

T = total number of intervals in adjustment period of capital good = 20

(€1,350,000 x 16)/20 = €1,080,000 = relevant amount

The adjustment is payable to Revenue on or before 19 May 2022, being the due date for the submission of the March/April 2022 VAT return.

Ceasing to provide emergency accommodation

Providers should be aware that if they cease to provide emergency accommodation services and return a hotel to taxable hotel use, positive annual and big swing adjustments will arise (if the adjustment period for any capital good has not expired). Similarly, depending on the terms of the lease, a landlord may be entitled to re-exercise an option to tax the hotel lease. This would have the effect of repaying to the provider and the landlord some of the VAT previously clawed back during the exempt use of the hotel.

This is extremely relevant right now, as hotels make the decision on whether to renew emergency accommodation contracts with the State. For those that triggered big swing adjustments, if the adjustment remains unpaid then returning the hotel to taxable use could minimise the net VAT liability owing to Revenue.

It should be noted that there is no uplift for non-deductible VAT suffered by a provider on set-up costs incurred to prepare a hotel for the supply of emergency accommodation services that are not comprised in a capital good, even if goods acquired are subsequently diverted back to use in a taxable hotel or guest accommodation trade.

Emergency accommodation during the pandemic

Readers will be aware that a number of tax-relieving measures were introduced to alleviate the burden of the Covid-19 pandemic on consumers, one of which was the disapplication of the big swing adjustment to supplies to the State/HSE for the purposes of being used as emergency accommodation to combat Covid-19. It allowed the proportion of deductible use for any interval during which property was used for emergency accommodation to be based on the deductible use in the interval immediately preceding when the property was first used for emergency accommodation. This measure was permitted under EU law to help manage the pandemic and expired on 30 June 2022. We understand that there is no plan to extend the CGS concessionary treatment to supplies of emergency accommodation for refugees, and any such measure would have to be permitted at EU level in the first instance.

Conclusion

Emergency accommodation can, at first glance, appear to be an efficient short-term solution for many businesses and/or property owners. Many view the emergency accommodation model as a reliable income stream to replace existing and perhaps less stable cash-flows from rental or hospitality. However, the old adage of the devil being in the detail rings true on this particular topic. Whether one looks at emergency accommodation as a temporary arrangement or as a longer term change to their business model, there is a significant breadth of issues within the ambit of emergency accommodation that require careful consideration and management, including many that this article has not explored in any detail, such as banking, debt covenants, insurance and non financial .The combination of such issues and complexities would suggest, as always, that one should proceed with caution and ensure that any decision is made with full knowledge of the implications.

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Finance Act 2022: Impact on Financial Services Sector

Introduction

Following the significant legislative reform introduced over the past number of years, Finance Act 2022 ("the Act") is limited by comparison in terms of its impact on the financial services sector. This is perhaps unsurprising given the geopolitical backdrop against which it was presented, which has fuelled an inflationary environment and compounded economic uncertainty as the Irish economy sought to recover from the Covid-19 pandemic. Budget 2023 was described by the Minister for Finance in his Budget Speech as a "cost-of-living Budget, focused on helping individuals, families and businesses to deal with rising prices". As a result, there is little by way of material legislative reform in this Act that impacts on the financial services sector in a broad sense. That said, it includes a number of incisive changes which could have a significant impact on financial services taxpayers with certain fact patterns. The Act was signed into law on 15 December 2022, and summarised

below are its key measures from a financial services perspective.

Stamp Duty Measures

Changes to electronic transfer of securities

The Act contains a number of amendments to Part 6 of the Stamp Duties Consolidation Act 1999 (SDCA 1999). Before the Act, stamp duty on the electronic transfer of shares through securities settlement systems applied only to transfers of interests in "dematerialised securities". Section 69 of the Act amended the provision to state that stamp duty now applies where "an interest in securities is transferred by electronic means".

The transfer of Irish securities in settlement systems other than Euroclear Bank Belgium has always technically been within the charge to Irish stamp duty, but the charge has not typically been pursued.

Modernisation of banking and insurance levies

Finance Act 2021 previously provided for the modernisation of banking and insurance levies, with the relevant provisions subject to Commencement Orders.

Section 70 of the Act now provides that the banking levies modernisation provisions will apply from 1 January 2023 but with transitional measures in place to permit the current system to continue until 31 January 2023 for levies on cash/combined cards and until 31 January 2024 for levies on credit/charge cards. For the purposes of applying these provisions, the definitions of a "credit institution" and "financial institution" in s123B, s123D and s124 SDCA 1999 have been amended.

Section 71 of the Act removes the daily penalty of €380 that applied under s125A(6) SDCA 1999 where an authorised medical insurer failed to submit the required stamp duty statement and payment for an accounting period by the due date. It also includes provisions for the modernisation of the system for collecting the levies due from authorised medical insurers.

Extension of the banking levy

Section 72 of the Act has extended the application of the banking levy, included in s126AA SDCA 1999, to 2023. However, it has not made any amendments to the rate, and it remains at 308% of DIRT paid by the financial institution in the relevant base year.

VAT Measures

Irish VAT treatment of management of EU qualifying fund

Section 60 of the Act amends paragraph 6(2) of Schedule 1 to the Value-Added Tax Consolidation Act 2010, which deals with the "fund management" VAT exemption. This amendment seeks to extend the VAT exemption that currently applies to the management of qualifying Irish funds to the management of qualifying EU funds (including AIFs and UCITS).

Practically, this means that there will no longer be an entitlement to claim input VAT recovery on any costs directly incurred in respect of the management of these EU qualifying funds. Before this change, the provision of fund management services to non-Irish funds by Irish fund managers and administrators was considered to be a qualifying activity, with a corresponding entitlement to full input VAT recovery on related costs. However, based on the above amendment, fund management services provided to qualifying EU funds will become VAT-exempt under Irish legislation, meaning that input VAT recovery entitlement will become restricted.

This change will have a negative impact on the input VAT recovery entitlement of Irish fund managers and administrators in relation to costs that are directly attributable to the management of EU qualifying funds and with regard to general overhead costs incurred. It should be noted that this change will not impact the provision of services to non-EU funds. For example, the provision of fund management services to a Cayman fund will still be considered a qualifying activity, and therefore there will be corresponding

entitlement to full input VAT recovery for costs incurred in servicing such non-EU funds.

Finally, in addition to the VAT recovery position, these changes could potentially affect the Irish VAT treatment applying to fund management services delegated to third-party or group entities (if applicable). Any such contractual arrangements will need to be reassessed in light of the revised VAT legislation, in particular, to determine whether there is a risk of increased VAT costs arising in respect of any such delegated services.

Scope of fund management VAT exemption in respect of s110 companies holding plant and machinery

Irish VAT legislation currently provides that the management of an undertaking that is a qualifying company for the purposes of s110 TCA 1997 is VAT-exempt.

Section 61 of the Act provides that, from 1 March 2023, the fund management VAT exemption will not apply to s110 companies that hold plant and machinery. Under the amendment, where a s110 company holds any plant or machinery, services provided to the company will no longer be capable of qualifying for the fund management exemption – for example, management and administration services.

Where the s110 company is solely making taxable supplies – for example, a s110 company holding an aircraft on lease – the VAT incurred on services should be fully recoverable. However, if the s110 company holds both financial assets and plant/machinery, there may be a restriction on input VAT recovery, resulting in an additional cost to the company.

Companies that are currently providing services to s110 companies that qualify for the fund management exemption should review their supplies and determine whether the exemption is still applicable. Such companies could see an increase in input VAT recovery and, therefore, a lower cost of providing their services where the exemption no longer applies.

Agency services

Irish VAT legislation currently provides that agency services in respect of the management of certain qualifying funds (e.g., UCITS) are VAT-exempt. Section 62 of the Act removes this exemption, bringing Irish legislation in line with the EU VAT Directive.

Foreign Currency: Computation of Income and Chargeable Gains

Section 79 of the Taxes Consolidation Act 1997 (TCA 1997) provides that foreign exchange movements on "relevant monetary items" are, for corporation tax purposes, to be treated as part of profits or losses of a company's trade, rather than as capital gains or capital losses.

"Relevant monetary item" was previously defined solely as "money held or payable by the company for the purposes of a trade carried on by it". Section 38 of the Act expands the definition to include both trade receivables of the company and "a debt owed by a bank which is represented by a sum standing to the credit of the company in an account in the bank, where the sole purpose of the account is the lodgement and disbursement of amounts that are taken into account in computing profits or losses of a trade carried on by that company", i.e. trading bank accounts. Revenue has confirmed that the rationale for this amendment is to allow foreign exchange movements in respect of those items to be taken into account in computing the trading income of the company.

Such foreign exchange movements were often already capable of being treated as such under both first principles and certain interpretations of the previous version of s79 TCA 1997, and practitioners have raised concerns that the definitions as currently drafted are restrictive in terms of their applicability in practice.

First, a trade receivable in the context of the section is defined as "an amount recorded in the company's balance sheet as owed to that company in respect of goods or services sold by that company for the purposes of a

trade carried on by it". There is a concern that this definition could be interpreted narrowly in practice, particularly with regard to the reference to "goods or services sold", and there are activities that may not fall within this, e.g. royalties receivable from an IP licensing trade or receivables from a treasury trade. Revenue has indicated in discussions at TALC that it is not intended to restrict the application in this manner and that the accounting classification as a "trade receivable" will be a very important factor in the analysis.

Furthermore, the amendment to s79 TCA 1997 requires that the treatment of a bank account is determined by the "sole purpose" of amounts that are taken into account in computing profits/losses of a trade, rather than the purpose of the lodgements from/withdrawals to the account itself. This will likely create practical issues for taxpayers and may make it difficult to obtain the desired benefit of the measure. For example, it may be difficult for taxpayers to prove that a bank account that has been set up for trade purposes can factually satisfy the "sole purpose" test as drafted, given that tax computational issues are generally not likely to be the purpose of opening an account. In addition, even if a taxpayer satisfies themselves that an account is set up for that purpose, issues may arise if amounts are lodged to the bank account that are not taken into account in a tax computation.

It is anticipated that Revenue will publish guidance to offer some clarity on these matters over the coming months.

Interest Limitation Rules

Section 39 of the Act includes a number of clarifying amendments to align interest limitation rule legislation with Tax and Duty Manual Part 35D-01-01, "Guidance on the Interest Limitation Rule". The following clarifying amendments are welcome news for the financial services industry:

- The definition of "consolidating entity" in s835AY TCA 1997 has been amended to include an entity that is excluded from the consolidated financial statements solely on grounds of size or materiality.
- Section 835AY TCA 1997 expands the exemption for qualifying long-term public infrastructure projects from the application of interest limitation rules to include the provision, upgrade, operation or maintenance of a large-scale residential development. This is a very welcome amendment, which should help to mitigate the potential negative impacts of the interest limitation rules on the construction of residential developments and increase the attractiveness of investment in this sector.
- Section 835AAB TCA 1997 has been amended to clarify the operation of the exemption for interest on legacy debt, being debt the terms of which were agreed before 17 June 2016. Where there is a part-repayment of a debt that consists of legacy and non-legacy debt, the part repaid shall be treated as being a repayment of legacy debt in priority to the non-legacy debt.
- The definitions of "group EBITDA" and "group exceeding borrowing costs" in s835AAI TCA 1997 have been amended to ensure that they operate as intended.
- A new sub-section (1A) is inserted in s835AAI TCA 1997 to clarify that the ratio of equity over assets for the relevant entity is to be calculated on the basis of financial statements prepared under the same body of accounting standards and the same accounting policies as the ultimate consolidated financial statements of the worldwide group.

Although they are minor technical amendments, these measures ensure that the interest limitation rules operate as intended.

Collective Investment Schemes

The Act introduces additional annual reporting requirements for exempt unit trusts (EUTs), common contractual funds (CCFs) and investment limited partnerships (ILPs). Under the existing rules, contained in s731, s739I and s739J TCA 1997, respectively, EUTs, CCFs

and ILPs were already required to provide an annual statement to Revenue containing certain information about their profits and details in respect of their investors. Per the new changes contained in s37 of the Act, such funds are now obliged to disclose additional details of the business undertaken by the fund, the nature of the assets used to generate the relevant profits of the fund for the period and the net asset value of the fund.

As EUTs, CCFs and ILPs are not currently required to submit accompanying financial statements, Revenue has no standard visibility of the type of investments held within these funds. The intention to update the reporting requirements to capture this high-level detail would represent less of an administrative burden on filers than facilitating the submission of tagged financial statements.

A €3,000 penalty now applies where the management company of a CCF or the partners of an ILP fail to submit an annual statement or submit an incomplete or incorrect annual statement. This brings it in line with the regime previously applicable to EUTs, as provided for by s731(5) TCA 1997.

Interests in Irish unit trusts

Section 743 TCA 1997 has been amended by s36 of the Act to remove historical uncertainty about the classification of Irish unit trusts as a domestic or offshore fund. Under the new rules, an authorised unit trust, the general administration of which is ordinarily carried on in Ireland, will not be treated as an offshore fund where the trustees are resident in another EU or EEA Member State and provide their trustee services to the unit trust through a branch in Ireland.

This is helpful in the case of Irish investors, as those with a material interest in an offshore fund may be subject to special taxation regime in respect of their income and gains.

Conclusion

In summary, albeit that no fundamental legislative reform was introduced by the Act this year, some important clarifications are included. In addition to the content of the Act, of particular interest to financial services taxpayers will be the announcements made by the Minister in his Budget Speech – in particular, communication that a review will be undertaken of the use of the s110 (securitisation) regime and a that working group will be established to consider the taxation of funds, life assurance policies and other investment products. Furthermore, it is also expected that a review will be undertaken of the REIT and IREF regimes to consider how these regimes can support housing policy into the future. With Pillar Two implementing legislation and a potential move towards a territorial corporation tax system also on the horizon, 2023 will be a busy year for policy-makers, taxpayers and practitioners alike.

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Finance Act 2022: Changes to Pension Provisions and Overview of Tax Treatment of Pan-European Personal Pension Products

Introduction

This article provides an overview of changes introduced by Finance Act 2022 in respect of the treatment of foreign lump sum pension payments and the removal of the benefit-in-kind (BIK) charge for employer pension contributions. Finance Act 2022 also provided for the introduction of a new Chapter 2D to Part 30 of the Taxes Consolidation Act 1997 (TCA 1997), which sets out the tax treatment of and relief applicable to the Pan-European Personal Pension Product (PEPP).

Section 19: Lump Sums from Foreign Pension Arrangements

Section 19 of Finance Act 2022 introduced a new s200A to TCA 1997, which provides clarity on the tax treatment of foreign pension lump sums that are drawn down by Irish-tax-resident individuals. The effect of s200A is that the tax treatment of foreign pension lump sums is aligned with that of Irish pension lump sums dealt with under s790AA.

Where an Irish-tax-resident individual receives a lump sum from a foreign

pension on or after 1 January 2023, it will be taxed in the same manner as a lump sum received from an Irish pension:

- The first €200,000 of the lump sum should be exempt from tax.
- Any amount in excess of this tax-free limit is subject to tax, in two stages:
  - The portion between €200,000 and €500,000 will be taxed at the standard rate of tax, i.e. 20%.
  - Any amount over €500,000 will be taxed at the individual's marginal rate of tax including universal social charge (USC).

Similar to lump sums receivable from an Irish pension fund, these are lifetime limits. Therefore, in calculating any available limit, it will be necessary to aggregate:

- any lump sums received from a foreign pension fund after 1 January 2023 and
- any pension lump sums paid from a "relevant pension arrangement" since 7 December 2005. The definition of a "relevant pension arrangement" is contained in s790AA TCA 1997 and relates to certain Irish pension funds and qualifying overseas pension plans.

Unlike Irish pension funds, where the taxable element of the lump sum is subject to Irish payroll taxes, in the case of foreign lump sums, the taxpayer is responsible for discharging any tax payable under the income tax self-assessment provisions.

Although s200A provides clarity regarding the tax treatment of lump sums received from a foreign pension fund on or after 1 January 2023, the position with regard to the tax treatment of foreign pension lump sums received before this date is less clear cut.

Before the introduction of s 200A, the only published Revenue guidance on the tax treatment of foreign pension lump sums (other than TALC minutes of the recent discussions with Revenue on this matter) was contained in Precedent 28 (dated 30 July 1987), which stated that "tax free lump sums in commutation of foreign pensions are not taxable in Ireland should the individual come to reside in the country following their retirement".

It is not possible for taxpayers to rely on this Precedent as it is over five years old. We understand that Revenue's current view is that if the taxpayer is resident in Ireland on the date that the foreign lump sum is paid, then that lump sum is subject to income tax under Case III as it is a "foreign possession".

This matter has been the subject of discussions between tax practitioners and Revenue at the TALC Direct and Capital Taxes Sub-Committee meetings. Tax practitioners have requested clarity from Revenue regarding the technical basis for Revenue's current approach to treat foreign pension lump sums as taxable income as it is a fundamental change in practice from the historical position as set out in Precedent 28. A Precedent 28 Subgroup was established to consider the technical basis.

Revenue's basis for the current position adopted with respect to the tax treatment of foreign pension lump sums is set out in a paper as an addendum to the minutes of the TALC Direct and Capital Taxes Sub-Committee meeting that was held on 1 September 2022. Revenue has noted that it will consider existing cases of taxpayers who received a foreign lump sum payment on or before 31 December 2022 on a case-by-case basis. It is our understanding that at the time of writing there continues to be ongoing representations to Revenue on this issue.

Sections 20 to 21: Tax Treatment of Pan-European Personal Pension Product

Sections 20 and 21 of Finance Act 2022 introduced a new Chapter 2D to Part 30 TCA 1997, which sets out the tax treatment of and relief applicable to the Pan-European Personal Pension Product (PEPP), as required under Regulation (EU) No 2019/1238 of the European Parliament and Council of 20 June 2019 ("the

EU Regulation"). The PEPP proposal was adopted and agreed as a legislative proposal on 25 July 2019, and the PEPP Regulation became applicable on 22 March 2022.

Before the introduction of this EU Regulation, there was no legal framework to govern personal pensions at an EU level, and it is hoped that standardising the personal pension products market will allow both citizens and pension providers to make use of their basic freedoms, as it should enhance the degree of portability of these products. The EU Regulation acknowledges that "the development of a PEPP will contribute to increasing choice for retirement saving, especially for mobile workers, and establish a Union market for PEPP providers".

The tax relief on PEPP contributions and the taxation of benefits etc. are similar to those of Personal Retirement Savings Accounts (PRSAs).

What is a PEPP?

The EU Regulation defines a PEPP (Article 2) as meaning:

> "A long-term savings personal pension product, which is provided by a financial undertaking eligible according to Article 6(1) under a PEPP contract, and subscribed to by a PEPP saver, or by an independent PEPP savers association on behalf of its members, in view of retirement, and which has no or strictly limited possibility for early redemption and is registered in accordance with this Regulation".

The tax measures for PEPPs are modelled on the existing PRSA tax measures in Chapter 2A, Part 30, TCA 1997. Section 20 of Finance Act 2022 introduces the new Chapter 2D, which is made up of nine sections. PEPPs will be taxed according to the "exempt–exempt–taxed" (EET) system that is applied to Irish pension products. The EET system is where contributions are tax-exempt, the growth of the funds contributed is also tax-exempt, and tax is applied on withdrawal.

What are the tax implications for contributions to a PEPP?

Taxpayers who invest in a PEPP will receive tax relief in line with the existing age and earnings limits for pension contributions. Sections 787W, 787X, 787Y and 787Z, which were introduced by s20 of Finance Act 2022, set out the relief that is available for PEPP contributions. To qualify for tax relief, payments must be made under a PEPP contract that complies with the conditions of Regulation (EU) 2019/1238.

The maximum amount of annual contributions on which tax relief can be obtained by an individual is a percentage of the individual's relevant earnings for that year. The maximum amount depends on their age during the tax year, as follows (s787Z TCA 1997).

Age	Percentage
29 or below	15%
30–39	20%
40–49	25%
50–54	30%*
55–59	35%
60+	40%

** The 30% rate also applies to any individual below the age of 55 whose income is derived wholly or mainly from certain sporting activities.*

Similar to the current tax rules for Irish pensions, the overall annual earnings cap to which the above percentages are to be applied is €115,000. An individual can be granted tax relief for PEPP contributions made up to €1,525, even if this exceeds the maximum annual contribution amount. For example, if an individual aged 26 earned income of €9,000 and made a PEPP contribution of €1,600, the normal limit on tax-deductible contributions would be 15% of €9,000, i.e. €1,350. However, the individual will be able to claim relief of €1,525, as opposed to €1,350.

The relief on PEPP contributions is in respect of income tax only; there is no relief from PRSI and USC.

Contributions paid in any year in excess of the maximum annual contribution may be carried forward and claimed in future years, subject to annual limits for those years. Contributions paid after the end of the tax year and before the return filing date for that year may be claimed for that tax year. For example, for the tax year 2022 the return filing deadline will be 31 October 2023; therefore, where a contribution is made on or before 31 October 2023, tax relief can be claimed for the 2022 tax year. Currently, where an individual uses the Revenue Online Service (ROS) to file their return and pay their income tax liability, the deadline for paying contributions to an Irish pension scheme or a qualifying overseas plan after the tax year and making the choice to claim the relief for that tax year is extended. It would be our view that this extended deadline should be applied to PEPP contributions; however, we will need to await Revenue guidance on this point.

Where an individual has made contributions to a PEPP and a PRSA and/or Retirement Annuity Contract (RAC) and is entitled to tax relief, the maximum relief for the PEPP contributions is reduced by the amount of any relief in respect of the PRSA and/or RAC contributions made.

Employer contributions to a PEPP are not treated as a taxable benefit-in-kind (which we discuss further below) and are not treated as if made by the employee for the purposes of income tax relief. There is a statutory deduction for employer contributions for Schedule D, Case I and II, purposes in s787AD TCA 1997, which is allowed only on a paid basis.

Is the growth in investments in the PEPP subject to tax?

As with occupational pension schemes and PRSAs, the income and gains from the investment of funds in a PEPP are exempt from income tax (as introduced by s20 of Finance Act 2022, which enacts the new s787AC TCA 1997) and capital gains tax (s21 of Finance Act 2022 extends s608 TCA 1997).

How are future payments from a PEPP taxed?

Payments from a PEPP will generally be taxed under Schedule E (PAYE). Any payments taxed under Schedule E will be subject to income tax at the individual's marginal rate of tax (plus PRSI and USC, where applicable). The PEPP provider will be responsible for discharging the relevant tax to the Collector-General. Where a PEPP provider is not established in Ireland at any time, it must enter into an enforceable contract with Revenue to meet all of the duties and obligations imposed by the PEPP Regulation and the relevant sections of TCA 1997. Where a PEPP provider opts to appoint a resident agent to discharge these duties and obligations, it must notify Revenue.

Amounts withdrawn from a PEPP in the following circumstances are not treated as taxable emoluments of the individual under s787AA TCA 1997:

- a tax-free retirement lump sum paid when PEPP assets are first made available to the individual that does not exceed 25% of the fund;
- the transfer of PEPP assets to an approved retirement fund (ARF);
- the transfer of PEPP assets to the individual's personal representative after their death;
- an amount made available by a PEPP provider to meet a tax charge arising on a chargeable excess in connection with the PEPP; or
- an amount made available from a vested PEPP for the purpose of:
    - the reimbursement, in whole or in part, of a PEPP provider for tax paid by that provider on a chargeable excess relating to the PEPP contributor or
    - the payment by a PEPP provider of a non-member spouse's or civil partner's appropriate share of the tax charged on a chargeable excess or part of it (for

which the PEPP provider is made jointly liable with the non-member) where a benefit crystallisation event giving rise to tax occurs in respect of retirement benefits.

What options are available on retirement?

As provided for under Article 58 of the EU Regulation, the options provided at retirement age for an individual are:

- purchase an annuity,
- take a lump sum,
- draw down payments or
- a combination of the above.

Section 787AB provides that at the time that the assets of the PEPP are allowed to be made available to a PEPP beneficiary, the individual can opt to transfer these assets to an ARF. As noted above, this transfer would not be treated as a payment to the PEPP beneficiary. The assets that may be transferred to the ARF are the PEPP assets less any tax-free lump sum payable.

What are the tax implications of the death of the PEPP beneficiary?

Where an individual dies after PEPP assets have been made available to them (or deemed to have been made available on their reaching the age of 75) and the assets remain in the PEPP, the assets of the PEPP at the time of the death are treated, under s784A(4) TCA 1997, in the same way as assets in an ARF. This is provided for in s787AA(9) TCA 1997. If the individual on retirement availed of the option of transferring the assets to an ARF and subsequently dies, then the following treatment also applies.

Transfer from an ARF	Tax treatment
If paid to an ARF for the deceased spouse or civil partner	Exempt from income tax on transfer to the ARF. Not subject to capital acquisitions tax (CAT) as spousal exemption is available.
If paid to a child of the deceased or his/her civil partner who is under 21 at date of death	Exempt from income tax but may be subject to CAT.
If paid to a child of the deceased or his/her civil partner who is 21 or over at date of death	30% income tax deducted by the PEPP provider before the payment is made. Section 21(32) of Finance Act 2022 extends s85 of the Capital Acquisitions Tax Consolidation Act 2003 (CATCA 2003) to PEPPs, which results in such payments to children over 21 being exempt from CAT.
If paid to any other individual	Subject to PAYE at the deceased's marginal rate of tax in year of death as it is deemed income of the deceased immediately before death. Subject to CAT in the normal manner in the hands of the recipient.

Where an individual has purchased an annuity, there should no longer be any assets in the PEPP. Generally, on the death of the individual, the annuity should cease, and no further payments should be made. However, certain annuities provide for a guaranteed period of pay-out or provide a reduced spouse's pension on the annuity member's death.

Additional considerations

Consequential amendments throughout the tax code (TCA 1997, CATCA 2003 and the Stamp Duties Consolidation Act 1999) have been introduced by s21 of Finance Act 2022 to ensure that PEPPs qualify for the same tax treatment as PRSAs. Examples of these amendments are the extension of the "imputed distribution" regime to vested PEPPs (s790D TCA 1997) and PEPPs' inclusion in the "chargeable excess tax" regime (s787R TCA 1997). Changes were also introduced to ensure that PEPP products are subject to the same administration provisions as PRSAs. We do not propose to cover each amendment in this article as we have discussed above the main tax provisions that are applicable to a PEPP.

Section 22: Removal of BIK Charge for Employer Contributions to PRSAs and PEPPs

Historically, an employer contribution to a PRSA was treated as a benefit-in-kind (BIK) for the employee for income tax purposes. The employer contribution is then treated as if it were made by the employee for the purpose of income tax relief (s787E(2) TCA 1997). Therefore, provided the combined contributions of the employee and employer do not exceed the relevant contribution limit, income tax will not apply to the employer contribution to the PRSA. Employer contributions to PRSAs were not subject to PRSI (as noted in eBrief No. 36/2011) and USC (s531AM(1)(a)(v)(VI) TCA 1997). From a tax perspective, the historical treatment restricted employer PRSA contributions to a maximum of the personal tax relief limits.

Section 22 of Finance Act 2022 amends s118 TCA 1997, whereby an employer contribution to a PRSA is no longer considered a BIK for the employee. This change relates to employer contributions made on or after 1 January 2023. The change brings the tax relief available to employees for employer contributions to a PRSA in line with that available for occupational pension schemes. This section was also amended to ensure that an employer contribution to a PEPP is not treated as a BIK. The removal of the BIK charge was a recommendation of the Interdepartmental Pensions Reform and Taxation Group.

This section also deletes sub-section (2) of s787E TCA 1997, noted above, as it is no longer required after the abolition of the BIK charge.

Conclusion

The introduction of an EU-wide Regulation for PEPPs is a welcome change to the pension market that should assist the mobile worker with saving for their retirement, but it is yet to be seen if this will become a prevailing pension product in the Irish market. PEPPs should also provide an additional option for retirement saving for the ordinary citizen who is not a mobile worker and who may be worried that existing employer and State pensions will not provide adequate income/savings for their retirement.

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Finance Act Measures Updating R&D Tax Credit, KDB and Digital Games Tax Credit

Introduction

The research and development (R&D) tax credit is a key incentive for companies performing R&D in Ireland. The consistency of the rate of Ireland's R&D tax credit together with the various legislative enhancements to the credit since its introduction in 2004 have helped companies to plan their R&D investment in Ireland. The availability of the R&D tax credit, when combined with IDA Ireland's R&D-related grants, is often the tipping point in investment decisions when Ireland is compared with other jurisdictions.

The regime provides for a credit of 25% on qualifying expenditure on R&D activities. Until the introduction of Finance Act 2022, the credit was first used to reduce a company's corporation tax liability. Where a company had offset current and previous years' corporation

tax liabilities, the credit was then available as a cash refund and was typically paid out in three instalments spread over three years.

In 2022 the Department of Finance conducted a public consultation on the R&D tax credit, and key stakeholders, including multinational companies, indigenous companies, industry bodies and R&D tax credit practitioners, submitted recommendations for improvements to the regime. The main changes that were recommended sought to ensure that the R&D tax credit regime is aligned and compliant with new international definitions of refundable tax credits with the introduction of the OECD's minimum tax proposals under Pillar Two.

Finance Act 2022 gives effect to a number of these recommendations, and this article considers the details of the Finance Act changes for the R&D tax credit regime, the Knowledge Development Box (KDB) and the digital games tax credit.

Impact of International Tax Reform on R&D Tax Credits

Before discussing the Finance Act 2022 changes for the R&D tax credit regime, it is important to consider the backdrop of international tax reforms that have taken place recently. The main reform is the proposed implementation of the OECD's Pillar Two.

OECD BEPS Pillar Two

The OECD's Pillar Two Model Rules introduce a new global minimum effective tax rate of 15% for large multinational groups. EU Member States have now reached agreement on implementing the Pillar Two rules, and it is likely that the 15% minimum effective tax rate for multinational enterprise groups will apply in the EU (including Ireland) from 1 January 2024. Under the new rules, "a qualified refundable tax credit" is treated as income and recognised for the purposes of the calculation of a company's effective tax rate.

Where the Irish R&D tax credit regime fails to meet the criteria of a "qualified refundable tax credit", the R&D tax credit would instead be treated as reducing covered taxes. A non-qualifying refundable tax credit will therefore result in a lower effective tax rate (as covered taxes are reduced) for the company than a credit that meets the definition of a qualifying refundable tax credit, resulting in potentially higher top-up taxes payable under the Pillar Two rules. As a result, jurisdictions that offer qualified refundable tax credits will naturally be more attractive to groups within the scope of Pillar Two than those with non-qualified refundable tax credits.

Before Finance Act 2022, the R&D tax credit regime in Ireland did not meet the Pillar Two requirements for a "qualified refundable tax credit" due to the obligation for taxpayers to use the credit, in the first instance, to reduce the corporation tax liability of a company. The definition of a "qualified refundable tax credit" requires the credit to be implemented in such a way that it must be able to be paid as cash or available as a cash equivalent within four years of satisfying the conditions to receive the relief. "Available in cash" includes the ability to offset the refundable amount against other tax liabilities (outside of corporation tax) owing to the tax authority. Before Finance Act 2022, the Irish R&D tax credit regime provided that in most instances the tax credit would be refundable within four years. However, certain companies that were loss making with insufficient payroll liabilities, in accordance with the application of s766B of the Taxes Consolidation Act 1997 (TCA 1997), were not eligible to obtain the refund within four years.

The OECD Commentary on Pillar Two provides further detail on the criteria to be a "qualifying refundable tax credit". These include the requirement that the refund amount is not limited to any "tax liability". "Tax liability" is not defined in the Commentary. A broad interpretation of the term could include payroll taxes (although should not include a limit based on payroll costs). The refundable amount previously eligible under s766(4B) TCA 1997 was limited by the amount of corporation tax or payroll liabilities in accordance with s766B TCA 1997. Therefore, there was a risk that the R&D

tax credit, as it stood, would not have been considered a "qualified refundable tax credit" under Pillar Two.

Changes to R&D Tax Credit Regime: Finance Act 2022

In the context of the above international tax reforms and following the Department of Finance's public consultation on the R&D tax credit, Finance Act 2022 included a number of changes to the operation of the regime that seek to future-proof it by ensuring that it meets the requirements of international tax reforms. These changes focus on how companies can claim the benefit of the R&D tax credit.

The new regime, which we discuss further below, applies to accounting periods where the specified corporation tax return date is on or after 23 September 2023 (for companies with a year-end of 31 December, for example, this means that the new regime is being introduced for their accounting period that commenced on 1 January 2022). Transitional rules will apply, allowing companies to make an R&D tax credit claim under the old regime; however, the old regime will not be available in respect of R&D expenditure incurred in an accounting period that commences on or after 1 January 2023. This essentially provides for a one-year transition period to the new regime.

We will now discuss each of the main updates to the R&D tax credit regime.

Cash refund

The most significant change to the R&D tax credit regime included in Finance Act 2022 is that the current method of offsetting the credit against corporation tax (in priority to the credit's being processed via a cash refund) will no longer be available. Instead, companies will be required to claim the R&D tax credit via a new three-year fixed payment schedule, with no option to offset the full R&D tax credit amount against corporation taxes paid or owing. This will mean that a certain cohort of companies will experience a negative cash-flow impact as those companies that paid more corporation tax than their R&D tax credit claim will no longer be able to get a full refund of the corporation tax paid in "year 1". Companies will have the option to specify that any part of each instalment be offset against their tax liabilities (not limited to corporation tax).

This amendment to the payable element of the R&D tax credit is designed to enable the regime to align with the new international definitions of refundable tax credits. This has been achieved through substantial structural changes to the way in which companies can access the benefits provided by the credit.

How does the new cash refund system work?

The newly introduced s766C TCA 1997 (R&D expenditure other than a building or structure) sets out the new three-year fixed payment schedule, which will be calculated 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.

In other words, the tax credit is likely to be received by many companies in a 50:30:20 split over three years.

By way of example, if a company submitted an R&D tax credit claim with a total value of €400,000 for the year ended 31 December 2022 and opts to claim under the new regime, the fixed payment schedule would be as follows:

- The first instalment would be €200,000 (i.e. €400,000 x 50%) and claimed in the company's corporation tax return for the year ended 31 December 2022.

- The second instalment would be €120,000 (i.e. €400,000 – €200,000 = €200,000 x 3/5 = €120,000) and claimed in the company's corporation tax return for the following accounting period.
- The third instalment would be the remaining €80,000 (i.e. €400,000 – €200,000 – €120,000 = €80,000) and would be claimed in the further following accounting period.

Section 766D TCA 1997, the second new section introduced, 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. The payment schedule is broadly the same as outlined above, i.e. 50:30:20.

The new provisions in s766C and s766D also provide for the payment of the R&D tax credit in full within 48 months from when a "valid claim" is made, i.e. 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 "valid claim" provision would appear to have been introduced to satisfy the definition of a "qualified refundable tax credit" under Pillar Two (i.e. the credit must be paid as cash or available as a cash equivalent within four years of satisfying the criteria to receive the relief).

Removal of caps on payable element of credit

The previous limits with respect to the payable/refundable R&D tax credit amount, which were linked to the corporation tax paid by the company in the previous 10 years or the payroll taxes remitted by the company for the relevant periods, have been removed in full from s766B. This is a positive change as it means that claimants will no longer have any limitation on the amount of their R&D tax credit that is refundable and they will not need to carry out complex calculations to determine the cap that applies to their payable R&D tax credit claims.

Benefits for small and micro enterprises

The amendment to make the first €25,000 of a claim for R&D expenditure payable in full in "year 1" will provide a cash-flow benefit for companies carrying out smaller R&D projects and as a result will likely encourage more companies to engage with the regime. Under the old regime, where a company sought a cash refund of an R&D tax credit of €25,000, this would have been split into three instalments over a period of 33 months, with only €8,250 being received in year 1 as the first cash instalment. Under the new R&D tax credit repayment mechanism, it will be possible to claim up to €25,000 in year 1, which is a significant acceleration of the refund for smaller R&D tax credit claims.

In addition, under the new regime, companies that incur R&D expenditure in pre-trading periods will be able to claim a payable credit for this over a three-year period from the year that the company commences to trade. Under the previous regime, the R&D tax credit on pre-trading expenditure was only available for offset against future corporation tax liabilities, and a company could not avail of the cash refund mechanism for this expenditure. This will benefit small and micro-sized companies and provide a welcome cash-flow benefit for start-ups.

Valid claim

Finance Act 2022 introduces the concept of a "valid claim" for the first time to s766C and s766D TCA 1997. While the concept of a "valid claim" has always existed under the broader corporation tax requirements of s865 and R&D tax credit claims have always been subject to audit or review by Revenue, they also have always been made under our self-assessment regime (i.e. a company claims the R&D tax credit in its full and true corporation tax return, and after the credit is first used to offset fully the company's corporation tax liability for the current period, a cash refund may be due).

Now, based on the amendments in the Finance Act, payments will not be released until Revenue accepts that a "valid claim" has been

made. The determination of a "valid claim" appears to be a subjective test to be applied by Revenue in relation to whether sufficient information has been provided by the taxpayer to demonstrate how it is entitled to the R&D tax credit that has been claimed. Depending on how it is implemented in practice, this change has the potential to slow the pace at which refunds are made and, indeed, could increase the administrative burden on companies claiming the R&D tax credit. We understand, however, that this is not Revenue's intention.

Additional reporting requirements

Sections 766C and 766D introduce additional reporting requirements for R&D tax credit claims. A company must now provide details on the amount of the R&D expenditure incurred during the accounting period concerned in respect of plant or machinery and emoluments of the employees carrying on qualifying R&D activities. Companies must also provide details on the sum of the remaining qualifying expenditure incurred by the company during the accounting period concerned.

Transitional rules

As outlined above, there will be a one-year transitional period to the new regime during which companies can make a claim under the old rules for accounting periods commencing before 1 January 2023. The transitional rules also permit payable R&D tax credit instalments carried forward from accounting periods that commenced before 1 January 2022 (i.e. payable instalments 2 and 3 from the previous year's claim and from the pre-preceding year's claim) to be claimed in the accounting period commencing on or after 1 January 2022. This would appear to indicate that such instalments carried forward under the current regime can be claimed in 2022 tax returns, effectively accelerating the third instalment.

Impact of Changes to R&D Tax Credit Regime

As taxpayers can now request payment of the R&D tax credit over a three-year fixed payment schedule without first offsetting it against other tax liabilities, the R&D tax credit would appear to qualify as a refundable tax credit under the current definitions laid out in Pillar Two. It is worth noting that international tax reforms such as Pillar Two are relatively new, and there could very well be additional requirements introduced in the coming months that mean that further updates to the Irish R&D tax credit regime are needed.

Although there is no doubt that ensuring that the R&D tax credit remains attractive to innovative multinational companies is critical, the manner in which Finance Act 2022 seeks to achieve this has a negative cash-flow impact for profitable indigenous companies, in particular. The introduction of a "fixed three-instalment approach" to the refundable element of the credit means that companies that previously were able to offset their credit in full against their corporation tax liability for the current period will no longer be able to do so. All claimants will now claim only 50% of the R&D tax credit in year 1, with the balance being paid out in years 2 and 3. This has an obvious impact for companies that have regularly received the full value of the credit in a single tax return where they had the tax capacity – a provision that has been available since the introduction of the R&D tax credit in 2004.

Knowledge Development Box

Finance Act 2022 confirmed that the Knowledge Development Box (KDB) regime has been extended for four years, to include accounting periods commencing before 1 January 2027. Although the extension is welcome, as companies need a long-term view to make investment decisions around R&D, it would be preferable if the Irish KDB regime were similar to those of other, competing jurisdictions, which are not limited by sunset clauses such as that included in the Finance Act. Ideally, the KDB would be a permanent fixture of the tax system.

The KDB in its current form will be significantly impacted by changes in the international tax environment, specifically under OECD Pillar Two if it is introduced. Pillar Two includes

a "subject-to-tax rule" (STTR), whereby developing countries may apply a withholding tax on interest, royalties and other defined payments where the recipient jurisdiction applies a nominal corporate tax rate of less than 9% to the payment.

As a result, Finance Act 2022 contained amendments to increase the effective tax rate on KDB profits to 10% from the current 6.25%. 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.

Despite the deemed tax deduction under Irish domestic rules resulting in the KDB profits' effectively being taxable at the proposed new rate of 10%, for larger companies (i.e. those with group turnover of more than €750m) these profits will be within scope of GloBE and will be subject to the minimum effective tax rate of 15%. This is likely to give rise to additional top-up tax payable on these profits, thus negating the benefit of the KDB regime for in-scope multinational companies.

In terms of the future of the KDB regime, it will be important that it is amended further to ensure it that falls within the definition of a "qualified refundable tax credit" under the Pillar Two rules. This would help to make sure that the KDB remains viable as an incentive, despite the reduced benefit.

For indigenous and other companies that will not be impacted by the proposed minimum effective corporation tax rate of 15% (because they are below the turnover requirements) and will retain a corporation tax rate of 12.5%, the increased tax rate for the KDB of 10% (rather than 6.25%) will significantly reduce the benefit and attractiveness of the KDB. Given the low number of taxpayers that currently avail of the KDB, this change is unlikely to help the uptake of the relief.

Digital Games Tax Credit

The digital games tax credit was introduced by Finance Act 2021 but was subject to approval by the European Commission under EU State Aid rules, which has now been provided. On 16 November 2022 a Commencement Order (SI 571 of 2022) brought this new regime into effect, and on 22 November 2022 supplemental Regulations (SI 593 of 2022) were introduced. It is expected that companies will be able to claim the credit from Revenue from 1 January 2023. At the time of writing, we are awaiting guidelines from Revenue on how the digital games tax credit will operate and be administered in practice. It would be helpful, in order to give taxpayers clarity, if these guidelines were published before the first claims are made.

By way of background, the digital games tax credit will be available for digital games development companies that are resident in the EEA and carry on a business in Ireland that involves investment in the design, production and testing of a digital game. To qualify for the credit, a digital game must receive a "cultural certificate" from the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media. When applying for the cultural certificate, a company must include details on the contribution that the digital game is expected to make to the promotion and expression of Irish and European culture.

The tax credit will be available as a refundable corporation tax credit at a rate of 32% on eligible expenditure. Under the current Regulations, "qualifying expenditure" is considered to be expenditure incurred directly by the digital games development company on design, production and testing of a digital game (excluding expenditure incurred on designing the initial concept for the digital game), debugging a completed digital game or carrying out any maintenance in connection with such a digital game, and on sub-contractor payments exceeding €2m.

The total amount of tax credit available over the life of the project is capped at 32% of the lowest of:

- 80% of the total qualifying expenditure,
- 100% of qualifying expenditure in Ireland or the EEA and
- €25m.

Therefore, the maximum amount of credit that can be claimed is €8m per project (32% of €25m). To the extent that the tax credit exceeds the developer's tax liability in a tax year, the excess can be refunded in cash or applied against other liabilities.

The digital games tax credit is available in addition to the standard trading tax deduction (at 12.5%) but cannot be claimed on expenditure in respect of which Irish R&D tax credits have been claimed or expenditure that has been met by EU grant assistance.

The digital games tax credit will be claimed in the annual corporation tax return once the taxpayer has obtained either an interim certificate from the Minister or a final certificate at the end of the development process.

Some amendments were made in Finance Act 2022 to the digital games tax credit to ensure compliance with State Aid requirements and correct other, technical points. These included minor amendments to the definitions of "digital games development company" and "qualifying expenditure". Clarification was provided that a company resident in an EEA State (other than Ireland) must carry on a business in Ireland through a branch or agency in order to make a claim.

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Finance Act 2022: Residential Property Measures

Introduction

Ahead of the Budget 2022 speech, much pressure was placed on the Government to look closely at measures to alleviate the housing crisis. The shortage of affordable housing has been felt by potential first-time buyers and renters alike. The lack of housing for first-time buyers has driven up the price and reduced the availability of rental properties. This meant that areas of focus for the Budget were assisting renters financially while encouraging owners to bring properties to the market for sale and/or rent. We consider below some of the measures announced in Budget 2022 and included in Finance Act 2022 that sought to address this.

Incentive for Renters

It has been five years since the previous rent credit was phased out, and it was a welcome announcement for tenants that a new rent credit was being introduced from 2022 until 2025. The new rent tax credit is a maximum of €500 per annum for a single person and €1,000 per annum for a jointly assessed couple.

The property must be used by the claimants as their principal private residence (PPR) or, otherwise, used to facilitate their attendance at or participation in their trade or employment or an approved course.

Individuals can make a claim for rent that they pay on behalf of their child provided the child is using the residence as their PPR to participate in an approved course. The tenancy is required to be registered under Part 7 of the Residential Tenancies Act 2004 and to have met all such obligations within those regulations. The child or claimant must not be related to the landlord in these situations.

Although this introduction was good news for renters, the requirement for tenancies to be registered under the Residential Tenancies Act 2004 when paying for children may add a layer of compliance to rental arrangements for college students, which may previously have been more informal. It is also worth noting that no tax credit is available where the payment is made to a State body, a housing authority or an approved housing body or by a tenant who is in receipt of any social welfare rent supplements, housing assistance or support.

Incentive for Landlords

Although there is much negativity in media circles around introducing measures to assist "landlords", it is important to note that an individual with a second property is often in the higher, marginal tax bracket and therefore suffers an effective tax rate of as high as 52% on their rental profit. This is obviously a huge disincentive to landlords to rent a property in many instances, especially when it leads to additional compliance charges and obligations to complete tax returns, draw up tenancy agreements and make relevant registrations. Therefore, it was welcome that some small measures were introduced to encourage landlords to bring properties to the rental market.

One of these measures was improvements to the availability for deduction of pre-letting expenses. From 1 January 2023 the amount of pre-letting expenses allowed as a deduction has been increased from €5,000 to €10,000 and the period of vacancy has been reduced from 12 months to 6 months.

Not included in the Finance Bill but contained in the Finance Act was a deduction for retrofitting. This allows a rental deduction of a maximum of €10,000 per property for up to two properties. The spend must have been incurred on improving the energy efficiency of the property, and a grant from the Sustainable Energy Authority of Ireland towards the cost of the work must have been received.

These are two welcome additions to encourage landlords to spend money on older properties that they can then bring to the market.

Incentive to Sell

There was no cut to capital gains tax (CGT) on the sale of non-PPR properties, which certainly would have encouraged movement in the market, but there was the introduction of the vacant homes tax, which is hoped to result in vacant properties coming to the market. This will apply to properties used as a dwelling for fewer than 30 days a year. For such properties, the owner will incur a charge equal to three times the relevant local property tax charge (before the local adjustment factor is applied). There are some exemptions from the charge, including where the property is being actively marketed for sale or rent, which is obviously one of the main aims of the new legislation. The first chargeable period for the vacant homes tax will be the 12-month period beginning on 1 November 2022. The return filing date will be 7 November after the end of the chargeable period. The date for payment of vacant homes tax will 1 January immediately following the chargeable period.

Although they are not directly a measure to encourage property sales, there have been changes to the provisions on rent paid to non-resident landlords that possibly could have the positive effect. In addition to withholding the relevant tax, the tenant or agent must provide Revenue with details on the landlord, the property and the rental payments. In some scenarios this may prove to be too

much information/too onerous a compliance requirement for a non-resident landlord, and they may decide to exit the Irish rental market.

We have not looked at the RZLT in this article as it is analysed by Sinead Lew, Aaron Mullan and Clodagh Casey in this issue, "Residential Zoned Land Tax: Latest Updates and Operational Considerations", but it is another measure that may give gentle encouragement to landowners to sell sites for development.

Incentive to Buy/Build

The Help to Buy scheme was introduced in 2017 and has been used by more than 35,000 people to date. It currently provides for a refund of tax of up to €30,000 for first-time buyers of new-builds from an approved contractor or for self-builds. The property value must not exceed €500,000, and the mortgage must be for at least 70% of the value. This scheme, which had been due to expire on 31 December 2022, has been extended for two years, to 31 December 2024, which is good news for new entrants to the property market.

The residential development stamp duty refund scheme reduced the stamp duty on a site from 7.5% to an effective rate of 2% where the site was developed for residential use. The commencement date for construction, which was to be before 31 December 2022, has been extended by three years, to 31 December 2025, which is welcome news for people looking to buy a site to develop.

The Living City Initiative, which allows a tax deduction for expenditure on refurbishing or converting a property in specific regeneration areas of our six cities, has been extended by five years to 31 December 2027. Owner-occupiers can now claim the deduction over seven years rather than ten, as previously legislated for, and they can now carry unused losses forward until a full nine years after the spend has elapsed.

These extensions and improvements to schemes are good news for first-time buyers and people looking to purchase a site for developing their home. However, it is difficult to discuss incentives to build arising from Finance Act 2022 without mentioning the disincentive introduced by the concrete levy, which will come into effect from 1 September 2023. The new provisions will apply a 5% levy on all concrete products on the supply date. It is to apply to the first supply of the product. It was initially suggested in the Budget speech that this may be higher, but a 5% levy will still have a negative impact on the cost of building your own home.

Conclusion

Overall, there have been some welcome announcements for renters and house-hunters in Finance Act 2022. However, it may take something more substantial to encourage the supply of residential property to the market that is needed to alleviate lack of supply and increasing cost. An improvement for landlords regarding the potential income tax charge of 52% or a CGT incentive on property sales similar to that in s604A TCA 1997 could potentially see an increase in properties for rent and/or sale.

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Finance Act 2022: Disposal of Certain Patent Rights – Amendments to s757 TCA 1997

Introduction

Section 757 TCA 1997 is a specific legislative provision that imposes a charge to tax[1] in respect of the receipt of a capital sum on the disposal of certain "patent rights".[2] Although it has been on the Irish statute books since 1959,[3] s757 has come into sharper focus recently for many taxpayers and multinational groups, given the increased importance of intellectual property (IP) in current business models. Accordingly, structuring IP from an efficiency perspective is a key consideration leading to an increase in transactions involving the purchase

1 Being a charge to corporation tax for corporate taxpayers and a charge to income tax for other (non-corporate) taxpayers.

2 The term "patent rights" for these purposes is defined in s754 TCA 1997 and "means the right to do or to authorise the doing of anything which but for that right would be an infringement of a patent".

3 See https://www.irishstatutebook.ie/eli/1959/act/18/section/50/enacted/en/html#sec50.

and sale of IP (including the onshoring of IP to Ireland from abroad to align with existing substance of Irish operations).

Section 26 of Finance Act 2022 introduced certain welcome amendments to s757. Before examining the specific amendments, it is worth understanding the background and the nature/scope of the charge to tax imposed by s757.

Background: Charge to Tax under s757

Section 757 applies to both Irish-resident and non-Irish-resident sellers of patent rights, although the scope of the charge is necessarily different in each case.

"Patent rights" are defined in s754(1) TCA 1997 for these purposes as "the right to do or to authorise the doing of anything which but for that right would be an infringement of a patent". By definition, therefore, it can be seen that "patent rights" are necessarily lesser rights than the rights held by the outright patent holder.

Charge to Tax for Irish Resident

For an Irish resident, s757 charges to tax any capital sum received on the sale of worldwide patent rights (wherever situate) as Case IV income at a rate of 25%. In calculating the charge to tax, a deduction is allowed for any capital sum incurred in acquiring the patent rights. The capital sum is reported in the taxpayer's tax return for the chargeable period in which the sale occurs, and any tax due to Revenue forms part of the taxpayer's usual preliminary tax obligations for the period.

Charge to Tax for non-Irish Resident

For a non-Irish resident, however, the charge to tax under s757 is narrower in scope. A non-Irish resident is similarly subject to a charge to tax under Case IV at a rate of 25% on net taxable proceeds received from the sale of patent rights but only to the extent that those patent rights are Irish-registered patent rights. To the extent that any capital sum was incurred by the person in acquiring the Irish patent rights in the first instance, this amount is also taken in consideration in arriving at the net taxable proceeds.[4]

The disposal of all other patent rights is not subject to a charge under s757.[5] This means that a valuation exercise may be required to determine the value of the Irish patent rights relative to the non-Irish patent rights and other IP that may be transferring as part of the same disposal transaction, which, from a taxpayer's perspective, can be a costly and time-consuming exercise. It should be noted that for non-Irish persons who are resident in a treaty partner country, depending on the terms of the relevant treaty, protection against the application of a charge to tax under s757 may be available. Finally, a withholding tax mechanism is in place in accordance with s238 TCA 1997 for the collection of the tax where the seller is a non-Irish-resident person.

Interaction with CGT Rules

At the time of its enactment in 1959, the purpose of s757 was to provide a mechanism to tax capital sums received on the sale of certain patent rights, and it obviously pre-dated the introduction of Ireland's CGT regime in 1975. In that context, it is a matter of speculation whether s757 would have been enacted as it was had a CGT regime been in place at that time (being the primary mechanism for the taxation of capital receipts on sale). Notwithstanding this, it is fair to say that the interactions between s757 and the CGT rules have caused unnecessary complexity in impacted transactions (complicated further by the differential tax rates that may apply)[6] and a lack of certainty

4 Defined as "a patent granted under the laws of the State [Ireland]", also in s754. This includes granted patents filed in Ireland or via the European Patent Office designating Ireland.

5 Such disposals may instead be subject to a charge to CGT. Note, however, that the scope of the charge to Irish CGT is narrower for a non-Irish resident person, who, in accordance with s29(3) TCA 1997, is subject to CGT on any gain arising on the disposal of Irish-situate assets only to the extent that, at or before the time when the chargeable gains accrued, the assets were used in or for the purposes of a trade carried on by the non-resident in Ireland through a branch or agency (or were used or held by or for the purposes of the branch or agency).

6 Transactions may have elements taxed at the 12.5%, 25% (via an s757 charge) or 33% (CGT) rates.

on the application of the tax rules in a number of respects, which is clearly unsatisfactory, given the competitive international landscape. The Finance Act 2022 amendments are a welcome step to deal with a number of these areas and are summarised below.

Finance Act 2022 Amendments

The amendments (broadly) seek to address the following:

- clarification of the scope of the charge with respect to the sale of patent rights and other disposals (including the outright sale of patents) for both Irish residents and non-Irish residents and
- provision of a group relief mechanism for relieving an immediate charge to tax under s757 on the transfer of patent rights between companies where the patent rights remain within the charge to Irish tax (similar to the existing CGT group relief provisions).

Area 1: Clarification of scope of charge

Finance Act 2022 makes the following amendment to s757 with the insertion of a new sub-section (6):

> *"(a) This section* [s757] *shall not apply to a sale which results in the purchaser being entitled to have their title as applicant, or co-applicant, for the patent, or proprietor, or co-proprietor, of the patent, registered in the Register of Patents under the Patents Act 1992* ***or*** *in accordance with the analogous law of another jurisdiction,* ***or*** *being absolutely entitled as against the applicant, or co-applicant, for the patent, or proprietor, or co-proprietor, of the patent.*[7]
>
> *(b) In this section, 'applicant' and 'proprietor of the patent' shall have the same meaning, respectively, as they have in the Patents Act 1992 and 'co-applicant' and 'co-proprietor' shall be construed accordingly* [emphasis added]*."*

We understand that the statutory intention of the new sub-section (6) is to clarify that a sale that results in an outright disposal of a patent (whether Irish or non-Irish) and a sale of any patent rights that effectively afford rights to the purchaser that are akin to those of an outright patent holder (by virtue of the purchaser's being "absolutely entitled" as against the patent holder) should not fall within s757 but should instead be dealt with through the CGT rules. This is on the basis that such sales represent disposals of capital assets and should be taxed as such rather than as income. Indeed, this intention would seem to be borne out by the text of the Explanatory Memorandum accompanying the Finance Bill, which proposed the new sub-section (6) in the first instance, stating that it:

> "is a technical amendment confirming that the outright sale of a patent or a patent pending is not a sale of patent rights. This confirms that the sale of a patent is chargeable to CGT, whereas the sale of patent rights for a capital sum is subject to tax as income."

Interestingly, however, the Explanatory Memorandum does not comment on the final piece of the amendment (being the sale of patent rights that are effectively rights akin to those of an outright patent holder, by virtue of the purchaser's being "absolutely entitled" against such a patent holder).

Given the stated intention behind the amendment, it is worthwhile exploring the impact of the sub-section in the context of a number of areas of uncertainty that have arisen in the past.

Outright disposal of patents: Subject to CGT only

We understand that the outright disposal of a patent has generally been regarded as falling outside of the charge under s757 (on the basis that it did not comprise the disposal of a somewhat lesser interest in "patent

7 These apply to both patents and patent-pending applications – for ease of reference, the remainder of this article refers to patents only.

rights”). This treatment has now been put on a legislative footing.

A more interesting question that had arisen in practice is whether the outright disposal of a patent could comprise the sale of both the legal title to the patent itself **and** a bundle of other rights attaching to the patent (which could be seen as “patent rights”, given the definition in s754(1), noted above). Again, this gave rise to uncertainty regarding the scope of application of s757. Sub-section (6) has now clarified that any sale of a patent (or patent pending) should be outside the charge to tax under s757 such that the potential distinction between patents and patent rights in the context of an outright disposal should not arise.

Finally, the above exclusion is also extended to non-Irish patents (which is obviously relevant for Irish-resident sellers of patents), i.e. where the purchaser is entitled to register their interest “in accordance with the analogous law of another jurisdiction”. We understand that the intention here is for sub-section (6) to apply also to the disposal of non-Irish patents under the equivalent patent regime of the other jurisdiction (acknowledging that not all countries’ patent regimes apply in the same manner as the Irish patent regime). It is not entirely clear what factors are taken into account in determining whether a non-Irish regime is “analogous” in this context and whether this is an area that would give rise to practical difficulties regarding the application of sub-section (6). Further guidance on this point would be welcome.

Where purchaser “absolutely entitled”

In addition to an outright disposal of a patent, the sale of certain other interests is now confirmed to be excluded from the charge to tax under s757. The exclusion applies to sales that result in the purchaser’s being “absolutely entitled as against the applicant, or co-applicant, for the patent, or proprietor, or co-proprietor, of the patent”.

Clearly, the exclusion includes the sale of certain lesser interests than a patent (as the purchaser will not hold legal ownership of the patent) – the meaning of “absolutely entitled” must be understood to comprehend the scope of the exclusion here. The term is not defined in s757 itself but is used in a number of places in the CGT Acts and defined in s567(1) TCA 1997 (in the context of assets held in a fiduciary capacity) as follows:

“References in the Capital Gains Tax Acts to any asset held by a person as trustee for another person absolutely entitled as against the trustee are references to a case where that other person has the exclusive right...to direct how that asset shall be dealt with.”

Section 567 mirrors the equivalent UK tax legislative provision,[8] and the meaning of the term “absolutely entitled” was considered in the UK cases of *Hart (H.M. Inspector of Taxes) v Briscoe and Others* and *Hoare Trustees v Gardner (H.M. Inspector of Taxes)*.[9] The judgment in *Hart* held that:

“the expression ‘absolutely entitled’ used in the phrase ‘absolutely entitled... as against the trustees’ did not mean beneficially entitled; and the [UK equivalent legislative provision to s567] was not intended to introduce the requirement that for a person to be ‘absolutely entitled’, he must be beneficially entitled”.

The judgement in *Hoare Trustees* further held that “there is no particular reason to equate absolute entitlement with beneficial ownership...but rather with the ability to give a good discharge”.

If it is assumed that this case law would be followed in Ireland, although absolute entitlement does not equate to outright ownership of a patent, it does require an exclusive right in directing how the asset

8 Which was then contained in paragraph 9, Schedule 19, Finance Act 1969.

9 Heard together at the UK High Court (Chancery Division) [1976–1980] 52 TC 53.

should be dealt with. Whether that threshold is met in terms of the powers of the purchaser is a matter of legal analysis that will need to be considered on a case-by-case basis, and the legal documentation (e.g. licences, sale agreement) will be critical to that analysis.

Area 2: Group relief

The second Finance Act 2022 amendment to s757 provides for a form of group relief for transfers of patent rights between corporate group members where the patent rights remained within the charge to Irish tax (e.g. in the case of a transfer between two Irish-resident group companies). Before Finance Act 2022, the absence of a group relief provision in s757 was causing significant issues for Irish corporate groups seeking to realign their IP holdings within their Irish group of companies (including after the acquisition of IP from outside Ireland).

Companies within the charge to Irish CGT claim CGT group relief (under s617 TCA 1997 to the extent that the provision applies) on certain IP transfers, including the transfer of patents, where the assets transfer between two Irish companies in a capital gains group – this avoids an upfront charge to tax (with the transferee's assuming the tax basis of the assets of the transferor for future disposals). By way of contrast, companies seeking to undertake any type of internal restructuring involving IP had to consider the charge to tax under s757 for any patent rights transferring, as these assets fell outside of the charge to Irish capital gains tax and, consequently, group relief was not available. Contemplating such a transaction therefore required additional costly and burdensome valuation exercises to identify the value of the patent rights element of the business, often resulting in transactions' being restructured or, in some cases, abandoned.

After Finance Act 2022, companies can more efficiently structure and undertake intra-group reorganisations with respect to the transfer of IP, including patent and patent rights. To the extent that s617 group relief is otherwise available, it now also extends to the transfer of patent rights, alleviating (1) the need for a separate valuation of patent rights and (2) an immediate tax charge of 25% on any capital sum that may otherwise be attributable to the sale of patent rights. This is a very welcome development for taxpayers.

Conclusion

Overall, the clarification of the scope of the charge to tax under s757 and the introduction of a form of group relief is a positive change.

Taxpayers will, however, need to continue to analyse the provisions of s757 in detail in considering transactions involving IP. Relevant issues arising from the Finance Act 2022 amendments might include:

- the nature of any patent rights transferring (in particular, whether the transaction results in the purchaser's being "absolutely entitled" against the patent holder);
- modelling the impact of the charge to CGT versus s757 – relevant considerations here might include the impact of rate differential (33% versus 25%) and scope of charge to CGT for non-residents; and
- the availability of group relief for transfers of patent rights between members of an Irish group, in accordance with the provisions of s617.

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Share Remuneration: An Alternative Benefit for Employees

Introduction

Inflation rose steeply in 2022. According to the Grant Thornton Irish Business Voice Report, in recent months Irish companies have noted an increase in requests for higher wages as they fight to secure and retain staff. Current concerns around inflationary pressures and global economic unrest have led to a renewed focus on job security. Employers may be looking to alternative competitive benefit packages for attracting, retaining and rewarding employees.

Additionally, the Covid-19 pandemic shifted most aspects of peoples' lives: the way we work was fundamentally altered, with the result that employees have become more accustomed to alternative packages, and there is a greater value placed on benefits and working arrangements.

Share-based remuneration schemes are an alternative option for employers to remunerate and reward employees. However, they come with their own terms, conditions and accountabilities.

Share-Based Remuneration Schemes

Share-based remuneration schemes, or "share schemes", are long in operation in many Irish

companies. They are a means additional to salary for rewarding and retaining employees in a tax-efficient manner. The structure of such schemes can give employees a financial stake in the success of their employer company and consequently encourage greater employee commitment and loyalty.

For start-up companies, employees' participation in share schemes can be an important factor in bridging the gap between salary packages offered by established companies and start-ups while contributing to employees' buy-in to the success of the start-up. Similarly, share schemes can enable SMEs to compete with larger firms on a more level playing field in terms of hiring and retaining talented staff in a highly competitive labour market.

Tax Treatment

Although tax is unlikely to be the sole driver of establishing or operating share schemes, when combined with the commercial benefits, the ability to incentivise employees while obtaining beneficial tax treatment is important. Employers must not, overlook the administration of the schemes and the terms and conditions for beneficial tax treatment.

An example of such beneficial treatment is that employees who participate in share schemes may reduce their total tax liabilities on acquisition of the shares at a favourable price or on subsequent disposal of the shares. For instance, under the Key Employee Engagement Programme (KEEP), employees pay tax on the shares only when they dispose of them, as opposed to when they exercise the option to acquire the shares. From the employers' perspective, they can save on employer PRSI (currently 11.05%) where conditions of the schemes are satisfied. This may be a considerable financial saving compared to other forms of remuneration.

Types of Share Schemes

The main categories of share-based remuneration that employers can offer their employees are:

- Revenue-approved share schemes:
  - approved profit-sharing schemes (APSS) and
  - savings-related share options (SAYE).
- Unapproved share schemes:
  - unapproved share options,
  - restricted shares ("clog" schemes) and
  - restricted stock units (RSUs).
- Key Employee Engagement Programme
  - The KEEP, akin to a share-based remuneration scheme, was introduced in Finance Act 2017 and effective from 1 January 2018. The aim of the scheme is to provide SMEs with a tax-efficient means of granting share options to employees.

Revenue-Approved Share Schemes

One of the key aspects of Revenue-approved share schemes is that participation must be open to every employee (full-time, part-time or temporary) and every full-time director chargeable to tax under Schedule E who satisfies the qualifying period, not exceeding three years.

The requirement that the scheme is open to all employees to participate will be not appropriate for many Irish businesses as it prohibits flexibility to award key staff on a selective basis. The operation of the scheme may have an adverse effect on key employees who would prefer a selective incentive. This is one of the reasons why such schemes are not used more widely by employers to reward their employees.

Approved profit-sharing schemes

The tax advantages associated with this scheme mean that it can offer an alternative to a cash bonus, for participants provided this is not part of a salary sacrifice arrangement. Companies can claim tax relief on the cost involved in trustees' acquiring shares and the costs associated with establishing the scheme, and they can decide on a year-by-year basis if they wish to offer awards, giving them further

control and flexibility with regard to the overall share scheme process.

The employer's and employee's goals are aligned as, if the company does well during the qualifying period of the APSS, the employees will fare better when they decide to sell their shares in the future. This will further incentivise both management and employees to reach their goals.

The key features of an APSS are:

- Shares can be received free of income tax subject to certain criteria.
- USC and employee PRSI is charged on the initial appropriation of the shares.
- CGT applies on any gain on disposal of the shares.
- Trustees of an APSS are required to file an annual return Form ESS1 with Revenue by 31 March in the year following that year of assessment.

Save As You Earn

The SAYE scheme also provides tax advantages, with no income tax charged on the grant or exercise of the share option (provided the option is not exercised before the end of the third year from the date of grant). SAYE offers a flexible and risk-free way for an employee to save: employees have the option to receive their total savings if they do not want to purchase the shares, i.e. use the option to exercise.

Companies can also set a minimum service requirement for participants, of a maximum of three years, and this scheme can be used to incentivise the retention of employees working in the company.

With monthly savings amounts ranging from €12 to €500 for employees to enter the scheme, it can be used by smaller companies to enhance the growth of their business. However, it is uncommon to see the operation of this scheme in larger companies due to the amounts that are contributed.

The key features of SAYE are:

- Shares are exempt from income tax on the grant and exercise of the option.
- Employers must report the USC and employee PRSI through the payroll.
- CGT applies on any gain on disposal.
- Where the options are exercised within three years, they would become unauthorised and the employee is required to file a Form RTSO1 within 30 days of exercise and pay the necessary tax to Revenue.
- Employers are required to file a Form SRSO1 with Revenue by 31 March in the year after the allocation of the shares.

Unapproved Share Schemes

Irish businesses may opt for unapproved share schemes as they allow greater flexibility in rewarding key staff with equity as an incentive. However, the share awards will be liable to tax at the employee's marginal rate on receipt of the share award or on the exercise of a share option. Employees may also be liable to CGT, currently at 33%, on any future disposal of the shares.

Share options

A share option is an option granted to an employee to subscribe for shares in the company at a predetermined price in the future. It is expected that employees will be required to complete a certain period of service before being able to exercise their options, and they will not have any rights relating to the shares until the option is exercised.

Employers may tend towards the use of share options as all tax obligations and risks on exercise lie with the employee and the employer has no responsibility for operating Irish payroll taxes on the exercise of an option.

The key features of share options are:

- Income tax, USC and employee PRSI arise on the exercise – no tax liability arises if the option is not exercised.

- The employee must file a Form RTSO1 within 30 days of exercise and pay the necessary tax to Revenue.
- In the year in which an employee exercises a share option, they become a chargeable person and are required to file an income tax return Form 11 and are subject to the self-assessed income tax system.
- The disposal of shares is subject to CGT at 33%.
- Employers are required to file a Form RSS1 with Revenue by 31 March in the year after grant or exercise.

A common issue arises whereby an employee disposes of the share award to cover the tax payable, which reduces the benefit of the share award for employees. The option for employees to sell their share options to cover the tax payable may be difficult to achieve in the case of private companies, where there is no readily available market for the shares.

Restricted shares

Restricted shares may be most suitable for an employer that wishes to provide free shares to its employees with a relatively low value or wishes to reduce the cost further with a "clog", (being a time restriction on disposal of the shares). Where a company is not in a position to issue multiple classes of shares and does not have the ability to provide growth shares, restricted shares may be the preferable option for employers.

The upfront tax charge may not be attractive for employees, as there is no option for the employee to dispose of the shares to fund the tax cost for the duration of the clog period. It is also important for individuals to understand that there will be a clawback of the abatement (clog relief) if the original restriction is removed or varied during the clog period, and there is a risk that additional income tax will be due.

The key features of restricted shares are:

- Income tax, USC and employee PRSI arise on the receipt of the shares.
- There may be an abatement of the income tax charge (of between 10% and 60%).
- Any gain on the disposal of the shares is subject to CGT at 33%.
- Employers are required to file a Form ESA with Revenue by 31 March in the year after grant or the end of the clog period.

Restricted stock units

An RSU is a grant or a promise to an employee to the effect that, on completion of a "vesting period", the employee will receive a number of shares or cash to the value of such shares. It is important for the vesting period to be completed to retain key staff, as no shares or cash will pass to an employee until the vesting period has passed.

Vesting periods are usually satisfied by the passage of time, the individual's performance or the achievement of corporate goals. Where the performance of an employee is a key factor in whether they receive the shares, it can be used to incentivise employees to exceed expectations and perform to the highest standards.

The key features of RSUs are:

- Income tax, USC and employee PRSI are payable on either:
  - the market value of the shares at the date of vesting or
  - the cash payment (if cash equivalent is received).
- Any gain on disposal of the shares is subject to CGT at 33%.
- Employers are required to file a Form ESA with Revenue by 31 March in the year after vesting – reporting of the grant of RSUs is currently optional.

When a RSU vests, employees may want to sell shares to cover the income tax charge on the shares. Revenue will defer collection of the tax up to the date the shares are settled provided such date is within 60 days of the vesting date. However, there is an overarching deadline of 23 January as the final date by which all tax

liabilities are paid in respect of the previous tax year[1]. On a separate matter, the employee may not have sufficient remuneration to cover the tax charge, leading to a timing issue for employers regarding collection of the tax. Revenue guidance[2] states that in these circumstances employers may pay the tax and then set up an arrangement for the tax to be repaid by the employee. It is important to note that where the employee does not repay the tax to the employer in full before 28 February of the following year, the employer is required to treat any outstanding tax as a benefit for the employee.

Share-Based Remuneration Developments

Revenue has stated that there are some inconsistencies and irregularities in the tax treatment of share option schemes.[3] This may be because employees are not aware of their tax reporting and filing obligations where share options are exercised or where there was a disposal of shares. In the final quarter of 2022, Revenue contacted Irish employers who operate share option schemes and provided them with information for their employees regarding their reporting and filing obligations. Although this contact from Revenue covered share options, it is possible that similar contact regarding all share-based remuneration may follow in the not-so-distant future.

There may also be an increased focus on companies that may have been incorrectly recorded share remuneration as notional salary for benefit-in-kind purposes via payroll, as opposed to the correct label – "share-based remuneration". It is important that all share-based remuneration is recorded correctly via payroll from the first day.

KEEP

SMEs had long lobbied the Irish Government for a scheme to be introduced to provide them with a simple and tax-efficient means of granting shares to key employees. The Department of Finance heeded, and Finance Act 2017 provided for the KEEP. The aim of the scheme is to provide SMEs with a tax-efficient way to grant share options to employees.

Tax treatment

The big selling point of the KEEP is that employees pay tax only when they dispose of the shares, as opposed to when the option to acquire the shares is exercised. Generally, income tax is chargeable on any gain realised by an individual on the exercise of a share option. However, under the KEEP, employees pay CGT on a future disposal of the shares. This creates a tax benefit of between 16% and 19% in the rate of tax payable by the employee.

Developments

Although the initiative was greatly welcomed, the uptake of the regime has been lower than anticipated. SMEs make up the vast majority of firms in the Irish economy, yet a significant plateauing of uptake has been observed since the KEEP's establishment.

It is evident that the Department of Finance is aware of the lower-than-expected uptake. In early 2022 the Department engaged in a public consultation to gain insight into potential barriers to the regime. Respondents appeared to emphasise throughout their feedback that, although slight improvements have been implemented since the scheme's establishment, further changes were desirable.

In Finance Act 2022 some changes were introduced to enhance the KEEP. One such change provides for CGT treatment to apply to the buy-back of shares by the company from the employee where certain conditions are satisfied. This is a welcome measure as it addresses a significant barrier for SMEs and the uncertainty surrounding the interaction

1 Share Schemes – Chapter 02 – Restricted Stock Units (RSU) (revenue.ie).

2 https://www.revenue.ie/en/employing-people/benefit-in-kind-for-employers/taxation-of-benefit-in-kind/insufficient-wages-to-deduct-tax.aspx.

3 Minutes of Main TALC meeting held on 6 September 2022, https://www.revenue.ie/en/tax-professionals/talc/main-talc-minutes/2022/talc-minutes-090622.pdf.

between KEEP shares and share buy-backs. SMEs do not generally have a ready market waiting to purchase their shares when the employees wish to sell. Many SMEs would therefore be interested in buying back the shares that they previously granted. In ordinary buy-back circumstances, CGT treatment would be allowed only if the buy-back were deemed to fulfil a number of conditions, including the "trade benefit test". Until Finance Act 2022, it was unclear whether KEEP shares would qualify for CGT treatment under a buy-back. Employees of SMEs have been understandably reluctant to obtain KEEP shares when they could not necessarily see to whom they could sell them in the future.

Finance Act 2022 extends the scheme to the end of 2025; it had been due to expire at the end of 2023. Additionally, the company lifetime limit for KEEP shares is increased from €3m to €6m. Amendments introduced in Finance Act 2019 concerning group structures and qualifying employees are brought into effect. Lastly, the definition of a "qualifying individual" has been extended to include certain part-time and flexible-working employees and for the movement of employees within qualifying group structures.

Future of KEEP

The most frequently mentioned barrier for SMEs to participate in the regime is in relation to share valuations. Under the KEEP scheme, options must be granted at not less than their market value at the date of the grant. If companies are required to know the value of the shares they are issuing, they need to know the value of the company. Obtaining a professional valuation is not an everyday expense for any company but can be particularly costly for SMEs.

The scheme's intention is to help SMEs to compete with larger companies; however, the current rules do not correlate with how SMEs are commercially structured and funded. If a company chose to roll out share options over a number of years, it would likely be required to obtain valuations each time, which would understandably be unfeasible for many SMEs.

SMEs are calling for Revenue to adopt a "safe harbour" approach for valuations. It can be frustrating for SMEs to see a similar "safe harbour" approach being implemented and running successfully in the UK. In the UK, companies can agree on a valuation with HRMC, which holds for 90 days unless there is a significant event.

The KEEP scheme has the potential to boost Ireland's SMEs' recruitment power and their ability to compete with larger companies. However, despite changes introduced in Finance Act 2022, significant roadblocks remain.

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Recent Stamp Duty TAC Determinations: A Review

Introduction

As any practitioner who advises in the area of stamp duty is well aware, there is a distinct deficit of case law, particularly in this jurisdiction. Additionally, many of the already too few decisions belong to the English judiciary and largely to a different era.

Stamp duty is a tax that heavily relies on legal principles where tax really does "follow the law". Fundamentally a charge to stamp duty requires a written instrument, and it is usually the law that dictates both the existence and the content of that written instrument.

Without case law, there is insufficient discourse in the public domain on the application of the stamp duty legislation. A very important by-product of reasoned legal arguments and judicial considerations of those legal arguments is the assistance given to practitioners in providing advice and developing their own views when advising.

In its absence, theoretical and academic arguments must be relied on without having withstood the level of scrutiny that comes from being examined before a court. There is a tendency to a lack of attention to detail, sometimes underpinned by a lack of understanding of the legal principles which form the basis of an opinion or interpretation.

There have been two recent decisions on stamp duty by the Tax Appeals Commission (and later the High Court and Court of Appeal) that are topical and of importance for practitioners working in the area and also for practitioners taking an appeal before the TAC. This article considers these decisions.

27TACD2021

Tax appeal 27TACD2021 concerned an appeal against assessments to stamp duty raised in accordance with s31 and/or s31A SDCA 1999. The taxpayer was one of five members of a partnership that held a property. The acquisition of the property was part of a capital allowances scheme, and the structure and transaction documents form part of a document pack that would have been common for these types of schemes. The key documents were:

- the "third put and call option agreement", dated 3 November 2006 (the "2006 option agreement");
- the "facility agreement", dated 28 February 2013;
- the "mortgage, charge and assignment", dated 28 February 2013; and
- the "notification of assignment by investors to promoters (appellants)", dated 28 February 2013.

To finance the development of the property, the partnership entered into an arrangement with third-party investors, agreeing to sell the property to the investors by way of a lease for a period of 999 years. An exit mechanism for the investors was put in place in the form of a put-and-call option agreement (the "option agreement") granting them the option to require the members of the partnership to purchase all of the investors' rights in the property.

In 2013, under refinancing arrangements, the investors entered into a deed of mortgage, charge and assignment with a bank ("Bank A"), which obliged them to assign their interest in the option to Bank A as security for the loan. The investors exercised the option by way of notice in writing to the appellants in 2014, and the partnership concluded the repurchase by making a payment of *c*. €11m to the investors in February 2014.

Revenue viewed the notice together with the option agreement as constituting a conveyance on sale to the members of the partnership for the purposes of s31 SDCA 1999. Additionally, or in the alternative, it was submitted that they constituted a contract or agreement for the sale of an estate or interest in land in respect of which more than 25% of the consideration has passed and were liable under s31A SDCA 1999.

The appellant asserted that, as the option agreement had been fully assigned to Bank A in 2013, it was not a validly exercised notice. The Appeal Commissioner agreed with this, finding that the option agreement had been absolutely assigned by the investors to Bank A in 2013.

In determining that the exercise notice had been assigned to the bank and that therefore the exercise notice could not have been validly exercised, the Appeal Commissioner reviewed submissions and considerable legal analysis to conduct a thorough review of the case law on assignments and charges.

What is of vital importance in this TAC decision is the level of scrutiny and legal analysis that was conducted by counsel for both the appellant and the respondent of an area completely unrelated to stamp duty. The law of assignments and charges was the area of focus, and in arriving at a decision, the Appeal Commissioner relied on the difference between an absolute assignment and an assignment by way of charge only.

In making this investigation, a complete dissemination was conducted of the existing UK case law on the difference between an absolute assignment and an assignment by way of a charge only; Irish case law on the interpretation of commercial contracts; and leading textbooks on the principles of charges and assignments. Each transaction document, together with its terms and structure, was unpicked and reviewed, with submissions made on their relevance and impact by both counsel.

The Appeal Commissioner at paragraph 6 articulates the reason for this area of focus in stating: "The legal interpretation of documents relating to bank loan facilities provided by The Bank A to the third party Investors goes to the heart of this appeal".

On review of all of the foregoing, the Appeal Commissioner determined that there had been an absolute assignment of the rights and obligations under the 2006 option agreement by the investors to Bank A on the 2013 refinancing and under the deed of mortgage, assignment and charge. The Appeal Commissioner concluded that as there had been an absolute assignment of the 2006 option agreement, the investors no longer had any interest in the option agreement and therefore had no right to exercise the option. As there was no right to exercise the option, the exercise notice was invalid and no charge to stamp duty arose under s31 SDCA 1999.

Although it was ultimately not relevant to the Appeal Commissioner's determination, Revenue's submission in relation to the application of s31 SDCA 1999 is of interest to anyone advising in this field. Revenue argued at paragraph 43:

"The Put Option Notice is chargeable to stamp duty under s31 of the SDCA. Section 31(1) provides:

'Any contract or agreement –

(a) for the sale of any equitable estate or interest in any property, or

(b) for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situated outside the State, or goods, wares or merchandise, or stock or marketable securities (being stock or marketable securities other than any share warrant issued in accordance with section 88 of the Companies Act, 1963), or any ship or vessel or aircraft, or part interest, share, or property of or in any ship or vessel or aircraft, shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold.'

The exercise of an option creates a binding contract of sale which is enforceable by way of specific performance. Therefore, there is a contract of sale for the purposes of s52 of the Land and Conveyancing Law Reform Act 2009 which provides that 'the entire beneficial interest passes to the purchaser on the making...of an enforceable contract for the sale or other disposition of land'.

Where the exercise of an option is recorded in writing, the option agreement and the exercise of the option may together be considered to form part of the one transaction or contract and thereby render the exercise of the option stampable and chargeable to duty as an agreement for sale of an interest in property under Section 31 SDCA."

The difficulty is that these arguments were not considered by the Commissioner during the TAC case, as the invalidity of the exercise notice rendered redundant any consideration of the arguments relating to the exercise notice together with the 2006 option agreement forming a stampable instrument under s31 SDCA 1999.

It would be wise of practitioners to be very mindful of this analysis when advising on options.

It was further submitted by Revenue that:

"Further, or in the alternative, a charge to stamp duty also arises pursuant to s31A SDCA which states:

'(1) Where –

(a) the holder of an estate or interest in land in the State enters into a contract or agreement with another person for the sale of the estate or interest to that other person or to a nominee of that other person, and

(b) a payment which amounts to, or as the case may be payments

> > which together amount to, 25 per cent or more of the consideration for the sale has been paid to, or at the direction of, the holder of the estate or interest at any time pursuant to the contract or agreement,
>
> then the contract or agreement shall be chargeable with the same stamp duty, to be paid by the other person, as if it were a conveyance or transfer of the estate or interest in the land.'"

The partnership in fact paid €11,583,650 for the property on 27 February 2014, which reflects the full consideration due for the purchase of the property.

In a highly unusual move, the Appeal Commissioner made a finding that had not formed part of the formal submissions made by Revenue. The Commissioner undertook a review of the overall transaction and the documentation effecting the transaction and concluded that the payment made by the partnership of €11,583,650 was in pursuance of an agreement between the parties for the acquisition of the property as provided for under s31A(1)(a) and s31A(1)(b) SDCA 1999.

The Appeal Commissioner found that the "agreement" was the combined interdependent set of agreements represented by the transaction documents of 2013 and the option agreement of 2006.

The determination found that stamp duty was payable by the partnership on foot of this transaction under the provisions of s31A SDCA 1999, with the appellant and his partners being jointly and severally liable.

Summary

The most interesting elements of this case and decision can be summarised as follows:

- the importance of the form and structure of the legal documentation effecting a transaction;
- the application of established legal principles in determining the substance of a transaction;
- a review of the principles for a charge to stamp duty under both s31 and s31A SDCA 1999; and
- the Appeal Commissioner is not precluded from making a determination outside of the formal submissions proffered by the appellant and/or respondent.

It is also worth noting that the Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, and the findings of the Commissioner may be overturned. However, until that time, the findings of this case are relevant.

67TACD2020

The second TAC case for review, 67TAC2020, also relates to property and focuses on sub-sale relief, a relief that is widely known, having fallen under huge scrutiny over the years and been the subject of a number of related anti-avoidance provisions. Sub-sale relief has been significantly amended over the years; the changes were introduced under the Finance Act 2007 but never enacted with the final form anti-avoidance provisions ultimately made effective under the Finance Act (No. 2) 2013.

Sub-sale relief under s46 SDCA 1999 applies to a situation where a person (the original purchaser) contracts for the purchase of property and then, before a conveyance of the property is taken, contracts to sell the property (or part of it) to one or more sub-purchasers. The effect of the relief is that where the conveyance of the property is direct from the original vendor to the sub-purchaser, stamp duty is charged only once, on the consideration passing under the second contract from the sub-purchaser to the original purchaser. It applies whether the price under the second contract is greater or less than the price under the first contract.

Sub-sale relief is provided for under s46 SDCA 1999 – Directions as to sub-sales. The provisions of the section are:

> "(1) Where –
>
> (a) a person having contracted for the purchase of any property, but not having obtained a conveyance of that property, contracts to sell the same to any other person, and
>
> (b) the property is in consequence conveyed immediately to the sub-purchaser, then the conveyance shall be charged with ad valorem duty in respect of the consideration moving from the sub-purchaser."

The relief also applies in a situation where the property is sub-sold in several parts or parcels. Each part or parcel is chargeable only on the consideration paid by the sub-purchaser for such part or parcel. The relief equally applies where there is a chain of sub-sales.

This recent high-profile TAC case concerning sub-sale relief was subsequently appealed to the High Court and the Court of Appeal. As the case has a complicated background, this article focusses on the findings and principles to be gleaned from the decisions at the TAC and the Court of Appeal rather than a detailed review of the factual matrix of the case.

In very simple terms, there was a contract for sale of a property on 1 June 2005 that was then sub-sold to an unrelated third-party company under a contract for sale dated 28 June 2013. After the initial contract and before the sub-sale contract, there was a declaration of trust by the original purchaser in favour of his wife dated 23 July 2005. The balance of the purchase monies under the original contract was paid over on 1 July 2006, but no conveyance was taken. There was a subsequent nominee agreement, dated 9 October 2006, whereby a nominee company agreed to hold the wife's interest. There was a subsequent sale of the property (the 28 June 2013 contract), with the vendor on the contract being the husband as trustee for his wife. The ultimate purchaser ("Yesreb Holdings") filed and paid the stamp duty as the only assessable person on the application of sub-sale relief in accordance with s46(1) SDCA 1999.

In *Yesreb Holdings Limited v Revenue Commissioners* [2022] IECA 127 the Court of Appeal heard an appeal from the High Court taken by the taxpayer. The judgment was written by Allen J (with Costello J and Haughton J in agreement). The matter concerned whether "sub-sale relief" from stamp duty under s46 SDCA 1999 applied to a transaction. The principal issues before the court were:

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

At the TAC hearing the respondent submitted that the appellant did not meet the conditions necessary to avail of sub-sale relief. The respondent submitted that the deed of conveyance dated 29 March 2013 was the chargeable instrument and was chargeable to duty in respect of both of the considerations to which it related and that the appellant was the accountable person in respect thereof. The appellant accepted that it was the accountable person in the event that s46 SDCA 1999 sub-sale relief applied but submitted that it was not the accountable person in respect of duty arising in relation to the original contract, dated 1 July 2005. The appellant submitted that it was an accountable person only for its own purchase, namely, the purchase by agreement for sale dated 28 March 2013 in the sum of €14 million.

The Appeal Commissioner made the following findings:

> "Having considered the statutory wording contained in section 46(1) SDCA 1999 and the dicta of Lord Wilberforce in *Fitch Lovell*, I am satisfied that the following three conditions must be met by a taxpayer in order to avail of section 46 sub-sale relief;

1. **Identity** – the purchaser in the main contract and the vendor under the subsale contract must be the same person, not the same name, but the same person.

2. **In consequence** – the conveyance must have been in consequence of both the original contract and the sub-sale contract and must arise from contracts which are enforceable by means of specific performance.

3. **No intervening act** – There must be no act other than the signing of the subsale contract, between the main contract and the execution of the conveyance.

...

Further, it follows from the judgement of Wilberforce J. in *Fitch Lovell* that in order to qualify for sub-sale relief, there must be a seamless uninterrupted passage from the contract to the sub-contract. In other words, as formulated by Wilberforce J., what the subsection contemplates is that the conveyance must be executed 'before any other act'. The judgement does not define or address what might constitute such act."

In the appeal at issue the original purchaser divested himself of an interest in the property by executing a declaration of trust in favour of another person.

"In effect, he deprived himself of capacity to enter into a legally enforceable sub-sale contract in relation to The Property, at any future date...Instead, the rights and obligations of X *qua* purchaser were fundamentally transformed from the party holding a beneficial interest to a party with no interest, legal or beneficial, in The Property."

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

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

Accordingly, the Court of Appeal held:

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

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

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

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

The relevant provision is s1(1) SDCA 1999, which provides that:

> "(1) In this Act, unless the context otherwise requires –
>
> 'accountable person' means –
>
> (a) The person referred to in column (2) of the Table to this definition in respect of the corresponding instruments set out in column (1) of that Table by reference to the appropriate heading in Schedule 1...
>
> Schedule 1
>
> | CONVEYANCE or TRANSFER on sale of any property other than stocks or marketable securities or a policy of insurance or a policy of life insurance | The purchaser or transferee. |
> | --- | --- |

Section 7 provides:

> "Except where express provision to the contrary is made by this or any other Act –
>
> (a) An instrument containing or relating to several distinct matters shall be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters;
>
> (b) An instrument made for any consideration in respect of which it is chargeable with ad valorem duty, and also for any further or other valuable consideration or considerations, shall be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the considerations."

Summary

The various findings in this case provide a very useful analysis of and guideline to the components of sub-sale relief under s46(1) SDCA 1999. It is recommended that any practitioner advising on this relief has made themselves aware of the three headline requirements to avail of relief.

To summarise the importance of this case:

- Sub-sale relief is not available or will be denied where the requirements for the relief are not met.
- Section 7 SDCA 1999 may apply to impose a double charge (or more, where there is a chain of sub-sales) to stamp duty on the conveyance where sub-sale relief has been denied (i.e. the ultimate purchaser will suffer the denial of the relief).
- The form and substance of the documentation giving effect to the transaction and its individual parts are critical to any analysis of the charge to stamp duty.

Conclusion

It is very informative that there is a recurring theme in both cases: the form and structure of the legal agreements are critical to any analysis of the charge to stamp duty. Both of these decisions are welcomed for their thorough review of two difficult and subjective pieces of stamp duty legislation. Each decision also underlines the importance of the application of the relevant legal principles and the documentation giving effect to a particular transaction in the analysis of the charge to stamp duty and the availability (or denial) of a relief. Practitioners would be wise to take heed.

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Residential Zoned Land Tax: Latest Updates and Operational Considerations

Background

The residential zoned land tax (RZLT) was introduced in Finance Act 2021 with the aim of increasing housing supply by activating zoned and serviced residential development lands for housing. The tax will be operational from February 2024 and is calculated at 3% of the market value of land in scope. Broadly, this is land that is (1) '"serviced"', (2) zoned solely or primarily for residential use or for a mixture of uses including residential use and (3) not excluded. The article by Brendan Slattery and Martina Firbank titled "Residential Zoned Land Tax: Under the Legal Lens", published in *Irish Tax Review* Issue 2 of 2022, provided an overview of the scope of RZLT, including what is meant by serviced, potential exclusions, deferrals and repayments, as well as potential challenges that the tax faces. Several amendments were introduced in Finance Act 2022, which are aimed at streamlining

the operation of RZLT and ensuring that it is efficiently administered.

Zoning into the Maps

Draft map

Each local authority was required to publish a draft map on or before 1 November 2022 specifying land that it considered to satisfy the criteria for inclusion and hence be within the scope of RZLT for the first charge, arising in 2024.

The publication of these maps was the first stage in a defined process with a number of strict deadlines, as prescribed in the Taxes Consolidation Act 1997 (TCA 1997). The process culminates in a final map, which is due to be published by each local authority by 1 December 2023. Lands included in the final maps will be considered to be "relevant sites" which are within the scope of the RZLT charge for 2024.

Where land was included on a draft map, liable persons (typically, the owner of the land) had just two months to make a submission to the relevant local authority for their land to be removed from the map or request an amendment to the zoning of their land on the issued map. The deadline for submissions was 1 January 2023.

Local authorities are currently reviewing these submissions and are required to respond to them by 1 April 2023. Where local authorities reject a submission, they are required to state the reason.

Where a request either to be removed from the draft map or for a zoning amendment is denied such that the land will remain liable to RZLT, appeals may be brought to An Bord Pleanála (ABP) before the deadline of 1 May 2023. Liable persons should state the reason given by the local authority in its response and their grounds for appeal. Once this appeal is with ABP, its final determination is due 16 weeks from the date of notice of appeal.

The 1 May 2023 deadline for lodging a notice of appeal is likely to give rise to challenges for a number of liable persons, as it provides just one month to review the decision, consider whether to make an appeal, and draft and submit the appeal. Practitioners are therefore encouraged to engage with interested parties around these timings to ensure that, where necessary, appeals are made by the deadline.

Supplemental map

A supplemental map will be released by local authorities no later than 1 May 2023 and, again, liable persons may make further submissions and requests in relation to this map.

A liable person with land included on the supplemental map may submit a request by 1 June 2023 to the local authority for the land to be removed. Again, the local authority will be required to provide its determination on the submissions by 1 August 2023. The local authority may request further details and information from the applicant during this period, and such requests are required to be made within 21 days of the submission.

Appeals may be made to ABP where liable persons disagree with or wish to challenge the local authority's decision, and the deadline for this is 1 September 2023. ABP is due to give its final decision within eight weeks of the date of notice of appeal.

Final map

Local authorities will publish their final map no later than 1 December 2023, before the first liability date of 1 February 2024. As noted above, land included in the final maps will be "relevant sites" which are within the scope of the RZLT charge for 2024.

Annual map

Each local authority will be required to update the map for the 2025 tax year and each year thereafter, and there is a prescribed process with deadlines for liable persons to make submissions each year to their local authorities where circumstances change and/or the fact pattern of their land is altered. These key dates should be reviewed each year to ensure that submission deadlines are not missed.

Finance Act 2022 Changes

Finance Act 2022 introduced a number of amendments to the provisions in the legislation, as well as a number of new sections. The key measures introduced are outlined below.

Unauthorised development

Land that is an "authorised development" used to carry on a trade or profession by a business liable to pay commercial rates and that provides services to residents of adjacent residential areas is excluded from RZLT by s653B TCA 1997.

A welcome addition is the introduction of s653AFA TCA 1997, which applies where a person makes an application for retrospective authorisation of land currently subject to certain "unauthorised" non-residential uses (e.g. being used to carry out a trade or profession and not considered vacant or idle).

Once an application has been made, a liable person can defer RZLT until the application is determined. Where the application is successful, the land will not be considered a relevant site for the purposes of RZLT. If, during the application process, the liable person pays RZLT, they should be entitled to make a claim for the repayment of all RZLT paid in respect of the site from the date of making the application. Section 653AFB TCA 1997 provides similar measures in respect of appeals against such determinations.

Of course, taxpayers should consider any other implications of using the land for an alternative purpose, such as the impact on VAT recovery and the potential application of commercial rates payable to local authorities.

Lease preluding development

Section 653AHA TCA 1997 introduces a relief such that RZLT should not be due and payable where a "relevant contract" – meaning a lease other than a lease or an agreement for lease referred to in s653Z(1)(c) TCA 1997 – has been entered into, in writing, with an unconnected party (within the meaning of s10 TCA 1997) before 1 January 2022 and it is reasonable to consider that the lease precludes the landowner from carrying out any development of the site.

Where applicable, the relief should apply for the duration of the contractual obligation preventing development that existed before 1 January 2022. The relief must be claimed in such form as prescribed by Revenue, and a return must be submitted to Revenue each year in respect of any liability occurring during the period.

Submissions to Local Authority

As noted above, a liable person may make a submission to their local authority (within the timeframes provided for) requesting that land be removed from the draft or supplemental map. An amendment to s653I TCA 1997 provides that where a landowner submits a zoning submission amendment to a local authority, the landowner is required to have evidence proving their ownership of the land. This information must be readily available, where requested by the local authority.

Failure to register

The tax is applied on a self-assessed basis via Revenue. Where liable persons have an obligation to register for RZLT in accordance with s653S TCA 1997 and fail to do so, they should be liable to a fixed penalty of €3,000. Interestingly, the penalty appears to apply to owners who are required to register their land for RZLT despite having no charge (i.e. residential property owners with yards or gardens of over 1 acre).

Late filing surcharge

Where a person fails to file a return by 23 May in a given year (the return date), s653AC TCA 1997 provides for a surcharge. Finance Act 2022 extends the surcharge to circumstances where a person deliberately or carelessly delivers an incorrect return and does not pay the full amount of any penalty calculated in accordance with s1077F(3) TCA 1997.

Partial completion of development

Section 653AH TCA 1997 provides that while development is ongoing during the granted

planning permission timeline, the liable person has the ability to defer any RZLT due. Changes have been introduced to the section to provide that where the planning permission expires and only part of the development is completed, the liable person is required to calculate the amount of RZLT payable, amend each return in respect of the liabilities deferred and pay any tax and interest due.

Restriction of deduction

Section 653AK TCA 1997 provides that for the purposes of corporation tax, income tax and capital gains tax, RZLT cannot be deducted when calculating any profit or gains. Finance Act 2022 expanded the restriction to apply to the domicile levy and universal social charge.

Death

For the purposes of RZLT, where a liable person passes away, a personal representative may step into the shoes of the deceased, previously liable person. The personal representative then takes over the liability and the filing responsibilities. Amendments were made to s653AI TCA 1997 to provide that where the death of a liable person occurs, the deceased's personal representative may make a claim for the repayment of RZLT to which the deceased person should have been entitled where the land retained its unauthorised non-residential status.

Practical Issues Arising

Readers will be familiar with the various challenges in increasing housing output, including the cost of land, the length of time and cost often incurred in obtaining unencumbered planning permission to develop property, and the cost of construction. These challenges are evident in a number of the practical issues arising under the operation of RZLT at present.

Planning permission

Obtaining full planning permission that is free from disputes preventing development commencing can be a very lengthy process. Delays in reaching this point can arise for a number of reasons, including amendments being required to planning permission applications to reflect requests from the planning authorities in respect of the size of the development or the desired nature of the development (e.g. the local authority not wishing for land zoned as mixed use to be developed for residential purposes). Even after planning permission is granted, it can be further appealed or subject to a judicial review. Cases of land being "stuck" in judicial review for significant periods of time are not uncommon.

While an application makes its way through the planning permission process, the liable person is liable to pay RZLT for relevant sites. Take the example of a plot of land with a value of €10m that takes four years to progress through the process – the potential liability for the four years is €1.2m.

There is a deferral mechanism in s653AF TCA 1997, but it is limited in its application and, as discussed below, is not without financial risk. The section provides that a deferral of RZLT may be made where planning permission has been granted but the development cannot commence because the grant of planning permission is subject to a "relevant appeal" that has not been determined at the liability date. Relevant appeals are limited to (1) an appeal to ABP in respect of planning permission, (2) an application for judicial review of a decision of a local authority or ABP in respect of planning permission and (3) an appeal of a determination of a judicial review. In all three cases the application/appeal must not be made by the owner or a person connected with the owner. Where a deferral may be made, it comes with a risk for the liable person, as the full €1.2m plus interest will fall due for payment should the planning permission ultimately be overturned. This liability may also be a deterrent to the liable person's selling the land to free up supply (this is discussed further below).

Viability

Land that meets the conditions to be a relevant site is within the charge to RZLT. A deferral from RZLT may be available where planning

permission has been successfully obtained **and** when a commencement notice (being a notice referred to in s6(2)(k) of the Building Control Act 1990) has been lodged with the appropriate local authority. Global factors such as Russia's invasion of Ukraine, interest rate increases, rising energy costs and inflation present significant challenges to the viability of certain planned developments. Similarly, affordability for buyers may be impacted by diminished incomes, rising interest rates and reduced activity from lenders. Where landowners do not expect to sell a property for a sufficient return on their costs, it is not viable either to start or to continue a development. Unfortunately, RZLT currently takes no account of the viability, or lack thereof, of a development.

Practically, this means that landowners could be faced with a choice of comparing the relative costs of an RZLT tax liability from doing nothing and carrying out an uneconomical development. There is a risk therefore that, despite the clear land activation policy intention, RZLT becomes an additional cost of construction, which discourages development and/or results in increased sales prices.

Phased developments

Construction requires finance, and often this takes the form of external funding from a lender that is provided in phases, i.e. as each phase is completed and sold, the proceeds are used to fund the next phase. Practically, this means that larger plots of land can take some time to develop. The market factors in recent months (referred to above) may slow this process such that the development of the site as a whole takes longer than was forecast and included in the landowner's original business plan.

Such landowners are faced with a prospective RZLT liability annually from 2024 if they hold the land. Of course, these landowners could consider selling the land to a purchaser who could develop the property; however, latent RZLT may be reflected in the selling price of the land (i.e. the purchaser may discount or price-chip the market value of the land for the cost of RZLT to which a purchaser may be liable).

Related to this, where a landowner has deferred RZLT on the basis that development has started, if the land is sold before a completion notice is lodged, the RZLT falls due and becomes a charge on the land if it is not paid before completion of the sale. Currently, there is no mechanism for the vendor to reclaim the RZLT where the purchaser completes the development in line with the planning permission. The introduction of such a refund mechanism could allow the parties to address this through the contract for sale.

In each of these cases there are specific practical challenges that result in the landowners' being liable for the tax even though they may be trying their utmost to deliver the required development.

Modelling transactions

Before transactions are carried out, expected costs, including tax liabilities, are typically modelled by the various stakeholders. RZLT should be factored in to models being prepared for current or prospective transactions, taking into account the attributes of the land throughout the ownership period and the measures that apply on the sale of land (outlined below).

Sale

The legislation applies specific provisions in respect of the sale of a relevant site. These provisions also apply to transfers under a compulsory purchase order or where a lease is entered into.

The vendor is required to file a return providing certain information to Revenue, including details of the relevant site, liable person and purchaser. It is important to note that this return is additional to the annual return filing requirement. Before the completion of the land sale, the vendor is required to file any outstanding returns and pay all outstanding liabilities, including interest and penalties. Additionally, where the vendor had elected to defer any tax, this is also required to be paid before the sale. As noted, there is currently no refund mechanism for either vendors or purchasers where the purchaser completes any development on the acquired

land. Therefore any RZLT that is paid by the vendor before the sale would appear to be an irrecoverable cost to the vendor.

Conclusion

The article "Residential Zoned Land Tax: Under the Legal Lens" in *Irish Tax Review* Issue 2 of 2022 questioned whether the simple approach of requiring those with development rights in respect of any lands zoned for residential development to take steps to develop it or pay to leave it undeveloped can be applied to the complex art of housing development to achieve the intended outcome of an increase in built units. This question remains, and only time will tell. What is clear at this stage, from the challenges discussed above, is that the legislation as amended by Finance Act 2022 can apply to a wide range of land, with only limited exclusions that do not currently cater for a number of the commercial complexities that commonly arise in practice.

Either way, the show must go on, and practitioners should continue to engage with liable persons and other interested parties to prepare for the application of the charge to RZLT. This includes monitoring the key dates in the mapping process, reviewing the supplemental maps once released and considering whether submissions or appeals are required in respect of land included on the maps. Where land is included in the final map, there are several new annual compliance dates to add to your calendar!

For practitioners advising on transactions, the potential scope for application of RZLT to property (or indeed shares in companies that own property) and ultimately compliance in respect of the land will become a focus of tax due diligence and should be factored in to both buy and sell side tax models and tax reviews of legal agreements.

News & Moves

Baker Tilly Ireland Becomes Azets Ireland and Announce Two Additional Tax Partners

With effect from 1 March 2023, Baker Tilly Ireland is now a part of Azets, the international accounting, tax, audit, advisory, and technology group. Rebranding and becoming part of Azets, our focus remains on supporting the needs of local and international SMEs, enabling them to take advantage of growth opportunities in the Irish market and beyond. In recognition of the importance of emerging talent to the future of the firm, we are delighted to announce the appointment of Kate Prendiville and Rory O'Shea as Partners in our Taxation department, to help drive the planned ambitious growth of the firm's tax advisory services.

Caption (L-R) Kate Prendiville, Rory O'Shea, and Alma O'Brien, Head of Tax

Grant Thornton Ireland Announces Further Growth with New Partner Appointments

Grant Thornton Ireland recently announced six new partners, including two new tax partners, across several business units as the firm continues to grow in line with client demands.

Sarah Meredith, who joined the firm in 2010, is appointed tax partner. She works in the Foreign Direct Investment (FDI) area of tax; and her exceptional technical knowledge means she is considered a trusted advisor for a large portfolio of clients.

Kevin Devenney is appointed as tax partner, specialising in the provision of indirect tax services to domestic and multinational organisations. He has more than 15 years' experience delivering advice to clients on complex indirect tax matters, particularly in the areas of property, financial services and assisting multinationals meet their multi-jurisdictional obligations. He regularly represents businesses interacting with the Irish tax authorities and facilitates the resolution of tax audits and disputes.

Matheson LLP Adds Fourteen New Partners Including Two New Tax Partners

Matheson LLP has promoted fourteen lawyers to partner across nine different practice areas. The appointments bring the total number of partners and tax principals in the firm to 121. The new partners, who have already taken up their positions, have been appointed in the following practice areas; Asset Management; Commercial Litigation and Dispute Resolution; Commercial Real Estate; Corporate M&A; Energy and Infrastructure; Finance and Capital Markets; International Business Group; Financial Institutions Group; and Tax.

Dara Higgins

Dara advises clients on VAT, Customs and Trade law, Excise and Relevant Contracts Tax. He specialises in Indirect Taxes across all industry sectors including, real estate and construction, financial services, import/export, technology, aviation, energy and pharmaceuticals.

Dara also has significant experience in the area of tax controversy and regularly acts for clients in the context of tax appeals and audits and investigations. He also has a broad client base consisting of both domestic and international clients, many of which have complex global supply chains.

Michelle Daly

Michelle practices in Matheson's tax department, primarily advising clients in the financial sector, including asset management, aviation leasing, securitisation and debt capital markets and insurance. Michelle has spent time working in Matheson's New York office. Michelle has a particular expertise in advising Irish domiciled investment funds, including UCITS and QIAIFs, and their managers.

Michelle also advises many fund managers who have invested in aviation assets, and alternative asset classes such as pharmaceutical royalties. In recent years, Michelle has worked on the establishment of a number of large direct lending fund platforms which are domiciled in Ireland.

Tax Department Promotions for McKeogh Gallagher Ryan's Limerick Office

McKeogh Gallagher Ryan is pleased to announce the following promotions in the Tax Department of the Limerick office: **Jane Hughes (CTA)** as Manager and **Chloe Hannon (CTA)** as Assistant Manager.

Speaking about the promotions Tax Partner Mary McKeogh stated: *"We are delighted with the contributions Jane and Chloe have made to the firm. Jane was promoted to Assistant Manager last year and quickly proved herself an extremely capable and resourceful manager, with a very busy client load. Chloe joined the firm in 2021 and has quickly established herself as an excellent tax professional – at ease with clients, multi-tasking across compliance and consultancy assignments, and also assisting with training and developing the tax trainees. Both Jane and Chloe work very closely with myself and our Tax Director Anne Hogan, and we are looking forward to their continued success with the firm."*

(L-R) Tax Partner Mary McKeogh with Jane Hughes, Chloe Hannon and Tax Director Anne Hogan, at the recent announcement of Jane & Chloe's promotion. Photo: Tarmo Tulit.

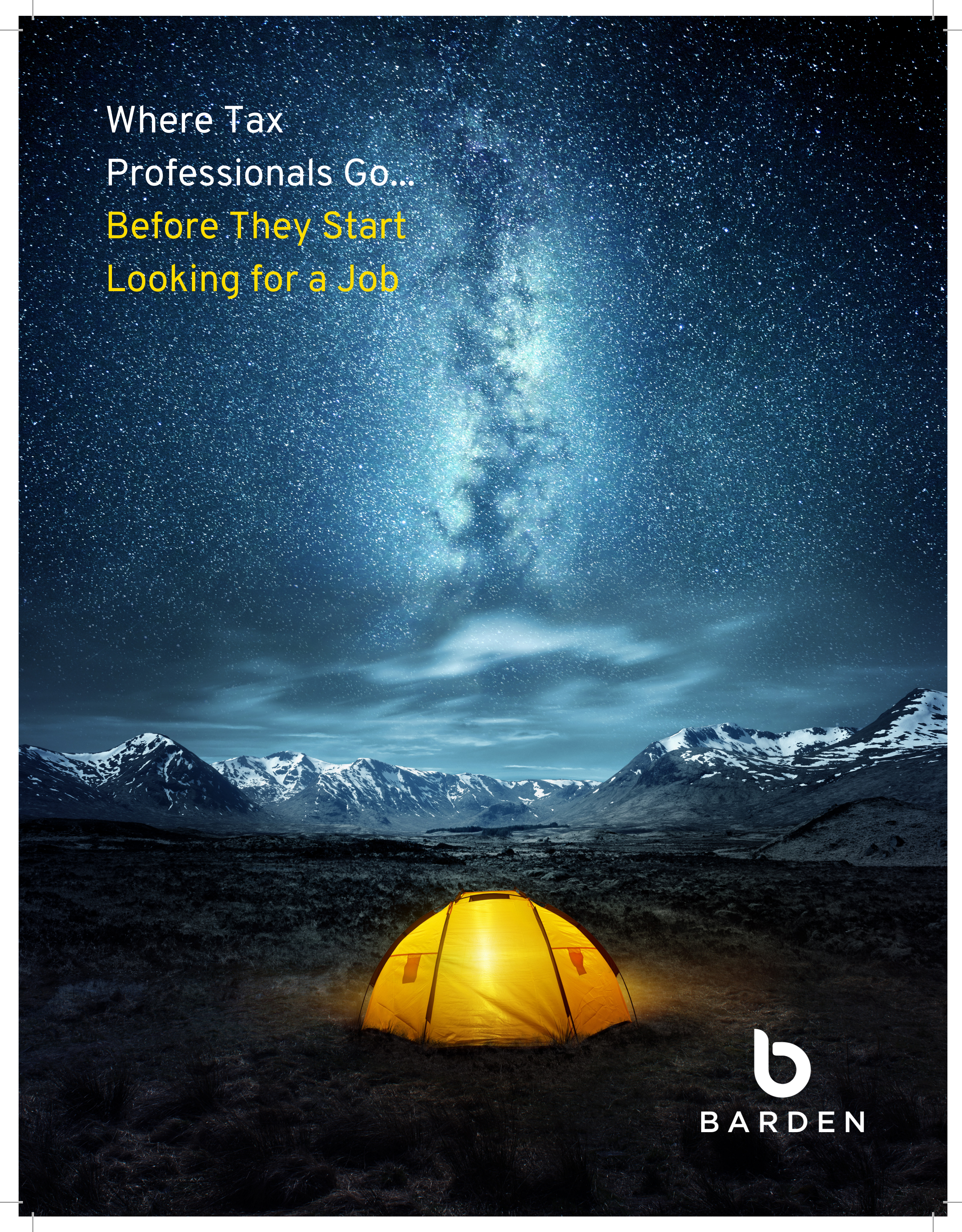
James O'Brien & Co Accountants has Merged with Roberts Nathan

We are delighted to announce that James O'Brien & Co Accountants has merged with Roberts Nathan. Post-merger, the firm will trade as Roberts Nathan and employ over 55 professionals in both Cork and Dublin.

Now more than ever scale and access to specialists, valuable business advice, and international capabilities are increasingly important. This is the driver behind our strategic decisions, the wish to deliver to our clients the breadth and depth of service they require.

This exciting merger gives us increased scale and resources, allowing us to continue providing a personal partner-led service to all of our clients.

Gail Ellis, James O'Brien and Vivian Nathan


Where Tax
Professionals Go...
Before They Start
Looking for a Job
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