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Contents

2023 Number 2

Messages from Irish Tax Institute

4 **Editor's Pages**
8 **President's Pages**
12 **Chief Executive's Pages**
19 **Contributors' Stories: Getting Involved with Your Institute**

Regular Features

20 **Policy and Representations Monitor**
Lorraine Sheegar, *Tax Manager – Tax Policy and Representations, Irish Tax Institute*
31 **Recent Revenue eBriefs**
Lorraine Sheegar, *Tax Manager – Tax Policy and Representations, Irish Tax Institute*
50 **Direct Tax Cases: Decisions from the Irish Courts and Tax Appeals Commission Determinations**
Mark Ludlow, *Senior Associate – Tax, RDJ LLP*
59 **Direct Tax Cases: Decisions from the UK and European Courts**
Stephen Ruane, *Partner and Leader, Tax Solutions Centre, PwC Ireland*
Patrick Lawless, *Tax Senior Manager, Tax Solutions Centre, PwC Ireland*
63 **International Tax Update**
Louise Kelly, *Tax Partner, Deloitte Ireland LLP*
Claire McCarrick *(not pictured), Tax Senior Manager, Deloitte Ireland LLP*
72 **VAT Cases and VAT News**
Gabrielle Dillon, *Director, VAT, PwC Ireland*
84 **Accounting Developments of Interest**
Aidan Clifford, *Advisory Services Manager, ACCA Ireland*
87 **Revenue Commissioner's Update**
90 **Legal Monitor**
Philip McQueston, *Of Counsel, A&L Goodbody*
92 **Tax Appeals Commission Determinations**
Catherine Dunne, *Barrister-at-Law*
97 **Tax Technology Update: Tax Authority Technology**
Andrew Egan, *Director, Tax Transformation & Technology, KPMG*
102 **UK and Northern Ireland Tax Update – Summer 2023**
Marie Farrell, *Tax Director, KPMG Ireland (Belfast Office)*

Feature Articles

106 **Preparing for Pay and File 2023: Tips and Tricks**
Lauren Clabby, *Director, Tax, KPMG*
115 **ePSWT: A Guide for the Tax Practitioner**
Feargal Kinsella, *Senior Manager, BDO Ireland*
119 **Key Considerations for the Corporation Tax 2022 Cycle**
Kelly Caffrey, *Senior Manager, Corporate Tax, Deloitte Ireland LLP*
126 **Interest Limitation Rule: CT1 Disclosures and Updated Revenue Guidance**
Angela Fleming, *Partner and Head of Financial Services Tax, BDO*
Yvonne Diamond, *Senior Manager – Tax, BDO*
133 **Capital Taxes Compliance Considerations**
Siobhán O'Moore, *Tax Director, Mazars*
Adrian Farragher, *Tax Manager,* Mazars
142 **The Domicile Levy: Relevance to Tax Returns 2022**
Anne Hogan, *Associate Tax Director, McKeogh Gallagher Ryan*
146 **Tax-Compliant Capital Allowance Claims for Property Investors**
Philip O'Connor, MSCSI MRICS ATT, *Managing Director, Chartered Surveyor, CA Partners*
152 **Irish Transfer Pricing Requirements Refresher**
Anthony Crewe, *Head of Transfer Pricing Ireland, Grant Thornton Ireland*
158 **Section 135(3A) TCA 1997: Common Traps and Pitfalls To Be Aware of**
Paul Morris, *Partner, PwC Private*
Michael O'Brien, *Director,* PwC Private
164 **The Taxation of Certain Compensatory Payments to Employees**
Aidan Fahy, *Partner, Matheson LLP*
Audrey Kean, *Senior Associate,* Matheson LLP
Siún Clinch *(not pictured), Associate,* Matheson LLP
173 **Residence, Domicile and Double Taxation Relief – Recent Case Law Issues**
Jeananne McGovern, *Barrister, Bar of Ireland*
Sara-Jane O'Brien, *Barrister, Bar of Ireland*
185 **Group Rationalisation Post-Acquisition: Part 2**
Úna Ryan, *Tax Director, Grant Thornton*
Caroline Kennedy, *Tax Associate Director, Grant Thornton*

Irish Tax Institute News

196 **News and Moves**

Editor's Pages

Julie Burke
Editor

Regular Articles

Policy & Representations Monitor

Lorraine Sheegar provides a comprehensive overview of key developments, including recent submissions from the Institute, and tax policy news.

Recent Revenue eBriefs

Lorraine Sheegar lists all Revenue eBriefs issued between 1 February 2023 to 30 April 2023.

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

Mark Ludlow

High Court

» In *Cintra Infraestructureas Internacional SLU v The Revenue Commissioners* [2023] IEHC 72 the High Court considered an appeal taken by Revenue against a determination of the Tax Appeals Commission examining the meaning of "land" and of value derived "directly or indirectly" from land for CGT

Tax Appeals Commission

» 24TACD2023 considered if deduction for what was considered excessive Directors renumeration was allowable for CT

» 28TACD2023 examined the treatment of an ARF distribution, income vs capital and application of the Portugal DTA

» 39TACD2023 involved farm payment entitlements to an incorporated farm

» 60TACD2023 looked at the timeframe of transferring farm payments to a company

» 48TACD2023 examined the anti-avoidance measures to avoid a distribution

» 57TACD2023 considered the general anti-avoidance rules of s811 TCA 1997

Direct Tax Cases: Decisions from the UK and European Courts

Stephen Ruane and **Patrick Lawless**

UK Cases

» In *N Henderson v HMRC* [2023] UKFTT 281 (TC) the First-tier Tribunal held that the buying and selling of shares did not constitute a trade

» In *Coller v Revenue and Customs* [2023] UKFTT 212 (TC) the FTT held that the taxpayer had a UK domicile of origin, thereby denying his claim to the remittance basis of taxation

» In *S England and another v HMRC* [2023] UKFTT 313 (TC) the FTT had to determine when a debt had been released for the purposes of the UK equivalent of s439 TCA 1997

» In *VolkerRail Plant Ltd & Ors v HMRC* [2023] EWCA Civ. 210 examined a UK-resident company whose ultimate parent was located in the Netherlands. Losses were incurred by a UK permanent establishment of a company resident in the Netherlands. The UK-resident company attempted to claim those losses through consortium and group relief.

CJEU Case

» In the case of *Banca A vs ANAF* C-827/21 the CJEU had to consider whether EU law required a national court to interpret domestic legislation applicable to a purely domestic transaction in accordance with the Merger Directive (Council Directive 2009/133/EC).

International Tax Update

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

- BEPS: Recent Developments
  - A feedback statement has been published following the Pillar Two consultation
  - Japan has implemented the 15% minimum tax rate
  - The Spanish government has launched a public consultation on transposing Pillar Two
  - The German Ministry of Finance has released draft legislation for Pillar Two
  - Liechtenstein has published a draft bill for implementation of Pillar Two rules
  - Sweden has also published a draft bill for Pillar Two implementation
  - The Financial Reporting Council (FRC) has released a Financial Reporting Exposure Draft that proposes changes to the reporting of deferred tax
  - The Swiss electorate will soon vote on a constitutional amendment for the implementation of Pillar Two
- US Tax Developments
  - The US Treasury Department released the Green Book for fiscal year 2024, increasing corporation tax rate and other measures of interest to US multinational groups
- EU Tax Developments
  - The European Commission has published feedback received on DAC8 proposal
- Jersey and Guernsey – tax compliance and economic substance
- Barbados has published its 2023 Budget
- The Australian Treasury launched a consultation on draft legislation proposing that certain large multinational entities will be required to publish specific tax information on a country-by-country basis, along with a statement of their tax approach
- The Australian Treasury also released the Exposure Draft Treasury Laws Amendment (Measures for Consultation) Bill 2023: Deductions for Payments Relating to Intangible Assets Connected with Low Corporate Tax Jurisdictions as part of its consultation on multinational tax integrity and transparency
- The Australian Treasury has proposed changes to the thin-capitalisation rules, with the consultation ending on 13 April 2023
- China's State Council announced on 24 March 2023 that the super-deduction rate for research and development (R&D) expenses would be increased from 75% to 100% for all eligible sectors
- The Inland Revenue Authority of Singapore has added two new examples of tax-avoidance arrangements to the e-tax guide on the general anti-avoidance provision under s33 of the Income Tax Act 1947
- The UK has published its Spring Finance Bill 2023
- HMRC has increased the interest rates on late tax payments and repayments
- German legislation on the ratification of the competent authority agreement between Germany and the US for the exchange of country-by-country reports has been published
- The Hong Kong SAR Government published a consultation paper proposing changes to the foreign-sourced income exemption regime to align with the EU's latest guidance on such regimes

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 *Nec Plus Ultra Cosmetics AG v*

Republika Slovenija C-664/21, which dealt with the interpretation of Articles 131 and 138(1) of the VAT Directive, together with the principles of tax neutrality, effectiveness and proportionality

» In *Generali Seguros SA, formerly Global – Companhia de Seguros, SA v Autoridade Tributária e Aduaneira* C42/22, the court had to consider whether the resale of parts of written-off vehicles by an insurance company that had underwritten the motor insurance policy was taxable or exempt

» *Dyrektor Krajowej Informacji Skarbowej v Gmina L.* C616/21 concerned the interpretation of Articles 2(1), 9(1) and 13(1) of the VAT Directive in the context of proceedings between Gmina L., located in Poland, and the tax authority concerning an advance tax ruling addressed to the Municipality in respect of its liability to pay VAT on asbestos removal activities that it sought to carry out and the right to deduct the input VAT incurred on those transactions

» *Dyrektor Krajowej Informacji Skarbowej v P. in W., interested party: Rzecznik Małych i Średnich Przedsiębiorców* C-282/22 sought a tax ruling that the planned activities it was going to engage in consisted of a supply of services in respect of which it would levy a single fee for the supply

Tax Appeals Commission Determinations

» 40TACD2023 dealt with the cancellation sum payable after the automatic cancellation of a waiver of exemption where excess input VAT was claimed over output VAT accounted for

» 44TACD2022 dealt with the election to register for VAT and payment of an election cancellation amount

» 46TAC2023 related to the refusal of the respondent to VAT-register the appellant

» 56TACD2023 concerned whether recruitment agency services provided by the appellant related to education and whether the commission paid was exempt or VATable

Accounting Developments of Interest

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

Revenue Commissioner's Update

There are two Update articles in this issue, covering eCommerce payment reporting and the ROS Return Preparation Facility.

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.

Tax Technology Update – Summer 2023

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

UK & Northern Ireland Tax Update – Summer 2023

Marie Farrell covers recent changes to and developments in UK tax law and practice and key areas of interest to CTAs are highlighted.

Key Tax Dates

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

Feature Articles

106 Preparing for Pay and File 2023: Tips and Tricks

Lauren Clabby provides guidance on completing the 2022 Form 11, including a review of relevant eBriefs published by Revenue and a comparison of the 2022 Form 11 with the 2021 version.

115 ePSWT: A Guide for the Tax Practitioner

Feargal Kinsella provides an overview of the electronic system for professional services withholding tax, introduced in 2021, and explains how interim refunds can be claimed.

119 Key Considerations for the Corporation Tax 2022 Cycle

Kelly Caffrey explains the key considerations to be taken into account for the 2022 corporation tax compliance cycle.

126 Interest Limitation Rule: CT1 Disclosures and Updated Revenue Guidance

Angela Fleming and **Yvonne Diamond** provide a practical guide for corporation tax filers that explains disclosure requirements on the CT1 regarding interest limitation rules.

133 Capital Taxes Compliance Considerations

Siobhán O'Moore and **Adrian Farragher** outline the main CAT and CGT compliance issues that should be considered by both individuals and companies.

142 The Domicile Levy: Relevance to Tax Returns 2022

Anne Hogan provides an analysis of Part 18C, s531AA to s531AK, TCA 1997, which deals with the domicile levy payable by certain individuals, highlighting the points to be considered for taxpayer compliance purposes.

146 Tax-Compliant Capital Allowance Claims for Property Investors

Philip O'Connor outlines an incentive that can provide landlords with considerable tax relief yet is often not used – capital allowances for plant and machinery fixtures attached to investment property.

152 Irish Transfer Pricing Requirements Refresher

Anthony Crewe provides a high-level review of the recent changes to the Irish transfer pricing rules, highlighting their application to companies and branches operating in Ireland and the consequences of non-compliance.

158 Section 135(3A) TCA 1997: Common Traps and Pitfalls

Paul Morris and **Michael O'Brien** consider s135(3A) TCA 1997, which treats certain capital transactions as income distributions but, unlike similar provisions, contains no "bona fide commercial reasons" protection.

164 The Taxation of Certain Compensatory Payments to Employees

Aidan Fahy, **Audrey Kean** and **Siún Clinch** critically examine recent determinations of the Tax Appeals Commission dealing with the interaction between s123 TCA 1997 and other relieving sections, including ss192A and 613 TCA 1997.

173 Residence, Domicile and Double Taxation Relief – Recent Case Law Issues

Jeananne McGovern and **Sara-Jane O'Brien** focus on potential taxation issues that can arise for individuals with income from outside the State and provide an analysis of some recent cases and determinations.

185 Group Rationalisation Post-Acquisition: Part 2

Úna Ryan and **Caroline Kennedy** discuss the anti-avoidance provisions that apply to group restructurings and reorganisations.

President's Pages

Colm Browne
President, Irish Tax Institute

Quarter 2 got off to a flying start with our return to the Galmont Hotel in Galway for the Institute's first in-person Annual Conference in four years. There was a great buzz about the whole weekend, and you could see that members were delighted to be back in the company of tax colleagues discussing areas of common interest.

Annual Conference

On the day before the conference the HSE announced that it was closing the Covid-19 testing centres that many of us had become acquainted with during the pandemic. It was a small item in the news but a reminder of what we had come through over the previous three years. Not for the first time, I felt very fortunate indeed to be President of the Institute in a post-Covid world.

The quality of the presentations at the conference was excellent, and their focus on issues such as M&A transactions for SMEs and developments in VAT, employment taxes and global mobility was well judged. Congratulations to Úna Maguire and her team for organising a most enjoyable and informative event.

A Sustainable Economy

The title of our conference was "Forging a Sustainable Future", which certainly encapsulates the challenge facing many businesses up and down the country. It also sums up the challenge facing the Government. In a very difficult global trading environment, Ireland's economic performance is an international stand-out. Despite Russia's war in Ukraine, the energy crisis, stubbornly high inflation, continuing supply chain disruption, a substantial global reset in the tech sector and a slowdown in demand internationally, all of the important economic indicators for Ireland are breaking records. Exports are booming; Exchequer returns have never been higher; the Department of Finance is forecasting budget surpluses of €65bn up to 2026; and the number of adults in employment is at an all-time high of 2.6m, having grown by more than 100,000 in the last year.

And yet, there is a sense of foreboding because – as a small open economy that has gained so much from globalisation – we are at the mercy of events beyond our control such as the war and the impact of international tax changes on the behaviour of large multinationals.

So how do we forge a sustainable future? Well, it is good to see proposals such as the Minister for Finance's new State Investment Fund taking shape. Provision for the future needs of an aging population is a critical function of statecraft.

Supporting SMEs

But it is also important to think about protecting our economic base, which everyone agrees is over-dependent on our hugely successful multinational sector. There is a pressing need to correct this imbalance by fostering productivity and innovation in our indigenous small businesses and start-ups.

In that respect, Minister McGrath's commitment to take a fresh look at existing SME tax measures in the forthcoming Budget is very welcome. The Institute has recently submitted its Pre-Finance Bill submission and will shortly finalise its Pre-Budget submission, and are detailing our ideas about how these tax reliefs could be made more attractive and accessible to domestic businesses.

Measures such as the KEEP, EII and CGT entrepreneur relief were introduced to incentivise investment, development and growth in our domestic sector. As practitioners, we know that they are not working efficiently for many in that sector. Let's hope that the Minister's review will be an important step in helping us to forge a sustainable future.

Pillar Two Directive

Of course, foreign direct investment will remain a critical part of our economic base into the future, and the implementation of the Pillar Two Directive is the burning issue for those of us involved in international tax. The Department of Finance is currently drafting the implementing legislation, and in our response to its recent Feedback Statement, the Institute highlighted the importance of an iterative process of consulting with stakeholders to minimise the complexity involved to the greatest extent possible and ensure the successful practical implementation of the Directive into Irish law.

Further engagement with the Department is planned as the drafting continues over the coming months, and let's hope that it is a productive process. Either way, the compliance load in corporate tax is not going to get any lighter.

Joint Conference

It was a great honour for me to welcome the Revenue Chairman, Niall Cody, and his officials to our Joint Conference, which took place in the Strand Hotel in Limerick on 19–20 May. This was our first in-person Revenue/Institute Joint Conference in six years, and it didn't disappoint. The programme covered all of the current hot topics in tax, including the operation of the new Compliance Intervention Framework, the challenges and opportunities in the digitalisation of tax, debt management and Revenue's approach to warehoused tax, and the implementation of Pillar Two.

Niall Cody, Revenue Chairman, and Colm Browne, Institute President, before the ITI and Revenue Joint Conference 2023 in Limerick.

Apart from the valuable content, which was covered in greater detail in TaxFax, the dinner on the evening of 19 May was most enjoyable. The Joint Conference is a forum to cement the collaborative work that we do with Revenue in our separate but complementary roles to ensure a high level of voluntary compliance among taxpayers in Ireland.

Irish Tax Institute and Revenue Joint Conference 2023, The Strand Hotel, Limerick.

Research on the Career in Tax

We are all aware from our own businesses that staff recruitment and retention have become the defining challenge in a time of full employment. In that context, the findings of the research project recently undertaken by the Institute make for interesting reading.

The survey and focus group research sought the views of members, students and university undergraduates on the career in tax. In broad terms, the research found that although the attitude of members and students to the job of the CTA is overwhelmingly positive, there is work to be done in the very crowded marketplace of university undergraduates to attract new recruits to the career.

The findings will inform the Institute's strategy for the promotion of the CTA and the design of its educational programme. We will be sharing the outcome of the research with members firms, the universities and colleges, and other key stakeholders over the coming months.

On behalf of the Institute, I want to thank all of you who took part in the survey and focus groups. The insights you have given us will benefit the entire profession.

Conclusion

Time has flown, and this is my last outing on the President's Pages of *Irish Tax Review*. I will continue as President until early September, but I want to take this opportunity to thank members for their support during my term.

Our Institute is lucky to have such a committed and active membership. Time and again over the last nine months I have been struck by the generosity of many members with their time and expertise, and I want to acknowledge the debt that the profession owes to all of those who contribute to the Institute's work.

I am grateful to my fellow Council members and the Officer Board for their help and friendship; I also want to thank the team at the Institute for their work during my term so far, and I look forward to working with them through the final quarter. We, as members, are extremely fortunate to have such a committed and dedicated team in the Institute who work diligently and very professionally in managing the education programme for our students and representing members' interests.

Finally, I want to pay tribute to Michael Ryan who is stepping down as *Irish Tax Review* Editorial

L–R: Martin Lambe, Institute Chief Executive, Julie Burke, Irish Tax Review *Editor, Michael Ryan,* Irish Tax Review Editorial Board *Chair, and Colm Browne, Institute President.*

Board Chair of this journal after 15 years. Michael has given tremendous service to the Institute over the years in various roles and has helped steer the *Irish Tax Review* to new heights during his tenure as Chair. I want to wish Michael well into the future and thank him for his significant commitment and contribution to our Institute.

As I said at the outset, it has been a great privilege to be in this role in a year when all of our events could take place in-person. I wish my successor and the current Deputy President, Tom Reynolds, all the very best in his upcoming Presidency.

Chief Executive's Pages

Martin Lambe
Irish Tax Institute Chief Executive

First, I want to thank you all for renewing your subscriptions and submitting your CPD declarations.

We also wrote to you requesting you to participate in our research project on the career in tax which I mentioned before in these pages. We had a very good response, and we greatly value your input. The insights we received through the focus groups and the survey have given us a lot of food for thought and will help us in the development of our education and marketing strategy for the career over the coming years.

Leading Through Tax Education

The summer courses are well under way now, with healthy numbers across the board. The students have only a few more weeks of study before they sit their exams in August.

Our students who sat their exams in April received their results earlier this month. Well done to all, and we look forward to seeing you again on the next part of your studying journey. And we wish the best to the CTA Part 3 students, who will receive their results in early July.

Registration will open in a month's time for our autumn 2023 CTA, Tax Technician and Diploma in Tax programmes. If you or any of your colleagues would like to be notified when registration goes live, you can register your interest here.

The Conference Season

In recent months we were delighted to welcome you back to in-person conferences. In late March, over 300 delegates gathered in Galway for our Annual Conference 2023, where they heard from our panel of expert speakers on M&A transactions for SMEs, VAT, employment taxes, green investments, trusts, pensions and tax appeals. It was great to be back to an in-person Conference and for delegates to have an opportunity to catch up and network during the breaks and at dinner, where we were joined by Ray Goggins, best known for RTÉ's *Ultimate Hell Week*.

Colm Browne, Institute President, welcomes more than 300 delegates to Galway for the first in-person Annual Conference since 2019.

Niall Cody, Revenue Chairman, and Colm Browne, Institute President, before the ITI and Revenue Joint Conference 2023 in Limerick.

Irish Tax Institute and Revenue Joint Conference 2023, The Strand Hotel, Limerick.

In mid-May, over 160 delegates travelled to Limerick for the first in-person ITI and Revenue Joint Conference since 2017. The quality of discussion did not disappoint, as delegates were updated on important areas of tax administration, including the Code of Practice and Compliance Intervention Framework, use of data analytics, Pillar Two, debt management and digitalisation.

Publications

It has also been a busy time for the information services team, with many titles being published, including a new publication. Our sincere thanks goes to the editors for their sterling work in consolidating and updating this year's legislation:
David Fennell, *Direct Tax Acts*; Maria Reade, *Law of Value-Added Tax*; and Aileen Keogan and Emmet Scully, *Law of Capital Acquisitions Tax, Stamp Duty and Local Property Tax*.
Your essential legislation titles can be ordered from our website or by contacting Michelle Byrne (mbyrne@taxinstitute.ie).

At the launch of Valuations for Tax Purposes *at this year's Annual Conference were the author, Marie Flynn, PwC Private, Colm Browne, Institute President, and Úna Maguire, Irish Tax Institute. The book is available to order here.*

Finance Act 2022 – The Professional's Guide is also available to order now. Thank you to our authors and editor for providing expert, section-by-section analysis of the legislation: Emma Arlow, Deloitte Ireland LLP, Brendan Murphy, Roberts Nathan, and Denis Herlihy, BDO. Those who attended our Finance Bill/Act webinars have already received their complimentary copy.

Representations

The Institute sent its Pre-Finance Bill Submission to the Minister for Finance, Michael McGrath TD, at the end of May. The 65-page submission included a range of recommendations such as:

- the urgent need to move to a territorial system of taxation, with the implementation of a participation exemption for dividends and a foreign branch exemption to ensure Ireland's position as an attractive place in which to do business;
- targeted tax measures to promote the green agenda and sustainability for businesses seeking to reduce their carbon emissions;
- technical issues relating to the digital games tax credit, Knowledge Development Box and R&D tax credit arising from the implementation of Pillar Two; and
- the reform of SME incentives.

In December 2022 the European Council adopted the Pillar Two Minimum Tax Directive. Since then, there have been many consultations and calls for feedback by various stakeholders. In May the Institute responded to the Department of Finance's Feedback Statement on the implementation of the Directive.

Since then, the Institute has been participating in technical discussions on the implementation of the Directive at the TALC BEPS sub-committee. This work is in addition to the various TALC meetings that have been taking place, and you will receive an update on all developments from these engagements.

Last week the Institute met with Benjamin Angel, Direct of Tax for the European Commission to discuss tax EU developments. It was good to hear what the Commission has in the pipeline and how it would affect Ireland and our tax code.

In the coming weeks the Institute will meet the Minister for Finance to discuss our Pre-Budget 2024 Submission, which is being finalised as I write.

Getting Involved

The success of the *Irish Tax Review* depends on members sharing their expertise by submitting technical articles on tax developments for publication every quarter. We had, in the past, given annual awards of excellence for these contributions and on 19 June, we were delighted to revive this tradition at a special lunch in the Institute where we marked the excellence of two standout contributions during 2022.

The Norman Bale *Irish Tax Review* Article of the Year Award 2022 – went to Lee Squires and Mona Costelloe of *ByrneWallace* for their article *Arderin Distillery: Legitimate Expectation and Judicial Review of Revenue*.

L–R: Julie Burke, Irish Tax Review *Editor, Michael Ryan,* Irish Tax Review Editorial Board *Chair, Lee Squires, ByrneWallace, Mona Costelloe, ByrneWallace, and Colm Browne, Institute President.*

The second award – the Irish Tax Review Compliance Article Award – was presented to Dr Patrick Mulcahy, DCU, and Ross Duffy, PwC Ireland, for their Issue 3 article “Corporation Tax Return 2021: Focus on Disclosures”. Congratulations to all four winners on their well-deserved recognition.

L–R: Julie Burke, Irish Tax Review *Editor, Ross Duffy, PwC, Dr Patrick Mulcahy, DCU, Michael Ryan,* Irish Tax Review Editorial Board *Chair, and Colm Browne, Institute President.*

At the same lunch, we thanked Michael Ryan for his contribution to the *Irish Tax Review* over the last decade-and-a-half. As Michael steps down as *Irish Tax Review* Chair, you can see his influence over the technical journal and appreciate the invaluable guidance that he provided. Thank you, Michael, and on behalf of the Institute I would like to wish you the very best in the future.

L–R: Martin Lambe, Institute Chief Executive, Julie Burke, Irish Tax Review *Editor, Michael Ryan,* Irish Tax Review Editorial Board *Chair, and Colm Browne, Institute President.*

The work of the Institute depends on the generosity of members to give us their time and expertise. There are many ways in which you can get involved – become a lecturer, examiner or moderator, write articles, speak at a CPD event or join one of our committees. In this issue of *Irish Tax Review* Louise Graham shares her experience of being an examiner and member of the Professional Services Committee. If you are interested in getting involved in any aspect of the Institute's work, please fill out this short form.

Contributors' Stories: Getting Involved with Your Institute

Louise Graham
Tax Manager, PwC Ireland
Conferred in 2021

What is your involvement with the Institute and how did you first get involved?

Since being conferred as a member of the Irish Tax Institute in 2021, I have always been eager to stay involved. Initially, I wasn't sure what this would look like for me, but a few months after receiving my final results I received an email listing out the many possible ways to contribute. For me, it was as easy as ticking the possible options I liked the sound of! Since responding to that email I have done a stint as an Examiner and also joined the Professional Services Committee, and I thoroughly enjoyed partaking in both.

What have you gained from your involvement with the Institute?

From my involvement with the Institute to date I have refreshed my tax knowledge from writing exam papers (it was nice to be on the other side of the process this time!) Being a part of the Professional Services Committee has allowed me to network with like - minded individuals and also get an insight into what other CTAs are seeing in practice across different specialist tax areas.

Would you encourage others to get involved and why?

I would recommend everybody tries to get involved in their own way! It's nice to be a part of a community of CTAs, it is always interesting to connect with other ITI members working in different firms, across different tax heads and different ranging years of experience. Our day jobs are generally quite busy but staying involved with the institute doesn't have to mean giving up loads of your time. There is so much flexibility and optionality on how you choose to stay involved – there are a lot of "behind the scenes" options too. ITI always needs its members' contributions to help it grow and you will definitely benefit from involvement.

Get Involved

Remember, you don't have to wait to be asked. We are always delighted to hear from CTAs who would like to get involved.

To express your interest in contributing to the Institute's activities please email Samantha at sfeely@taxinstitute.ie or complete the survey at the link below Get involved with The Irish Tax Institute.

Irish Tax Institute

Policy and Representations Monitor

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

News Alert

Finance Bill 2023

As highlighted in the last issue of *Irish Tax Review*, on 21 February the Government announced the latest cost-of-living package, worth €1.2bn. A news item summarising the measures was published on the homepage of the Institute's website on the same day.

The Minister for Finance, Michael McGrath TD, received approval from the Dáil on 22 February to give immediate effect to a number of the tax measures announced and brought three Financial Resolutions before the Dáil to give effect to the changes to VAT and excise duty, outlined in more detail below. The Minister also brought forward a motion to make amendments to the Temporary Business Energy Support Scheme (TBESS) by Ministerial Order, as provided for in Finance Act 2022.

On 9 March Finance Bill 2023 was published, which gives full legal effect to the tax measures announced, summarised below. Finance Act 2023 was signed into law on 15 May 2023.

Extension to the Temporary Business Energy Support Scheme

On 1 March Minister McGrath welcomed the introduction of changes to the TBESS by way of Ministerial Order. The Minister had exercised his powers contained in s100(2)(a)(i) of Finance Act 2022 to extend the scheme to 30 April 2023. He also exercised his powers contained in s100(2)(a)(ii) and (iii) of Finance Act 2022 to increase the monthly limit on aid under the scheme to €15,000 per qualifying business in relation to a trade or profession, subject to an overall cap of €45,000 where a business is carried on from more than one location. The enhanced limits apply for claim periods from 1 March 2023. The three Statutory Instruments giving effect to these changes were published in *Iris Oifigiúil* on 28 February: SIs 73, 74 and 75 of 2023.

In addition to the above changes, the Government agreed to make a number of further enhancements to the TBESS, set out in s7 of Finance Act 2023, that were subject to State Aid approval. European Commission approval under the State Aid Temporary Crisis and Transition Framework was received on 17 April for the following enhancements to the TBESS:

- an extension of the scheme to 31 May 2023 and the potential for its further extension to 31 July 2023;
- with effect from 1 March 2023, an extension of the "specified period" from 28 February to 31 May 2023;
- a revised "energy costs threshold" of 30% to apply from 1 September 2022;
- an increased level of relief of 50% of eligible costs for claim periods after 1 March 2023; and
- 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.)

Revenue updated its "Guidelines on the Operation of the Temporary Business Energy Support Scheme (TBESS)" to reflect the enhancements approved by the European Commission. These updates are outlined below in Revenue eBrief No. 096/23.

The Institute submitted a Feedback Paper to Revenue in January on the "energy costs threshold", outlining difficulties for businesses that are on market-tracking tariffs or fixed contracts in meeting this threshold and suggestions on resolving this difficulty.

Grant aid for businesses using LPG or kerosene

The Government announced a new grant for businesses using liquefied petroleum gas (LPG) or kerosene, as these energy supplies do not qualify for the TBESS.

VAT

Financial Resolution No. 2: Value-Added Tax provides for the extension of the temporary reduced 9% VAT rate on gas and electricity to 31 October 2023. Financial Resolution No. 3: Value-Added Tax provides for the extension of the temporary reduced 9% VAT rate for the hospitality and tourism sectors to 31 August 2023. Section 5 of Finance Act 2023 amends the Value-Added Tax Consolidation Act 2010 to reflect these extensions.

On 5 April Minister McGrath and the Minister for the Environment, Climate and Communications, Eamon Ryan TD, announced the Government's approval of a Report Stage amendment to Finance Bill 2023 to provide for a zero rate of VAT on the supply and installation of solar panels for private dwellings. This is a permanent change and is effective from 1 May 2023.

Phased increase in excise duty on petrol and diesel

Financial Resolution No. 1: Mineral Oil Tax provides for a phased increase in the rate of excise duty per litre on petrol, diesel and marked oil to restore the rates to their previous levels, as follows:

- Petrol will increase by 6 cent on 1 June, 7 cent on 1 September and 8 cent on 31 October.
- Diesel will increase by 5 cent on 1 June, 5 cent on 1 September, and 6 cent on 31 October.
- Marked gas oil will increase by 1 cent on 1 June, 1 cent on 1 September and 3 cent on 31 October.

Section 4 of Finance Act 2023 amends Schedule 2 of Finance Act 1999 to reflect the revised rates of mineral oil tax.

Stamp duty

Section 6 of Finance Act 2023 amends the Stamp Duties Consolidation Act 1999 (SDCA 1999) to extend the stamp duty relief for young trained farmers (s81AA SDCA 1999) by three years to 31 December 2025 and amends the period during which an individual can qualify for this relief after acquiring land from four years to three years, to comply with Article 18(6) of the revised EU Agricultural Block Exemption Regulation (ABER). Section 6 also extends farm consolidation relief for stamp duty (s81C SDCA 1999) to 31 December 2025.

Agri-tax measures

Section 3 of Finance Act 2023 amended the following five agri-tax reliefs provided for in the Taxes Consolidation Act 1997 (TCA 1997):

- Section 285D was amended to reflect updated publication requirements for the acceleration of wear-and-tear allowances for farm safety equipment in accordance with the revised EU ABER. This section was updated to include the same definition of SME as is set out in Commission Regulation (EU) 2022/2472 of 14 December 2022.
- Section 604B was amended to extend the relief for farm restructuring to 31 December 2025.
- Section 658A was amended to extend the relevant period for accelerated allowances for capital expenditure on slurry storage to 31 December 2025. This section was also amended to reflect updated publication requirements in accordance with the revised EU ABER and to include the same definition of micro or small enterprise as is set out in

Commission Regulation (EU) 2022/2472 of 14 December 2022.

- Section 667B was amended to extend stock relief for young trained farmers to 31 December 2024. This section was also updated to reflect the definition of micro or small enterprise as is set out in Commission Regulation (EU) 2022/2472 of 14 December 2022.
- Section 667C was amended to extend stock relief for registered farm partnerships to 31 December 2024.

Benefit-in-kind regime for vehicles

Minister McGrath introduced a temporary change to the benefit-in-kind (BIK) regime for vehicles at Committee Stage. Finance Act 2019 introduced a new CO2-based BIK regime for employer-provided cars, which applies from 1 January 2023. The amount taxable as BIK is determined by the car's original market value (OMV), the annual business kilometres driven and CO2 emissions-based bands.

Although the move to a CO2-based BIK system, which incentivises the use of electric vehicles (EVs) and lower-emissions cars, is an important element of achieving Ireland's climate targets, a significant number of employees with vehicles in the typical emissions range experienced large increases in their income tax liabilities since the start of 2023. To address the issue, the Minister introduced a relief of €10,000 to be applied to the OMV of cars in Categories A–D to reduce the amount of BIK payable. This relief is not applicable to cars in Category E.

This treatment will also apply to all vans and electric vehicles. For EVs the OMV deduction of €10,000 will be in addition to the existing relief of €35,000 that currently applies to them, meaning that the total relief for 2023 will be €45,000. The upper limit in the highest mileage band is amended by way of a 4,000km reduction, so that the highest mileage band is now entered into at 48,001km. These temporary measures will be retrospectively applied from 1 January 2023 and will remain in place until 31 December 2023.

Institute responds to Pillar Two implementation feedback statement

On 8 May the Institute responded to the Department of Finance's Feedback Statement on the implementation of the Pillar Two Minimum Tax Directive ("the Directive"), which was adopted by the European Council in December 2022. Pillar Two of the OECD Two-Pillar Solution to address the tax challenges arising from digitalisation and globalisation, which Ireland signed up to in October 2021, consists primarily of two interlocking rules, together referred to as the Global Anti-Base Erosion (GloBE) Rules. These rules, as reflected in the Directive, require Member States to introduce a global minimum effective tax rate of 15% for corporate groups with annual global turnover of at least €750m. This minimum rate will apply in each jurisdiction in which the group operates and will be calculated on an adjusted accounting measure of profit.

The Feedback Statement sets out possible draft legislative approaches to the income inclusion rule (IIR) and the undertaxed profits rule (UTPR) and outlines possible approaches that could be taken in respect of the qualified domestic top-up tax (QDTT) and the administration of the GloBE Rules.

In our response to the Feedback Statement we note that the draft legislative approaches to the IIR and the UTPR, outlined in Appendix 1 of the Feedback Statement, largely follow the wording of the Directive. The proposed legislative approaches to the QDTT and the administration of the GloBE Rules by Revenue have not yet been published. Consequently, it is difficult to anticipate fully how the draft legislative provisions will interact with existing provisions of the Tax Acts.

As work on drafting the legislation transposing the Directive progresses, we highlighted the importance of an iterative process of consulting with stakeholders to minimise the complexity involved to the greatest extent possible and ensure the successful practical implementation of the Directive into Irish law.

Considering the very technical nature of the GloBE Rules and their significant impact on in-scope businesses, we strongly urged the Department of Finance and Revenue to continue to engage with stakeholders directly and via TALC BEPS before the publication of a second Feedback Statement.

We recommended that policy-makers consider the following key matters when transposing the Directive into Irish law:

- In drafting the relevant legislative provisions, it must be clear that any top-up taxes payable are incremental corporation tax, i.e. a corporate tax on income. A key concern for taxpayers is that any top-up tax payable under a QDTT will be considered a creditable tax for the purpose of Ireland's double taxation agreements with its key trading partners. In particular, care must be taken to ensure that any tax payable under the QDTT is considered foreign tax paid or accrued for foreign tax relief purposes under the US Foreign Tax Credit Regulations.
- Consistency of application of the GloBE Rules across jurisdictions will be a crucial factor in providing certainty to businesses. In the Directive's transposition into Irish legislation, we believe that the legislation should make direct reference to the GloBE Rules, the Commentary on the GloBE Rules and the Administrative Guidance on the GloBE Rules. To provide the necessary tax certainty to taxpayers, it would be important that the Irish legislation define the Administrative Guidance by reference to the date on which it is published.
- As the Administrative Guidance will evolve and likely be updated regularly during the initial period of implementation, we believe that an approach similar to that which applies to s835D TCA 1997, in respect of updates to the OECD's Transfer Pricing Guidelines, should also apply in respect of updates to the OECD's Administrative Guidance. This would mean that if the Administrative Guidance is updated by the OECD, the definition in Irish legislation may be supplemented by such additional guidance as may be designated by the Minister for Finance on or after the date of the passing of the Finance Act. Such an approach would provide certainty to taxpayers by ensuring that any future guidance will have prospective application only.
- The implementation of the GloBE Rules reduces Ireland's scope to compete for foreign direct investment based on its corporation tax rate. Consequently, if Ireland is to continue to compete for such investment, it must, at a minimum, align its corporation tax code with those of other EU Member States. Adopting a participation exemption would help to align the Irish corporation tax code with those operated by other EU Member States and with the GloBE Rules, which is more in line with a territorial system of taxation. We strongly urged that a participation exemption for dividends be introduced in Finance Bill No. 2 2023 alongside the implementation of the Pillar Two Model Rules.
- Policy-makers must also consider other ways to improve the Irish tax system to ensure that Ireland remains a competitive place in which to do business. In tandem with the implementation of Pillar Two, it will be necessary to review existing tax credits and incentives, such as the digital gaming tax credit, to ensure that they remain competitive and are aligned with the GloBE Rules.
- After the introduction of the Anti-Tax Avoidance Directive interest limitation rule in Finance Act 2021, which was layered on top of existing comprehensive interest deductibility provisions, Ireland now has one of the most complicated interest deductibility regimes in the EU. We strongly urged that priority be given to a review of the interest deductibility provisions, as part of an overall project of simplification, to ensure that Ireland's provisions are easier to administer and more in line with the measures in the corporate tax systems of other European countries.

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

Institute responds to consultation on Ireland's personal tax system

On 5 April the Institute responded to the Department of Finance's public consultation on Ireland's personal tax system. Ireland's personal tax system and international competitiveness regarding talent have been a long-standing area of focus for the Institute in our representations on personal tax policy.

In responding to the consultation questions we outlined 16 recommendations for reform of the personal tax system, relating to the personal tax base; supporting a competitive economy to incentivise and encourage work; simplifying the personal tax system; and encouraging workers to save for retirement.

We highlighted the importance of ensuring that Ireland's personal tax system can be relied on in the future to provide a sustainable and stable source of revenue to the Exchequer to fund public services. We noted that whereas the Irish personal tax system is highly progressive, the Irish personal tax base is unusually narrow and overly dependent on higher-paid workers, a significant proportion of whom work for a small group of multinational companies.

We submitted that a broader personal tax base, in which all taxpayers contribute according to their means, would be more sustainable in the long term. It would ease the burden on middle-income earners and bring Ireland more in line with competitor countries.

We emphasised the increasing importance of the attractiveness of a country's personal tax system and the cost for employers of locating workers in a country. We recommended that the marginal cost of employment be reduced for individuals and, ultimately, businesses that bear the cost of employment.

Regarding an intermediate, or third, rate of income tax, our submission noted that although, in principle, the Institute is generally supportive of any measure that reduces the burden on middle-income earners, careful consideration must be given to ensure that such a measure does not add further complexity to the Irish income tax system.

We highlighted that alternative measures such as continuing the trajectory taken in recent Budgets of increasing the standard rate threshold should achieve the same objective as a third rate of income tax of, say, 30% without the need for structural changes to the income tax system. We recommended that, at a minimum, credits and bands be automatically adjusted annually to ensure that taxpayers are not subjected to increased tax as a result of rising inflation.

Notwithstanding the difficulties and complexities involved, we emphasised the importance of simplifying the personal tax system, recommending that PRSI and USC be amalgamated as part of that process.

Finally, we highlighted the importance of ensuring that the personal tax system continues to incentivise individuals to provide for their retirement through the deferral of income to supplement their income in later years.

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

Business Tax Stakeholder Forum

During his address at the Institute's Annual Dinner 2023 on 24 February, the Minister for Finance, Michael McGrath TD, announced the introduction of a dedicated Business Tax Stakeholder Forum ("the Forum"), noting that "This forum will supplement existing forms of consultation and stakeholder engagement and will provide a dedicated forum for practitioners to engage on business tax policy issues at a technical level in a structured and regular way". The establishment of a formal tax policy stakeholder engagement process has been a long-standing area of focus for the Institute.

The Forum seeks to address a commitment made in "Ireland's Corporation Tax Roadmap: January 2021 Update" to develop a new framework for domestic stakeholder engagement. The Forum aims to provide an opportunity for key business tax stakeholders to engage with officials from the Department of Finance on direct business tax matters within the existing policy-making calendar. It is not a decision-making body and is intended to complement the existing engagement arrangements that the Department has with business stakeholders. It is anticipated that the Forum will meet twice a year, in spring and summer, to align with the Department's existing policy-making calendar.

The Forum's scope is limited to direct business taxation and it is consultative in nature, with a focus on knowledge and information sharing, including reflecting on tax developments in the EU and internationally and issues relating to domestic corporation tax legislation.

The inaugural meeting of the pilot Business Tax Stakeholder Forum took place on 29 March. Issues discussed included the state of play of Pillar One and Pillar Two; the transposition of the Pillar Two Minimum Tax Directive into Irish legislation; EU legislative files on the proposed Directive for preventing the misuse of shell entities ("the Unshell Directive"), on the Business in Europe: Framework for Income Taxation (BEFIT) proposal and on DAC8; measures to apply to outbound payments; and the Department's corporation tax workplan for 2023.

Regarding the potential move to a territorial tax system, the Department of Finance identified several issues for consideration, such as the interaction with controlled foreign company rules, anti-hybrid rules, exit tax provisions and tax treaties, and emphasised the importance of early engagement. At the meeting the Institute reiterated the importance of moving to a territorial tax system and introducing a participation exemption for foreign dividends. We will engage further with the Department of Finance on the potential issues that it has identified with regard to implementation.

Policy News

Department of Finance publishes terms of reference for review of funds sector

On 6 April the Minister for Finance, Michael McGrath TD, published the terms of reference for the Department of Finance to conduct a review of Ireland's funds sector in "Funds Sector 2030: A Framework for Open, Resilient & Developing Markets".

The multi-disciplinary review team will be led by the Department of Finance, with support from State bodies, including Revenue and the Central Bank of Ireland. The review team will look at a range of issues, which are set out in the published terms of reference. These include the regimes for s110 TCA 1997 entities, real estate investment trusts (REITs) and Irish real estate funds (IREFs). The review team will also examine international contexts, effects on employment and the economy, and the wider taxation regime for funds, life assurance policies and related investment products.

Under the broad and interlinked themes of "Open Markets, Resilient Markets and Developing Markets", the framework will seek to ensure that Ireland maintains its leading position in asset management and funds servicing. The review will also seek to ensure that Ireland's funds sector framework is resilient, future-proofed, supportive of financial stability and a continued example of international best practice.

The terms of reference envisage that the output of this review will inform and refresh Ireland's policy and legislative framework for the years ahead. In preparing its report, the review team will also engage extensively with stakeholders and, as part of this process, will undertake a public consultation.

The terms of reference refer specifically to recommendations 6.6 and 6.7 of the report of the Commission on Taxation and Welfare, which called for an examination of:

- the taxation regime for funds, life assurance policies and other investment products, with the goal of simplification and harmonisation where possible, with a net revenue-raising or -neutral mandate;

- the regimes for REITs and IREFs and their role in the property sector, including how they support housing policy objectives; and
- the use and scope of the s110 regime, both in the context of the property sector and more generally, so as to ensure that the regime is fit for purpose and meeting agreed policy objectives.

The review team will present its draft report to the Minister by summer 2024.

Updated General Scheme for Land Value Sharing and Urban Development Zones Bill published

The Minister for Housing, Local Government and Heritage, Darragh O'Brien TD, published the updated General Scheme for the Land Value Sharing and Urban Development Zones Bill on 14 April. The legislation provides for a new land-value sharing (LVS) charge of 30% on the difference between the existing use value and the market value of land that has been zoned for housing.

LVS aims to ensure that local authorities and communities benefit from a fairer share of land-value increases arising from State decisions relating to the zoning of land. All LVS revenue will be ring-fenced, and the increased revenue available to local authorities can provide infrastructure to support housing and other development.

The General Scheme of the Bill also provides for Urban Development Zones (UDZ), which have potential for significant development for housing and other purposes. UDZ, which are a new concept in the planning system, will include under-utilised large-scale areas with potential for significant development for housing and other purposes, generally within or in close proximity to existing settlements.

These measures are intended to be complemented by the residential zoned land tax, which was introduced in Finance Act 2021 and will come into effect from February 2024.

The General Scheme of the Bill is expected to go through pre-legislative scrutiny by the Joint Oireachtas Committee on Housing, Local Government and Heritage in the weeks following publication.

Commission amends General Block Exemption Regulation

On 9 March the European Commission confirmed that it had endorsed a targeted amendment to the General Block Exemption Regulation (GBER) to facilitate, simplify and speed up support for the EU's green and digital transitions. The Commission also adopted a new Temporary Crisis and Transition Framework, which, together with the amendment to the GBER, aims to foster support measures in sectors that are key for the transition to a net-zero economy, in line with the Green Deal Industrial Plan.

The GBER declares specific categories of State Aid compatible with the Treaty on the Functioning of the European Union, provided that they fulfil certain conditions. It therefore exempts these categories from the requirement of prior notification to and approval by the Commission, enabling Member States to grant the aid directly and inform the Commission *ex post*.

The amendments grant Member States more flexibility to design and implement support measures in sectors that are key for the transition to climate neutrality and to a net-zero industry. The changes include:

- increasing and streamlining the possibilities for aid in the area of environmental protection and energy, among others, to support the roll-out of renewable energy, decarbonisation projects, green mobility and biodiversity, as well as to facilitate investments in renewable hydrogen and increase energy efficiency;
- facilitating the implementation of certain projects involving beneficiaries in several Member States, such as Important Projects of Common European Interest, in the research and development field, by

increasing the aid intensities, as well as the notification thresholds;

- extending the possibilities for training and reskilling across sectors by exempting from notification training aid below €3m;
- block-exempting aid measures set up by Member States to regulate prices for energy such as electricity, gas, and heat produced from natural gas or electricity;
- introducing a significant increase of notification thresholds for environmental aid, as well as for research, development and innovation aid;
- clarifying and streamlining the possibilities for risk finance aid, for small and medium-sized enterprises and start-ups, as well as for financial products supported by the InvestEU Fund;
- prolonging the GBER until the end of 2026 for legal certainty and regulatory stability;
- increasing the thresholds in the GBER even beyond the areas under specific review to cater for the longer period of validity of the rules; and
- aligning the provisions of the GBER with the new Regional Aid Guidelines; the Climate, Energy and Environmental State Aid Guidelines; the Risk Finance Guidelines; the Research, Development and Innovation Framework; and the Broadband Guidelines.

The formal adoption of the Regulation will take place once the translation of the text into all official languages of the EU is finalised. The adopted text will then be published in the *Official Journal of the European Union*.

EU list of non-cooperative jurisdictions for tax purposes updated

The European Council agreed, at a meeting of the Economic and Financial Affairs Council on 14 February, to add the British Virgin Islands, Costa Rica, the Marshall Islands and Russia to the EU list of non-cooperative jurisdictions for tax purposes (Annex I). The EU list now consists of 16 jurisdictions: American Samoa, Anguilla, the Bahamas, the British Virgin Islands, Costa Rica, Fiji, Guam, the Marshall Islands, Palau, Panama, Russia, Samoa, Trinidad and Tobago, the Turks and Caicos Islands, the US Virgin Islands and Vanuatu.

Commission Regulation on tax transparency

The European Commission adopted an Implementing Regulation on 13 April laying down detailed rules for implementing certain provisions of Council Directive 2011/16/EU regarding the assessment and determination of equivalence of information in an agreement between the competent authorities of a Member State and a non-Union jurisdiction. The Implementing Regulation sets out the criteria for determining whether the information automatically exchanged under an agreement between the tax authorities of Member States and of a non-EU country is equivalent to that specified in Council Directive (EU) 2021/514 (DAC7).

Directive 2011/16/EU was amended by Council Directive (EU) 2021/5142 to improve the provisions that relate to all forms of exchange of information and administrative cooperation by providing for a mandatory automatic exchange of information reported by platform operators.

Brexit: EU and UK Joint Committee adopts new Windsor Framework arrangements

On 27 February the European Commission and the UK Government reached political agreement in principle on the Windsor Framework. The Framework constitutes a comprehensive set of joint solutions aimed at addressing, in a definitive way, the practical challenges faced by citizens and businesses in Northern Ireland.

The joint solutions cover, among other matters, new arrangements on customs, agri-food, medicines, VAT and excise, as well as specific instruments designed to ensure that the voices of the people of Northern Ireland are better heard on specific issues particularly relevant to the communities there. These new arrangements are underpinned by robust safeguards to ensure the integrity of the EU's Single Market, to which Northern Ireland has a unique access.

New arrangements in the area of customs are based on an expanded trusted trader scheme that will also be open to businesses in Great Britain. Goods moved by trusted traders that are not at risk of entering the EU's Single Market will benefit from significantly simplified procedures and declarations with reduced data requirements.

At the tenth meeting of the EU–UK Joint Committee in London on 24 March, the Vice-President of the European Commission for Interinstitutional Relations, Maroš Šefčovič, and the UK Secretary of State for Foreign, Commonwealth and Development Affairs, James Cleverly, released a joint statement noting that the Joint Committee had adopted a decision laying down the arrangements relating to the Windsor Framework. This decision covers the arrangements for the movement of goods that are not at risk of entering the Single Market, the "Stormont Brake", and VAT- and excise-related solutions, including the establishment of an "enhanced coordination mechanism" for VAT and excise. A series of Recommendations, Joint Declarations and Unilateral Declarations were published, clarifying how different aspects of the Windsor Framework will work in practice, e.g. State Aid or market surveillance. Both sides agreed on the importance of continuing to protect EU citizens and UK nationals and welcomed the efforts made over the past year to do so.

The Joint Committee decision and recommendations entered into force on 25 March. Certain parts will become applicable in a gradual way: for example, the new and expanded trusted trader scheme for freight will start applying on 30 September 2023, provided that the relevant safeguards are in place. In order to fully implement the wide range of joint solutions announced in Windsor, on 27 February the Commission tabled three legislative proposals on sanitary and phytosanitary rules, medicines and tariff rate quotas. The Commission is working closely with the European Parliament and the Council for their swift adoption over the coming months.

UK Spring Budget 2023

The UK Chancellor of the Exchequer, Jeremy Hunt MP, delivered his Spring Budget 2023 on 15 March. A summary of the key tax measures announced in the Spring Budget 2023 is given below: (See also article by Marie Farrell "UK and Northern Ireland Tax Update - Summer 2023" in this issue.)

- **Corporation tax:** The main corporation tax rate increased from 19% to 25% with effect from 1 April 2023.
- **Capital allowances:** The super-deduction regime ended on 31 March 2023 and was replaced with "full expensing". From 1 April 2023 until 31 March 2026, investments made by companies in qualifying plant and machinery will qualify for a 100% first-year allowance for main rate assets. Companies investing in special rate assets will also benefit from a 50% first-year allowance in the year of investment. This includes long-life assets such as solar panels and thermal insulation on buildings.
- **R&D tax relief:** From 1 April 2023 a higher rate of relief for loss-making R&D-intensive SMEs was introduced. SMEs for which qualifying R&D expenditure constitutes at least 40% of total expenditure will be able to claim a higher payable credit rate of 14.5% for qualifying R&D expenditure. The consultation on merging the R&D expenditure credit and SME schemes closed on 13 March, and draft legislation on a merged scheme will be published for technical consultation alongside the publication of the draft Finance Bill in the summer, with a summary of responses to the consultation.
- **Reforms to audio-visual tax reliefs:** The film, TV and video games tax reliefs will be reformed, becoming expenditure credits instead of additional deductions from 1 April 2024. Video games, film and high-end TV will be eligible for a credit rate of 34%, and animation and children's TV for a rate of 39%.
- **Corporate interest restriction:** There will be a number of modifications to the corporate interest restriction rules to "protect

Exchequer revenue, remove unfair outcomes and reduce administrative burdens for businesses". In most cases these take effect for periods of account commencing on or after 1 April 2023.

- **Carried-interest rules:** A new elective accruals basis of taxation for carried interest was introduced, allowing UK-resident investment managers to accelerate their tax liabilities to align their timing with the position in other jurisdictions, where they may obtain double taxation relief. This applies from 6 April 2022.
- **Investment Zones:** Twelve new Investment Zones are to be established across the UK, which can benefit from tax reliefs including enhanced rates of capital allowances and relief from stamp duty land tax, business rates and employer National Insurance Contributions.
- **Plastic packaging tax:** The plastic packaging tax rate was increased in line with the Consumer Price Index from 1 April 2023.
- **Enterprise management incentive (EMI):** The process to grant options under an EMI scheme has been simplified. From April 2023 the requirement for a company to set out details of share restrictions in the option agreement and the requirement for a company to declare that an employee has signed a working-time declaration will be removed. From April 2024 the deadline for a company to notify HMRC of the grant of an EMI option will be extended from 92 days after grant to 6 July following the end of the tax year.
- **Pensions:** The amount that an individual can contribute tax-free to their pension fund was raised from £40,000 to £60,000 per annum from April 2023. The lifetime allowance charge is to be removed.
- **Agricultural property relief and woodlands relief:** The scope of agricultural property relief and woodlands relief from inheritance tax will be restricted to property in the UK from 6 April 2024.

HMRC confirmed in "Spring Budget 2023 – Overview of Tax Legislation and Rates" that the UK Government will introduce legislation in the Spring Finance Bill 2023, with supporting Regulations, to require large multinational businesses operating in the UK to prepare transfer pricing documentation – namely, a master file and local file – in accordance with the OECD Transfer Pricing Guidelines. This measure will apply to accounting periods beginning on or after 1 April 2023.

HMRC revises late-payment interest rates

The Bank of England's Monetary Policy Committee voted to increase the Bank of England base rate on 23 March from 4% to 4.25%. As HMRC interest rates are linked to the Bank of England base rate, HMRC interest rates for late payment and repayment also increased.

Late-payment interest is set at the base rate plus 2.5%, and repayment interest at the base rate minus 1%, with a lower limit, or "minimum floor", of 0.5%. The updated interest rates to be applied to the main taxes and duties that HMRC currently charges and pays interest on will be 6.75% for late payments and 3.25% for repayments. The changes came into effect on 3 April 2023 for quarterly instalment payments and 13 April 2023 for non-quarterly instalments payments.

President Biden announces Budget for FY2024

The US President, Joe Biden, announced his Budget for the fiscal year 2024 on 9 March. The Department of the Treasury released the General Explanations of the Administration's FY2024 Revenue Proposals, or "Greenbook", to explain the revenue proposals included in President Biden's Budget. Key business tax proposals in the Greenbook include:

- an increase in the US corporate income tax rate from 21% to 28%;
- reforms to US international tax rules, including raising the tax rate on the foreign earnings of US multinational corporations from 10.5% to 21% (i.e. increasing the effective global intangible low-taxed income (GILTI) rate to 21%) and adopting an undertaxed profits rule;

- the repeal of the deduction allowed for foreign-derived intangible income and the use of the resulting revenue to encourage R&D;
- an increase from 1% to 4% for the corporate stock repurchase excise tax that was enacted as part of the 2022 Inflation Reduction Act; and
- the elimination of fossil fuel tax preferences that distort markets by encouraging more investment in the fossil fuel sector than would occur under a neutral system.

Recent Revenue eBriefs

Lorraine Sheegar
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Revenue eBriefs Issued from 1 February to 30 April 2023

No. 026 Guidance on Interest Limitation Rule

Revenue has updated the manual "Guidance on the Interest Limitation Rule" manual in sections 4.1, 4.4, 5, 9, 11.4 and 12 to reflect amendments made to Part 35D TCA 1997 by Finance Act 2022.

No. 027 Extended Deadline for Claims under the Temporary Business Energy Support Scheme (TBESS)

Revenue updated the "Guidelines on the Operation of the Temporary Business Energy Support Scheme (TBESS)" to reflect the extension by Revenue of the time limit for the September 2022 claim period. Claims for an electricity or natural gas bill should be made within four months of the end of the claim period. However, this time limit has been extended in respect of claims for September 2022 energy bills, which can now be made beyond 31 January 2023. The guidelines have also been amended to clarify that a public body carrying on a trade or profession the profits of which are chargeable to tax under Schedule D, Case I or II, is an eligible business.

No. 028 Tax Treatment of Ukrainian Citizens Who Work Remotely in the State for Ukrainian Employers

Revenue has extended the concessional tax treatment of Ukrainian citizens who work remotely in the State for Ukrainian employers to the tax year 2023, given the continuation of the war in Ukraine and the ongoing humanitarian crisis.

In April 2022 Revenue issued eBrief No. 090/22, outlining Revenue's concessional treatments of Ukrainians who came to the State as a result of the war in their country and continued to be employed by their Ukrainian employer while performing the duties of their employment remotely from Ireland. The concession provided that in relation to Ukrainian employment income:

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

This concession applied solely to employment income paid to the Ireland-based employees by their Ukrainian employer for the tax year 2022.

Revenue also disregarded the presence of these employees in Ireland for corporation tax purposes in respect of any company resident in Ukraine where the employee, director, service provider or agent would have continued to be present in Ukraine but for the war.

This eBrief confirms that the concessional treatments will apply for the tax year 2023, subject to the qualifying conditions outlined in eBrief No. 090/22. Revenue advises that any individual or relevant entity that avails of these concessional treatments should continue to retain evidence to support compliance with the conditions.

No. 029 U.S. Dividends and Encashment Tax

Revenue has updated the "Schedule 2 – Encashment Tax" manual to provide an example of how encashment tax is applied to US dividends and to incorporate the manual "Part 35-02-05 – US Dividends", which has been archived.

No. 030 Stamp Duty Tax and Duty Manual Section 81AA: Transfers of Land to Young Trained Farmers Updated

Revenue's manual "Transfers of Land to Young Trained Farmers – Part 7: Section 81AA" has been updated to reflect Finance Act 2022 amendments and other relevant developments. Finance Act 2022 extended the relief under s81AA SDCA 1999 to 30 June 2023. In addition, it inserted a new s654A TCA 1997, which streamlines how trained farmer qualifications are listed and updated for the purposes of various tax relief schemes, including relief under s81AA SDCA 1999.

Section 81AA constitutes a State Aid granted in accordance with the Agricultural Block Exemption Regulation (ABER). The manual reflects the new ABER that came into effect on 1 January 2023, replacing the previous ABER, which expired on 31 December 2022.

No. 031 Stamp Duty Manual – "Section 81D Relief on Certain Leases of Farmland" – Updated

Revenue's manual "Relief for Leases of Farmland Part 7: Section 81D" has been updated to reflect Finance Act 2022 and other relevant developments. Section 81D SDCA 1999 provides for relief from stamp duty, subject to State Aid rules, in respect of certain leases of farmland executed, i.e. signed, sealed or both, on or after 1 July 2018. A farmer must either hold a relevant agricultural qualification or spend a specified amount of time farming to qualify for the relief.

Finance Act 2022 inserted a new s654A TCA 1997, which streamlines how agricultural qualifications are listed and updated for the purposes of various tax relief schemes, including relief on certain leases of farmland. The manual has been updated to reflect this.

No. 032 Share Schemes Manual – Chapter 13 Updated

Revenue has updated "Chapter 13 – Growth Shares" of the Share Schemes Manual to include updated examples and a link to Chapter 15 of the manual, which provides comprehensive guidance on filing the Employer's Share Awards (ESA) Return.

No. 033 Claiming Tax Relief for Health Expenses

Revenue has updated the manual "Health Expenses – Qualifying Expenses" to reflect the flat-rate expense amount allowable for certain kidney patients (at section 10.6) and children with life-threatening illnesses (at section 12). The examples throughout the manual have also been updated to refer to the current year of assessment.

No. 034 Help to Buy (HTB)

Revenue updated the "Help to Buy (HTB)" manual to reflect the extension to the enhanced HTB relief to 31 December 2024 by Finance Act 2022. The manual was also updated as follows:

- Paragraph 5, "What is a Qualifying Residence?", includes a reference to the technical amendment to the definition of qualifying residence introduced in Finance Act 2022.
- Paragraph 5.4, "Purchase of a property from a Local Authority", has been removed. All conditions of the scheme must be met for an application to proceed. Applicants who purchase from a local authority or State agency will not be excluded from the scheme where all conditions of the scheme are met.
- Paragraph 5.4.1 (previously paragraph 5.5.1) clarifies that where the price paid for a property is less than its market value, the purchase value for the purposes of the HTB scheme will be the market value.
- Paragraph 7.4, "Loan-to-Value Ratio", clarifies that the purchase value of a property cannot be less than its market value for the

purposes of the loan-to-value calculation. New examples covering shared-equity funding are also included.

- Paragraph 15.3, "Temporary relocation for work during the 5-year clawback period", clarifies the conditions pertaining to this concession. A new example is also included

No. 035 Stamp Duty Manual – "Schedule 1 to Stamp Duties Consolidation Act 1999" – Updated

Schedule 1 to the Stamp Duties Consolidation Act 1999 (SDCA 1999) lists, in alphabetical order, the various instruments that are within the charge to stamp duty. The manual "Schedule 1 to SDCA 1999: Stamp Duties on Instruments" has been updated to reflect recent developments:

- Finance Act 2021 abolished the stamp duty charge that applied on bills of exchange (i.e. cheques, drafts and money orders) by deleting the "BILL OF EXCHANGE" head of charge from Schedule 1 and replacing it with a new annual levy on bills of exchange, which is provided for by a new s123D, "Bills of Exchange". Under s123D, stamp duty at the rate of €0.50 will be payable in respect of each bill of exchange that is processed (or issued, subject to an election's being made) in each calendar year.
- Finance Act 2022 inserted a new s654A in TCA 1997, which streamlines how agricultural qualifications are listed and updated for the purposes of various tax relief schemes, including consanguinity relief, which is provided for in Schedule 1.

No. 036 Pensions Manual Updated

A new Appendix V has been added to Revenue's Pensions Manual, titled "Calculation of the Present Value of Pension Lump Sum for the Purposes of the Relevant Capital Sum Calculation". This appendix sets out the appropriate method to calculate the present value of the pension lump sum for the purposes of the Standard Capital Superannuation Benefit calculation. Revenue advises that Appendix V should be read in conjunction with the manual "Payments on Termination of an Office or Employment or Removal from an Office or Employment".

No. 037 Stamp Duty Tax and Duty Manual – "Section 31E: Stamp Duty on Certain Acquisitions of Residential Property (10% Rate of Duty)" – Updated

Revenue updated the Stamp Duty Manual "Part 5: Section 31E: Stamp Duty on Certain Acquisitions of Residential Property (10% Rate of Duty)" to reflect changes made by Finance Act 2022 to s31E SDCA 1999. The manual contains guidance on the application of s31E, which provides for stamp duty to be charged on certain acquisitions of residential property at a higher rate of 10%.

The manual has been updated to:

- clarify that the acquisition of a partial interest in a residential property is within the scope of s31E and
- provide that home reversion firms are excluded from the scope of s31E.

The manual has also been updated at sections 5 and 6.3 to further clarify that indirect acquisitions are within the scope of s31E.

No. 038 Amendments to Revenue Pensions Manual

Revenue updated the following chapters of its Pensions Manual:

- "Chapter 1 – Introduction" sets out the legislation governing the tax treatment of and contributions to pan-European pensions products (PEPPs).
- "Chapter 3 – Contributions by Employees" includes at section 3.1 a reference to PEPPs in relation to sources of income and the application of the earnings limit.
- "Chapter 5 – Funding and Investments" has been updated at section 5.7 on review.
- "Chapter 22 – Pension Adjustment Orders (PAOs)" provides further details at section 1

on how a PAO can apply to benefits from a PEPP.

- "Chapter 26 – Tax Relief for Pension Contributions: Application of Earnings Limit" has been updated at section 26.2 to list a PEPP within the relevant TCA 1997 provisions that cover the age-related limits on tax relief. Examples have also been updated throughout the manual.
- "Appendix I", which is a glossary section, includes relevant benefits from a PEPP in the definition of "retained benefits".
- "Appendix III", which deals with tax relief for pension contributions made in the year of retirement – late elections, now includes such elections made to a PEPP.

No. 039 Tax Equalisation Arrangements

Revenue published a new "Tax Equalisation Arrangements" manual outlining its treatment, for Irish income tax purposes, of tax-equalisation arrangements that apply to employees who are assigned from abroad to carry out duties of employment in the State under non-Irish contracts of employment.

The manual provides an overview of common practices adopted by overseas employers with respect to tax-equalised assignees who work in Ireland on assignment. It also highlights areas of risk that may be reviewed as part of Revenue compliance interventions into the operation of the PAYE system by overseas employers with respect to such assignees.

No. 040 Foreign Account Tax Compliance Act (FATCA)

Revenue has updated paragraph 4.3 of the manual "Guidance Notes on the Implementation of Foreign Account Tax Compliance Act (FATCA) in Ireland" and paragraph 7.6 of the manual "Filing Guidelines for Foreign Account Tax Compliance Act (FATCA)" to reflect new Internal Revenue Service guidance on the reporting of a taxpayer identification number, which issued in January 2023.

In addition, Appendix I of "Guidance Notes on the Implementation of Foreign Account Tax Compliance Act (FATCA) in Ireland" has been updated to include investment managers and investment advisers in the list of non-reporting financial institutions.

No. 041 Capital Acquisitions Tax Manual – Part 15 Insurance Policies

Revenue has updated the manual "Insurance Policies – Capital Acquisitions Tax Manual Part 15" at paragraph 15.4.1 to provide information on obtaining Revenue approval for new policy products.

No. 042 PAYE/USC Regulations – Emergency Tax

Revenue updated the manual "PAYE/USC Regulations – Emergency Tax" to reflect the increase in tax bands introduced by Finance Act 2022. Examples throughout the manual have also been updated, including relevant references to information on the Revenue website.

No. 043 C&E Tan Reports Available on ROS

Revenue has updated the manual "C&E TAN Reports Available on Revenue's Online Service (ROS) for C&E Traders" to include details of new reports. These reports are available since 1 March 2023 for importers and payers on import declarations.

No. 044 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 the changes and proposed enhancements to the TBESS after the Government announcement of the latest cost-of-living package on 21 February.

Some of the changes have already been introduced by Ministerial Order, as provided for in Finance Act 2022. The scheme has been extended to 30 April 2023. For claim periods from 1 March 2023 onwards:

- the €10,000 monthly limit on payments under the scheme has been increased to

€15,000 per trade or profession carried on by a qualifying business and

- the €30,000 limit has been increased to €45,000 per trade or profession in cases where the trade or profession is carried on from more than one location.

Revenue will update the TBESS guidelines for the other proposed enhancements to the scheme once State Aid approval for these changes is received:

- extension of the scheme to 31 May 2023,
- reduction of the energy costs threshold from 50% to 30% with effect from 1 September 2022,
- increase of the amount payable under the scheme from 40% to 50% of a business's eligible costs for claim periods from 1 March 2023 and
- extension of the time limit for all claims to 31 July 2023.

The TBESS guidelines note that qualifying businesses can continue to make claims for the September 2022 to February 2023 claim periods. Revenue will advise businesses in due course when claims can be made for the March 2023 claim period.

Once State Aid approval to revise the energy costs threshold is received, Revenue will automatically process claims using the revised 30% threshold. Businesses will not need to amend claims that have already been submitted.

Eligible businesses can continue to register for the TBESS as normal.

No. 045 The Administration & Control of Tax Warehouses Manuals Parts 1, 2 & 3

Revenue updated the following "Administration & Control of Tax Warehouses" manuals to reflect s47 of Finance Act 2021, which amended Part 2 of Finance Act 2001 to transpose Council Directive (EU) No. 2020/262 into Irish law (this Directive replaces Directive 2008/118/EC on the general arrangements for excise duty with effect from 13 February 2023):

- "Part 1 – General Warehousing Provisions",
- "Part 2 – Breweries, Microbreweries and Cider Manufacturers" and
- "Part 3 – Distilleries".

The Directive extends the use of the electronic EU Excise Movement and Control I.T. System to duty-paid excisable products that are subsequently moved to another Member State, replacing the paper-based system for such products. It also includes two new categories of excise trader: "certified consignor" and "certified consignee".

In addition, the manual "Part 2 – Breweries, Microbreweries and Cider Manufacturers" has been updated to include information on the new alcohol products tax relief for small producers of cider and perry. This relief was introduced by Finance Act 2022 from 1 January 2023.

No. 046 Stamp Duty Manual – Section 83F: Repayment of Stamp Duty for Cost Rental Dwellings – Updated

The Stamp Duty Manual "Part 7: Section 83F – Repayment of Stamp Duty on Cost Rental Dwellings" has been updated to include detailed step-by-step guidance on how to make a repayment claim using the eRepayments system, which can be accessed through ROS or myAccount.

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

No. 047 Employee Payroll Tax Deductions in Relation to Non-Irish Employments Exercised in the State

The contents of Revenue's manual "Pay As You Earn (PAYE) System – Employee Payroll Tax Deductions in Relation to Non-Irish Employments Exercised in the State" relating to internationally mobile employees and tax equalisation has been removed. More detailed guidance on these matters is now included in Revenue's recently published manual "Tax Equalisation Arrangements".

No. 048 Payment of Preliminary Corporation Tax

Revenue has updated the "Payment of Preliminary Corporation Tax" manual to include a new paragraph 6 covering leap-year preliminary tax calculations. Section 70 of Finance Act 2021 inserted a new sub-section (3A) into s959AM TCA 1997 to correct an anomaly in the calculation of preliminary corporation tax payments in a leap year or the year after a leap year.

The manual has also been updated at paragraphs 10–13 to outline the calculation of interest from the preliminary tax due date until the underpaid amount is paid. It contains examples where there is an underpayment of preliminary tax by a large and a small company, including where a large company has made a qualifying disclosure that increases its corporation tax liability.

No. 049 EU Sanctions in Response to the Situation in Ukraine

Revenue has updated its "Manual on EU Sanctions in Response to the Situation in Ukraine" to include the most recent sanction measures in place and updated legislative references.

No. 050 Revenue eBrief: ROS – Return Preparation Facility (RPF) Updated

Revenue updated the manual "ROS – Return Preparation Facility (RPF)" as follows:

- Paragraph 4, "Availability of RPF", and Appendix 1 include the release date for corporation tax forms CT1 2022 and CT1 2023.
- Paragraph 6, "Working on the Form", no longer references the "validation button" (previously in paragraph 6.1) as it is no longer required because validation is built into the "Save" feature.
- Paragraphs 6 and 6.1 include instructions on the "Save As" and "Save" features.

The RPF can be accessed through a link on the ROS log-in screen. Forms completed using the RPF are uploaded using ROS Online to sign and submit the return in the normal manner.

Over time, the RPF will replace the ROS Offline application for the majority of forms; however, ROS Offline will still be used for some forms. Appendix 1 contains information on the form types available in the RPF.

No. 051 Tax and Duty Manual 42-04-15 PAYE Refunds Failure by Employer to Furnish P35, P45 and P60 up to 2018

The manual "PAYE Refunds – Failure by Employer to Furnish P35, P45 or P60" has been archived because the contents of this manual no longer apply as 2018 is outside the four-year time limit. The manual dealt with refunds of tax and USC where employers failed to furnish P35, P45 or P60 forms up to and including the tax year 2018. With the introduction of real-time reporting from 1 January 2019, Forms P35, P45 and P60 have been abolished. Consequently, the content in this manual does not apply to 2019 and following years.

No. 052 Stamp Duty Manual Part 7: Section 81AA – Transfers of Land to Young Trained Farmers – Updated

The Stamp Duty Manual "Part 7: Section 81AA – Transfers of Land to Young Trained Farmers" provides for relief from stamp duty on the transfer of agricultural land where the individual acquiring the land is under 35 years of age on the date of execution of the deed of transfer, holds a relevant agricultural qualification, and spends not less than 50% of his or her normal working time farming the land for a period of not less than five years from the time the land is conveyed or transferred.

The manual has been updated to state that Revenue accepts the requirement that the transferee spend at least 50% of his or her normal working time farming the transferred land may be satisfied where he or she carries out the farming activities through a company or a partnership

No. 053 Guidelines for Using the Court Process to Pursue Tax Liabilities

Revenue updated the Collection Manual "Guidelines for Using the Court Process to Pursue Tax Liabilities". The text "It is the responsibility of the taxpayer or their representatives to ensure the Satisfaction Piece is registered in the Central Office of the Four Courts" has been included in paragraph 19.1 of Part 1, which deals with satisfaction of judgments and discharge of judgment mortgages.

No. 054 Exempt Unit Trust (EUT) February 2023 Filing – Deadline Extension and Updated Form EUT1 Available

The filing deadline for the annual statement by exempt unit trusts, the Form EUT1, in respect of the year of assessment 2022 was extended from 28 February to 5 May 2023. A new version of the Form EUT1 has been made available on the "Collective Investment Vehicles" webpage, in the "Related Forms" panel, of the Revenue website.

Section 731(5)(a)(iii) TCA 1997 obliges EUTs to file this statement annually. The new version of the Form EUT1 should be used for filings in respect of the year of assessment 2022. As noted on page 1 of the Form EUT1, filing should be completed electronically and returned to Revenue via MyEnquiries to largecasesdiv@revenue.ie.

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

- Disclosure of unitholder type (i.e., state if either a pension or a charity),
- General Overview of business activities carried out by the EUT in the year of assessment,
- Details of any Material Transactions carried out by the EUT in the year of assessment,
- Details of any transactions entered into with persons connected with any unit holder in the EUT in the year of assessment,
- Disclosure of Assets held by the EUT at the end of year of assessment (which includes disclosure of asset type, location and value) and
- Detailed guidance notes attached to the updated Form EUT1 to assist completion of the statement, including practical examples illustrating level of detail required.

No. 055 Capital Acquisitions Tax Manual – Part 12 Business Relief

The CAT Manual "Part 12 – Business Relief" has been updated at paragraph 12.7.1 to include guidance on a temporary concession that applied in relation to the relief while Covid-19 restrictions were in place.

No. 056 Double Deduction of Tax at Source: Credit Through PAYE System for Non-refundable Foreign Tax

Revenue's manual "Double Deduction of Tax at Source: Credit Through PAYE System for Non-refundable Foreign Tax" has been updated as follows:

- Paragraph 2.1.1. has been amended to reflect updated practice with regard to Irish employment income that is subject to payroll withholding tax in non-DTA jurisdictions, specifically relating to the claiming of unilateral relief in such circumstances.
- Paragraph 6 provides updated guidance on the funding of foreign payroll withholding tax liabilities that may arise when an Irish-resident employee exercises duties abroad.
- The examples in Appendices 1 and 2 have been updated.
- The application form (Double Deduction 1) in Appendix 3 has been amended to request details of the intended departure and return dates from and to the State in respect of the assignment and the expected work pattern of the employee between the two territories.

No. 057 Tax and Duty Manuals Payments on Termination of an Office or Employment or Removal from an Office or Employment and Pensions Manual – Appendix V Have Been Amended

Revenue's manual "Payments on Termination of an Office or Employment or Removal from an Office or Employment" has been updated at paragraph 3.6 to refer to Appendix V of the Pensions Manual, which includes detailed guidance on how to calculate the "relevant capital sum".

Appendix V of the Pensions Manual has also been updated to include an effective date for this guidance (24 February 2023). A reference to the use of this guidance for the purposes of calculating the increase in basic exemption has been added.

Appendix V of the Pensions Manual should be read in conjunction with the manual "Payments on Termination of an Office or Employment or Removal from an Office or Employment".

No. 058 Stamp Duty Manual – Section 83E: Repayment of Stamp Duty Where Certain Residential Units Leased (Social Housing) – Updated

The Stamp Duty Manual "Repayment of Stamp Duty Where Certain Residential Units Leased (Social Housing): Part 7: Section 83E" has been updated to include detailed step-by-step guidance on how to make a repayment claim using Revenue's eRepayments system (through ROS or myAccount). In addition, the existing contents of the manual have been updated and refreshed to provide clearer and more detailed guidance on the operation of s83E SDCA 1999.

No. 059 Tax and Duty Manual Part 07-01-27 Exemption from Income Tax in Respect of Certain Payments Made under Employment Law

The manual "Exemption from Income Tax in Respect of Certain Payments Made under Employment Law" has been amended at paragraph 2 to update definitions of "relevant Act" and "relevant authority". Paragraph 3 has also been amended to reflect the expanded options for mediation under the Workplace Relations Act 2015.

Revenue has also redrafted the examples provided in Appendix 2, which illustrated the operation of the legislation in respect of decisions/determinations/recommendations made by the Equality Tribunal, the Employment Appeals Tribunal, the Workplace Relations Commission and the Labour Court. Some new examples have also been added (Examples 6 to 9).

No. 060 Tax and Duty Manual 04-08-11 Pre-letting Expenses

Revenue's manual "Pre-letting Expenditure in Respect of Vacant Residential Premises" has been updated to reflect Finance Act 2022 amendments, which take effect from 1 January 2023.

Paragraph 1 reflects the reduction in the period for which the property must have been vacant from 12 months to 6 months. Paragraph 4 notes that the cap on the allowable deduction for the expenditure has been increased from €5,000 to €10,000.

No. 061 Stamp Duty Tax and Duty Manual Part 9 – Levies

A number of amendments have been made to the Stamp Duty Manual "Part 9: Levies" regarding stamp duty to be levied on financial cards, cheques and certain insurance premiums and policies, after legislative amendments:

- Section 61 of Finance Act 2021, which was amended by s70 Finance Act 2022, provided for the modernisation of banking levies by providing that statements are to be made online and amended the filing dates to coincide with the calendar year. It also introduced a new s123D SDCA 1999, which provides for a €0.50 levy on bills of exchange. This charge was previously contained in Schedule 1.
- Section 62 of Finance Act 2021, which was commenced by Ministerial Order (SI 133 of 2022) on 1 April 2022, provided

for the modernisation of insurance levies by providing that statements are made by electronic means. A new s125C SDCA 1999 was introduced, which provides for a charge of €1 on non-life insurance policies. This charge was previously contained in Schedule 1.

- Section 63 of Finance Act 2021, which commenced on 1 January 2022, updated the compliance provisions of the banking and insurance levies to bring them into line with other stamp duties.

No. 062 Capital Acquisitions Tax Manuals Parts 10 and 11 – Updated

The CAT Manual "Part 10 – Favourite Nephew/Niece Relief" provides guidance on the operation of the relief under Schedule 2, paragraph 7, Capital Acquisitions Tax Consolidated Act 2003. Revenue has expanded the guidance to include more details on the relief, including the conditions that apply. It also notes that the relief does not apply where the gift/inheritance is taken under the appointment from a discretionary trust set up by the disponer. The example in the text has been expanded to clarify the "relevant period" where there is an intervening life interest in the business property.

The CAT Manual "Part 11 – Agricultural Relief" has been updated at paragraph 11.6.3.4 to reflect the introduction by Finance Act 2022 of a new s654A TCA 1997, which streamlines how agricultural qualifications are listed and updated for the purposes of various tax relief schemes, including agricultural relief.

No. 063 Pensions Manual Amended

Revenue has updated nine chapters in the Pensions Manual after a review and to reflect Finance Act 2022 amendments. The main amendments are:

Chapter 7 – Lump Sum Benefits and Commutation

- This chapter now includes a reference to pan-European personal pension products (PEPPs) in the context of commuting a pension within "trivial limits".

Chapter 10 – Benefits on Death-in-Service

- This chapter has been updated at section 2 regarding CAT where an individual dies in service and the equivalent pension value is transferred to an approved retirement fund (ARF).

Chapter 13 – Transfer Payments

- Section 2 has been updated to provide clarity on the availability of transfer payments to a PEPP. It also provides a link to a new Chapter 31.

Chapter 17 – Overseas Employers, Overseas Employees and Employees Seconded from Overseas

- Section 3 has been updated to state that the section applies only to overseas employment contracts and includes an example clarifying the tax treatment of employees seconded from outside Ireland. It also removes guidance for seconded employees staying more than five years requiring Revenue's written permission.
- Section 5 now includes guidance that the treatment as set out in this section applies to both Irish and non-Irish employment contracts.
- Section 6 has been updated to state that, in certain circumstances, a non-resident employee may remain in an Irish occupational pension scheme.
- Section 7 has been updated to provide clarity for overseas employees of Irish employers.
- Section 8 has been updated to state that an employee on secondment from an Irish employer for up to five years can be deemed to remain on the payroll.
- Section 10 has been updated to include a reference to PEPPs.

Chapter 23 – Approved Retirement Benefits

- This chapter has been updated to include references to PEPPs.

- Section 4, the specified income requirement, has been removed after the abolition of the approved minimum retirement fund (AMRF) by Finance Act 2021.
- Section 5, the AMRF, has been updated to include guidance on the previous treatment of this product.
- Section 8 has been updated with new contact details for qualified fund managers (QFMs) advising Revenue of the intention to act as a QFM.
- Section 9 has been updated regarding CAT where an individual dies in service and the equivalent pension value is transferred to an ARF.

Chapter 24 – Personal Retirement Savings Accounts (PRSA)

- Section 24.2 has updated examples and includes a reference to PEPPs.
- A new section 24.3 is added, which clarifies the position regarding employer contributions to a PRSA after changes made by Finance Act 2022.
- Section 24.7 has been updated to include details on the interaction of a PEPP with a PRSA.
- Section 24.9 updates details on transfers from a PRSA to other pension products.
- Section 24.14 includes a link to the new Chapter 31 – PEPPs.

Chapter 25 – Limit on Tax Relieved Pension Funds

- Section 4 has been amended:
  - to update the circumstances in which a benefit crystallisation event (BCE) is deemed to occur to include cases where the assets are retained in a PEPP rather than transferred to an ARF,
  - to include information on vested PEPPs and
  - to include PEPPs in the definition of a “relevant pension arrangement”.
- Section 5 has been updated to include the circumstances in which the holder of a PEPP must provide the PEPP provider/administrator with a declaration relating to a BCE.
- The BCE Declaration example in the appendix section has also been updated to allow for declarations relating to a PEPP.

Chapter 27 – Taxation of Retirement Lump Sums

- Section 3 has been updated to include a lump sum from a PEPP as a lump sum arrangement.
- A link has been added to Tax and Duty Manual Part 07-01-09A, which deals with lump sums from a foreign pension under s200A TCA 1997.
- A new section 10 has been inserted to provide information on lump sums paid from a PEPP.
- Section 15 has been updated to provide details on amendments to the new s200A TCA 1997, which deals with the treatment of lump sums from foreign pension arrangements.
- Footnote 2 has been updated to include the UK as a country from which an individual can claim migrant member relief on a pre-existing pension arrangement.

Chapter 31 – Pan European Pension Products (PEPP)

A new Chapter 31 has been inserted into the Pension Manual, providing guidance relating to the taxation of PEPPs in Ireland. The topics covered in this chapter are: tax relief, PRSI and USC, benefits on retirement, death benefits, interaction with other pension arrangements, vested PEPPs, transfers between PEPPs and other pension products, migrant member relief and PEPP sub-accounts, imputed distributions, non-residents and vested PEPPs, anti-avoidance, pension adjustment orders, retirement benefits not taken on or before age 75 and non-established PEPP providers.

No. 064 Part 15-02-02a

Revenue's manual "High Income Individuals' Restriction: Income Chargeable to Tax at the Standard Rate in Joint Assessment Cases" has been updated to reflect changes to the standard rate band made by Finance Act 2022. In the case of jointly assessed couples with two income sources, for the year of assessment 2023 the amount by which the standard rate band may be increased is equal to the lesser of:

- the lower earner's specified income and
- €31,000.

No. 065 Representative Church Body – Cost of Living Accommodation Allowance

Revenue has updated the "Representative Church Body" manual to reflect the cost-of-living accommodation allowances for 2022.

No. 066 Stamp Duty Manual Part 10 Enforcement – Sections 127–13A

The Stamp Duty Manual "Part 10: Enforcement" has been updated to reflect Finance Act 2022 amendments. Section 79 of Finance Act 2022 amended Part 6 SDCA 1999, which relates to electronic trading in shares. It repealed Chapter 1, which applied to the system that operated when shares were settled in the London-based CREST system before 15 March 2021. Chapter 2 of Part 6 now solely applies to the electronic settlement of shares.

Section 79 also amended s134A SDCA 1999 in Part 10, which applies penalties to various incorrect stamp duty returns, which included "an incorrect operator instruction entered in a relevant system", referred to in Chapter 1 of Part 6 SDCA 1999. The updated term used in Chapter 2 is "an incorrect transfer order entered in a settlement system". Part 10.7 of the manual has been updated to reflect this change.

No. 067 Stamp Duty Tax and Duty Manual – Section 125A Health Insurance Levy – Updated

Section 125A SDCA 1999 provides for an annual levy on health insurers in respect of health insurance contracts. Revenue amended the contents of the Stamp Duty Manual "Levy on Health Insurers: Part 9" at section 2 to include the payment rates for accounting periods commencing on or after 1 April 2023, as provided for by s7 of the Health Insurance (Amendment) Act 2022.

An amendment has also been made to the contents in section 4 to reflect changes made by s71 of Finance Act 2022. This amended s125A SDCA 1999 to require that returns in respect of accounting periods commencing on or after 1 January 2023 are to be made online. Information relating to surcharge, interest and penalties has also been included.

No. 068 Annual Average Exchange Rates and Lloyds Sterling Conversion Rates

Revenue's manual "Annual Average Exchange Rates and Lloyds Sterling Conversion Rates" has been updated to include average market mid-closing rate v Euro and the Lloyds sterling conversion rate for the calendar year 2022.

No. 069 Examinership Caseworking Guidelines

The "Examinership Caseworking Guidelines" have been amended to reflect legislative developments, as follows:

- References to the Companies (Miscellaneous Provisions) (COVID-19) Act 2020 – Extension of an Examinership to 150 days (previously 100 days) have been removed.
- Paragraph 6.4, "Conditions for a Successful Scheme", has been updated to incorporate legislative changes introduced in July 2022 – the European Union (Preventative Restructuring) Regulations 2022.

The manual has also been updated throughout to provide clarity and improve readability.

No. 070 Geographical Indication for Irish Whiskey and Irish Poteen Manual

The manual "Geographical Indication for Irish Whiskey & Irish Poteen" has been updated to replace certain references to EU Regulations and provide further clarification regarding the verification of distilleries filling new-make spirits into casks.

No. 071 The Provision of Preferential Loans Has Been Updated

Revenue has updated the manual “Chapter 4 – The Provision of Preferential Loans” to remove obsolete material from section 5.

No. 072 Controlled Foreign Company Rules

The “Controlled Foreign Company Rules” manual has been updated in Chapter 11 to reflect an amendment introduced by Finance Act 2022 relating to “listed territories”.

No. 073 Capital Acquisitions Tax Manual – Part 24 Dwelling House Exemption

Revenue’s CAT Manual “Part 24 – Dwelling House Exemption” has been amended at paragraph 5.1 to clarify that the exemption in s86 of the Capital Acquisitions Tax Consolidation Act 2003 will not cease to apply if the dwelling-house is sold within six years and the full proceeds of the sale are used to purchase a replacement dwelling-house.

No. 074 The Provision of Staff Awards

Revenue has updated the manual “Chapter 10 – The Provision of Staff Awards” to provide additional guidance on the tax treatment of examination awards, in paragraph 2. Revenue notes that a cash award made to an employee in recognition of passing an examination or acquiring a qualification is a taxable payment.

Additional guidance has been included, in paragraph 4, on circumstances where the award is a reimbursement of certain of the employee’s expenses incurred in studying for and sitting an examination and may be made without the charge to tax where certain conditions are satisfied.

Additional guidance has also been included in paragraph 3 regarding course/exam fees.

No. 075 Part 38-03-33 – Returns by Employers in Relation to Reportable Benefits

Revenue published a new manual titled “Returns by Employers in Relation to Reportable Benefits”. The manual includes information on the Finance Act 2022 measures contained in s897C TCA 1997. The section requires employers to report to Revenue details of certain payments/benefits that are made/provided to employees and/or directors without the deduction of tax. These “reportable benefits” are the remote-working daily allowance of €3.20, the payment of travel and subsistence expenses and the small-benefit exemption.

The section is subject to a Commencement Order to allow time for the necessary stakeholder consultation process on implementing the requirements. Broadly, the intention is that the reporting of such measures will, where possible, align with the existing mechanisms used for payroll purposes, but implementation will be informed by the consultation process. Revenue anticipates that reporting will commence from the start of 2024. The manual also notes that this measure is intended to be the start of a phased introduction of additional reporting for employers in respect of the provision of other benefits or payments that have not been subject to tax by the employer through the payroll system.

The manual confirms in paragraph 6 that there will be stakeholder engagement on implementation of the reporting requirements. The employer engagement process will seek the views of key stakeholders such as employers, agents, representative bodies and software providers. Information gathered from the recently concluded survey of agents, employers and software providers on the “Enhanced Reporting Requirements” will be used to plan for ongoing engagement that will continue up to the start of the reporting regime. Revenue will also facilitate IT systems testing by software providers.

No. 076 Stamp Duty Manual Part 9 – Section 126AA Bank Levy – Updated

"Part 9 – Bank Levy" of the Stamp Duty Manual has been updated to reflect the s72 Finance Act 2022 amendment to s126AA SDCA 1999 to provide for the extension of the bank levy to 2023, to apply on the same basis as the levy charged for 2022.

No. 077 Update to Share Schemes Manual – Chapter 2

Revenue has updated "Chapter 2 – Restricted Stock Units (RSU)" of the Share Schemes Manual to include additional examples and further clarification regarding the operation of real-time foreign tax credits operated through the payroll by the employer.

In addition, a new Share Reporting Obligation Hub is now live on Revenue's website. This hub includes information for employers and employees, together with tips to assist employers to comply with their reporting obligations, given the 31 March 2023 reporting deadline for approved schemes or reportable events during 2022.

No. 078 Stamp Duty Manual – Section 80: Reconstructions or Amalgamations of Companies

A new "Part 7: Section 80 – Reconstructions or Amalgamations of Companies" of the Stamp Duty Manual has been published. Section 80 SDCA 1999 provides for a stamp duty relief on the transfer of certain property where a company undertakes a scheme of reconstruction or amalgamation or undertakes a merger under the Companies Act 2014. This guidance provides information on the operation of the relief and incorporates previously issued guidance.

No. 079 Filing Guidelines for Foreign Account Tax Compliance Act (FATCA)

Revenue has updated the manual "Filing Guidelines for Foreign Account Tax Compliance Act (FATCA)" at section 7.6 with guidance on the reporting of financial accounts that have no US Taxpayer Identification Number (TIN). TIN Placeholder codes published in May 2021 and February 2023, which are included in the manual, are currently accepted by Revenue validation for the relevant reporting periods.

No. 080 Deposit Interest Retention Tax (D.I.R.T.) Tax Treatment for Individuals

Revenue has updated the manual "Deposit Interest Retention Tax (D.I.R.T.) Tax Treatment for Individuals" to reflect the DIRT rate of 33% since 2020 and other minor amendments.

No. 081 Offshore Funds: Taxation of Income and Gains from EU, EEA and OECD Member States & from Certain Offshore States

Revenue has updated the manual "Offshore Funds: Taxation of Income and Gains from Certain Offshore States" to reflect amendments introduced by Finance Act 2022 and Finance Act 2020. The Finance Act 2022 amendment clarifies the tax treatment of an authorised unit trust where particular conditions are satisfied. The Finance Act 2020 amendment clarifies the interaction of the offshore funds legislation with respect to the migration of Irish securities from the CREST system to Euroclear Bank in March 2021 after Brexit.

Revenue has also updated the manual "Offshore Funds: Taxation of Income and Gains from EU, EEA and OECD Member States" at paragraph 2.1.1, to provide for a non-exhaustive list of general legal and regulatory criteria that should be considered to assist in establishing whether the threshold of "similar in all material respects" is met when determining the equivalent nature of an offshore fund to its Irish counterpart.

No. 082 The Treatment of Certain Gains and Losses on Foreign Currencies for Corporation Tax Purposes

The manual "The Treatment of Certain Gains and Losses on Foreign Currencies for

Corporation Tax Purposes" has been updated to reflect amendments introduced by Finance Act 2022 to the definition of "relevant monetary item" in s79(1)(a) TCA 1997.

The manual notes that, for the purpose of s79(1)(a), it is accepted that trade receivables of a company include any amount owed to a business by its customers and that companies should use the trade receivables amount shown on the balance sheet in their audited financial statements.

Regarding the meaning of "non-euro currency held in trading bank accounts" for the purpose of s79(1)(a), the manual states that a trading bank account is the company's main current account and that it is the account into which receipts from customers are lodged and from which expenses of the trade are paid. The manual confirms that it is accepted that some small amounts that would not qualify as a trade deduction may be paid out of this account without the account's losing its status as a "trading bank account" for the purpose of this section.

Where lodgements from customers exceed expenses, Revenue expects large surplus amounts to be transferred to a separate account to avoid this account taking on any characteristics of an investment or savings account and thus no longer qualifying as a "trading bank account".

The manual has also been updated to incorporate information previously set out in the following manuals:

- Part 04-05-01a: "Section 79A Matching of Relevant Foreign Currency Assets with Foreign Currency Liabilities" and
- Part 04-05-01b: "Section 79B Matching of Foreign Currency Assets with Certain Foreign Currency Share Capital".

No. 083 Dependent Relative Tax Credit

Revenue has updated paragraphs 5 and 6 of the "Dependent Relative Tax Credit" manual to reflect the "specified amount" for the 2023 year of assessment, which is €16,780.

No. 084 Guidelines for the Exchange of Information Between the Corporate Enforcement Authority and the Revenue Commissioners

Revenue has updated its Collection Manual "Guidelines for the Exchange of Information between the Corporate Enforcement Authority (CEA) and the Revenue Commissioners" to reflect the establishment of the Corporate Enforcement Authority and changes to ss944P and 944Q of the Companies Act 2014.

No. 085 Receipts Tracker in myAccount and ROS

The manual "Receipts Tracker in myAccount and ROS" has been updated to remove references to the decommissioning of the Revenue Receipts Tracker App and to include updated screenshots of log-in screens for myAccount and ROS.

No. 086 Contact Details for Access Officers

Revenue has updated the contact details for Access Officers in its manual containing information for taxpayers with disabilities. Section 2 of the manual has been amended to replace separate Divisional email and telephone numbers with a single email address and telephone number for all queries.

No. 087 Updates to eCG50 – Guide for Applicants

The manual "eCG50 – Guide for Applicants" has been updated at the following paragraphs:

- Paragraph 4.5: to advise that the system allows applicants to enter a future date for unsigned contracts, which must include a letter of undertaking to submit a copy of the signed contract when available. The manual also notes that eCG50 certs are valid in cases where unsigned contracts have been submitted, provided the letter of undertaking is included.
- Paragraph 5.4: to remind applicants to check the names entered on the clearance certificate and how to check the name, in ROS, of the first vendor, which is prefilled from Revenue's customer records. If this

information does not match, the application can be delayed. If the name of the first vendor is not correct on the Revenue Customer Record and a fully correct name is required for the CG50A certificate, the "official" name may need to be amended on Revenue's customer records system. Applicants should note that there is a limit of 70 characters for the name field on Revenue records. Some entities, particularly partnerships or corporates, may have names that are longer than this limit. The names of other vendors on the application, if any, are taken from the data input on the CG50A application.

- Paragraph 11: to remind that all applicants, including non-residents, must be, or have been, registered for CGT before making the clearance application. Even if the non-resident is registered for income tax, a CGT registration is also required, and this should be done in sufficient time ahead of the disposal/contract closing date to ensure that the clearance certificate can be processed in a timely manner.

No. 088 Pay & File Extension Date – 2023

Revenue has announced that the 2023 ROS Pay & File income tax deadline for self-assessed taxpayers is Wednesday, 15 November 2023. The ROS extension is available only to taxpayers who both pay and file through ROS. The extended deadline will also apply to CAT returns and payments made through ROS for gifts or inheritances with valuation dates in the year ended 31 August 2023.

No. 089 Stock Relief – Young Trained Farmers

Revenue updated the manual "Stock Relief – Young Trained Farmers" to reflect Finance Act 2022 amendments to s667B TCA 1997, which extended the relief to 30 June 2023. Finance Act 2022 also introduced a requirement that to avail of the relief the farmer must be the holder of a trained farmer qualification, within the meaning of s654A TCA 1997.

A trained farmer qualification is defined in s654A as being a qualification set out in the Table to that section, or any other qualification that Teagasc certifies as corresponding to a qualification set out in the Table and deemed by the Qualifications and Quality Assurance Authority of Ireland to be of an equivalent level.

No. 090 Process for Claiming Second Stage Relief on Employment Investment Incentive (EII) Investments Made Between 1 January 2019 and 8 October 2019

Revenue's manual "Relief for Investment in Corporate Trades" has been updated with information in relation to claiming second-stage relief on EII investments made between 1 January 2019 and 8 October 2019.

No. 091 Update to Share Schemes Tax and Duty Manuals

Revenue has updated three chapters of the Share Schemes Manual as follows:

- "Chapter 5 – Convertible Securities" to update examples;
- "Chapter 7 – Shares Acquired at Less than Market Value (Undervalue), Notional Loans, and Disposals for Greater than Market Value" to update examples and include a link to Chapter 15, which relates to filing of share scheme returns; and
- "Chapter 12 – Save As You Earn (SAYE)" at section 12.12.3 regarding the reference to an EEA State, together with a refresh of the examples.

No. 092 Updates to Movement of Excisable Products Manual

Revenue has updated the "Movement of Excisable Products Manual" in line with s47 of Finance Act 2021, which introduces a number of amendments to Part 2 of Finance Act 2001 to transpose Council Directive (EU) No. 2020/262 into Irish law. This Directive replaced Directive 2008/118/EC on the general arrangements for excise duty.

The Directive extends the use of the computerised EU Excise Movement and Control System to duty-paid excisable products that are subsequently moved to another Member State and includes the creation of two new categories of excise trader: “certified consignor” and “certified consignee”. This replaced the paper-based procedure for duty-paid products with effect from 13 February 2023.

Changes to the manual include:

- A new section 6 has been inserted to detail the application process for certified consignors and certified consignees.
- Section 9 has been updated to detail the new procedures for the consignment to a trader in the State of excisable products duty-paid in another Member State.
- Section 12 has been updated to detail the new procedures for the consignment to traders in other Member States of excisable products duty-paid in the State.
- A new Appendix H details the application form for certified consignor/consignee or temporary certified consignor/consignee.
- A new Appendix I contains a sample of the registration form for certified consignor/consignee or temporary certified consignor/consignee.

No. 093 Employer Provided Vehicles

Revenue updated the manual “Chapter 2 – Employer-Provided Vehicles” to reflect the Finance Bill 2023 Committee Stage amendments. The amendments provide for the temporary change in the benefit-in-kind (BIK) regime for vehicles that was announced by the Minister for Finance on 7 March. The updates to the manual include:

- A new section 4.1.3 has been inserted to outline the measures provided for in Finance Bill 2023. It confirms that employers can, if they are in a position to do so, apply the new method of calculation of BIK before enactment of the legislation. Furthermore, they should carry out any necessary adjustments to the BIK calculations in respect of prior 2023 pay periods by way of a current-period adjustment and not amend prior-period payroll submissions.
- The new rules for the calculation of BIK for 2023 and subsequent years (arising from Finance Act 2019 changes) have been moved from section 10 to section 4.
- Section 6, dealing with electric vehicles, has been updated for the Finance Bill 2023 measures.

The examples have been updated to apply the new rules effective from 1 January 2023, to include the additional Finance Bill 2023 measures

No. 094 Form P11D

Revenue has updated the “Form P11D” manual to note that from 1 January 2023 details of PRSA contributions are not required to be included on the Form P11D. In accordance with Finance Act 2022, employer contributions to a PRSA are no longer a taxable benefit from 1 January 2023. The employer’s obligation to report the amounts of PRSA contributions on the payroll submissions to Revenue remains.

No. 095 Deduction for Statutory Registration Fees Paid to the Health and Social Care Professionals Council (CORU)

Revenue has updated the manual “Deduction for Statutory Registration Fees Paid to the Health and Social Care Professionals Council (CORU)”. The main change relates to section 1.1, to note that podiatrists have been added to the register of professionals maintained by CORU.

No. 096 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)” as State Aid approval was received on 17 April for amendments to the TBESS contained in Finance Bill 2023.

These changes include:

- the extension of the scheme to 31 May 2023,
- a reduction in the energy costs threshold test for accessing the scheme to 30%

with effect from 1 September 2022 (it was previously 50%),

- an increase in the amount payable under the scheme to 50% of eligible costs for March 2023 to May 2023 claim periods and
- the extension of the time limit for making a claim to 31 July 2023.

"What's New", on pages 5 and 6 of the Guidelines, covers these developments. Appendix III of the Guidelines contains deemed reference unit prices for the May 2022 reference period, as provided by the Sustainable Energy Authority of Ireland (based on data provided by suppliers and the Commission for Regulation of Utilities).

Since 17 April, qualifying business can submit claims on ROS for the March and April 2023 claim periods. Details for the reference periods for March and April 2022 need to be provided to submit a claim.

The facility to make claims relating to energy bills covering the claim period 1–31 May 2023 will open when Finance Bill 2023 is passed. Revenue will issue an update when the claim portal opens for this period.

The reduction in the energy costs threshold from 50% to 30% applies from 1 September 2022. Therefore businesses that did not qualify previously because their unit cost threshold increased in the range of 30% to 50% are now eligible to register and submit claims. Such businesses can register, as required, and enter the details for the reference period for September 2021 to April 2022 so that they can submit claims.

From the week beginning 24 April 2023, Revenue began reassessing claims already submitted for the period 1 September 2022–28 February 2023 based on the revised 30% energy costs threshold. This means that it is not necessary for a business to amend claims already submitted for these periods that meet the revised energy costs threshold.

Once claims have been reassessed, the business will receive a notification to its ROS inbox confirming that the reassessment has occurred. The payment due to the business will then be processed.

All claims for TBESS must be submitted no later than 31 July 2023. Revenue recorded a number of "How To" videos, which are available on Revenue's website, to assist businesses in applying for the scheme.

No. 097 Tax Treatment of the Reimbursement of Expenses of Travel and Subsistence to Office Holders and Employees

Revenue updated the manual "Tax Treatment of the Reimbursement of Expenses of Travel and Subsistence to Office Holders and Employees" to reflect the new civil service rates as provided for in Department of Public Expenditure and Reform circulars 16/2022 and 17/2022. The manual has also been updated at section 1.8.1 to clarify that employees who work part-time at home and part-time in the office cannot claim expenses for travelling between the two locations.

No. 098 Natural Gas Carbon Tax (NGCT) Compliance Procedures Manual

Revenue published a new "Natural Gas Carbon Tax (NGCT) Compliance Procedures Manual", which contains information on the operation of the NGCT, including:

- current and historic rates,
- which traders should register as a supplier of natural gas for tax purposes and how to do so and
- the reliefs available for NGCT, including for High-Efficiency Combined Heat and Power operations and Greenhouse Gas Emissions Permit Holders.

The manual also includes information and guidelines for Revenue staff on compliance procedures relating to NGCT.

No. 099 New Guidance on the Digital Games Corporation Tax Credit

Revenue published a new "Section 481A Digital Games Corporation Tax Credit" manual on the operation of the credit provided under s481A TCA 1997 and the Digital Games Regulations 2022. The measure is intended to provide an incentive to digital games developers to produce digital games that contribute to the promotion and expression of Irish and European culture. The relief is in the form of a corporation tax credit that may be claimed by digital games development companies. It is a notified State Aid in accordance with EU State Aid rules.

The relief is available from 22 November 2022 in respect of certain expenditure incurred by digital games development companies on the development of eligible digital games provided conditions, as laid out in statute and regulations and as specified in the interim and/or final certificate issued by the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media in respect of the game, are met.

The credit may be claimed either on an interim basis as the game is being developed (the interim digital games corporation tax credit) or in full on completion of the development of the game (the digital games corporation tax credit).

No. 100 State Aid Transparency Requirements

Revenue's manual "State Aid Transparency Requirements: Publication of information Regarding State Aid Granted to Individual Taxpayers" has been updated to include the following additional schemes that are subject to State Aid transparency requirements:

- relief for investment in digital games under s481A TCA 1997,
- accelerated allowances for capital expenditure on slurry storage under s658A TCA 1997 and
- the TBESS, provided for in ss100 to 102 Finance Act 2022.

No. 101 Payment and Receipt of Interest and Royalties Without Deduction of Income Tax

The manual "Payment and Receipt of Interest and Royalties Without Deduction of Income Tax" has been updated to refer to the International Monetary Fund in section 8, "Payments to certain statutorily tax-exempt bodies".

The manual has also been updated in respect of applications under s246(3)(d) TCA 1997 to require completed Forms RTS 1A and supporting documents to accompany applications, to remove the postal contact address and to provide MyEnquiries contact information.

No. 102 Securitisation Regulation: Notification of Investment

Revenue updated the manual "Securitisation Regulation: Notification of Investment" to reflect the EU list of non-cooperative jurisdictions for tax purposes, which was updated on 21 February 2023. Example 1.2.2 has been updated to reflect the current listing of relevant Annex II jurisdictions. Section 1.1 and Appendix 1 have been updated to reflect the change from the October list for reference.

No. 103 Rates of Mineral Oil Tax, Natural Gas Carbon Tax and Solid Fuel Carbon Tax

Revenue has updated the manual "Excise Duty Rates – Energy Products and Electricity Taxes" to reflect increases in rates of mineral oil tax on certain mineral oils, natural gas carbon tax and solid fuel carbon tax effective from 1 May 2023. Relevant changes have also been made to the "Budget Excise Duty Rates" manual.

No. 104 Excise Duty Rates

Revenue has updated the following manuals to include changes that take effect from 1 May 2023:

- "Excise – Guide to Horticultural Production Relief" to reflect the updated excise duty rates and "pre-determined rates" in section 3.2. Historical net rates of repayment have been updated in Appendix 1.
- "Solid Fuel Carbon Tax (SFCT) – Compliance Procedures Manual" to note the updated excise duty rates in section 2. Biomass products rates have been updated in

section 6.1.1, and historical rates of solid fuel carbon tax and historical rates for biomass products have been updated in Appendices I and II, respectively.

- "Accounting for Mineral Oil Tax Manual" to reflect updated MOT rates, with historical rates updated in Appendix XI. This manual has also been updated in line with s47 of Finance Act 2021. A number of amendments were made to Part 2 of Finance Act 2001 to transpose Council Directive (EU) No. 2020/262 into Irish law. This Directive replaced Directive 2008/118/EC on the general arrangements for excise duty with effect from 13 February 2023.

No. 105 VAT Treatment of the Supply and Installation of Solar Panels

A new manual titled "Supply and Installation of Solar Panels" has been published to provide guidance on the new zero rate of VAT announced by the Minister for Finance on 5 April as a Report Stage amendment to Finance Bill 2023.

No. 106 Common Contractual Fund (CCF) 2023 Filing – Deadline Extension and Updated Form CCF1 Available

Revenue has made available a new version of the Form CCF1 on the "Collective Investment Vehicles" webpage, in the "Related Forms" panel. Common contractual funds (CCFs) are required to file this statement annually, and the new version of the Form CCF1 should be used for filings in respect of the year of assessment 2022.

The filing deadline for Form CCF1 in respect of the year of assessment 2022 is extended to 21 July 2023. Filing should be completed electronically and returned to Revenue via MyEnquiries to largecasesdiv@revenue.ie.

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

- General Overview of business activities carried out by the CCF in the year of assessment,
- Details of any Material Transactions carried out by the CCF in the year of assessment,
- Details of any transactions entered into with persons connected with any unit holder in the CCF in the year of assessment,
- Disclosure of Assets held by the CCF at the end of the year of assessment (which includes disclosure of asset type, location and value) and
- Detailed guidance notes attached to the updated Form CCF1 to assist completion of the statement, including practical examples illustrating the level of detail required.

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

Mark Ludlow
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	Topic	Court
01	**CGT: Meaning of "Land" and of Value Derived "Directly or Indirectly" from Land**	High Court
02	**Corporation Tax: Deduction for Excessive Director's Remuneration Disallowed**	Tax Appeals Commission
03	**PAYE: ARF Distribution and Ireland–Portugal DTA**	Tax Appeals Commission
04	**Income Tax: Farm Payment Entitlements/Farming Company**	Tax Appeals Commission
05	**Income Tax: Assessment Out of Time**	Tax Appeals Commission
06	**Income Tax: s817 TCA 1997 Schemes To Avoid a Distribution**	Tax Appeals Commission
07	**CGT: s811 TCA 1997 – General Anti-Avoidance Rule**	Tax Appeals Commission

01 CGT: Meaning of "Land" and of Value Derived "Directly or Indirectly" from Land

In ***Cintra Infraestructureas Internacional SLU v The Revenue Commissioners*** [2023] IEHC 72 the High Court (Butler J) considered an appeal taken by Revenue against a determination of the Tax Appeals Commission (TAC). A Spanish company (Cintra) sold a majority stake in an Irish company (Eurolink). Eurolink had contracted with the National Roads Authority (NRA) to design, construct, operate, maintain and finance a motorway in Ireland. Ownership of the motorway and the land on which it was built remained vested in the NRA (which later became Transport Infrastructure Ireland (TII)).

However, Eurolink was granted rights of access to the motorway "for the purposes of carrying out the project" (in effect, a licence) and also had the contract to collect the tolls on the motorway on behalf of the NRA/TII for a period of 30 years.

Cintra was of the view that it was not subject to Irish CGT on the disposal of its Eurolink shares as it was not Irish resident and the shares in Eurolink did not derive their value from Irish land. A CG50 certificate was requested from Revenue at the time of the sale of the shares in

Eurolink. Revenue refused to issue the CG50, expressing the view that the transaction was subject to Irish CGT. As no CG50 certificate was provided, the purchaser was obliged to withhold 15% of the proceeds (per s980 TCA 1997) and remit this to Revenue. After the sale, Revenue raised an assessment to CGT on Cintra in respect of the disposal of the shares. Cintra successful appealed that assessment to the TAC, whose decision Revenue then appealed to the High Court.

The main issues before the High Court concerned the meaning of the term "land in the State" for the purposes of s29(3)(a) TCA 1997 and whether the shares in Eurolink derived their value from land in the State. Section 29(3)(a) imposes a charge to CGT on non-resident taxpayers who make gains on the disposal of "land in the State". Section 29(1A) imposes a charge to CGT on non-resident taxpayers who make gains on the disposal of shares in a company that derive their value or the greater part of their value from relevant assets (e.g. land in the State).

The High Court rejected Revenue's appeal, holding that:

- a licence is not an "interest in land" for the purposes of the Capital Gains Tax Acts and
- the shares in Eurolink did not derive their value from Irish land.

In regard to the meaning of "land":

- The court held that s5 TCA 1997 defines "land" as "includes any interest in land" for the purposes of the Capital Gains Tax Acts.
- The court rejected Revenue's contention that "land" (for the purposes of s29) should be interpreted in light of the broader definition of "land" contained in the Interpretation Act 2005 (which also includes any "right" over land), holding that where legislation (such as the Capital Gains Tax Acts) contains a specific definition (i.e. of "land"), one cannot have recourse to a broader definition contained elsewhere [48 and 52].
- The court held that a licence is not an "interest in land". In this regard Revenue had argued that a lease is an "interest in land" and that, as "lease" is defined in s5 TCA 1997 as including a "licence", it followed that a "licence" was an "interest in land" for the purposes of the Capital Gains Tax Acts and s29, and therefore the shares in Eurolink derived their value from an interest in Irish land. The court acknowledged the attractiveness of the "deceptive simplicity" of Revenue's argument but ultimately accepted Cintra's counter-argument that because the definitions of "land" and "lease" in s5 do not cross-reference each other and as all of the definitions in s5 are prefixed by the phrase "except where the context otherwise requires", it follows that the definition of land should not be "radically and artificially" extended to include licences in the absence of express wording to that effect [62].
- The court agreed with the Tax Appeal Commissioner's finding that for a non-resident to come within the charge to Irish CGT, the interest in land disposed of must have been a "proprietary interest". The court clarified that "[a] proprietary interest connotes ownership and whilst possession of a legal or equitable estate in land is not necessary for the holder to have an interest in land, the interest relied on nonetheless must be one capable of being owned" [63]. The court accepted that the contractual right of access that Eurolink held amounted to a licence, but it held that this licence was not exclusive and was limited (in terms of both time and limits on its assignability).

In regard to the question of whether the shares in Eurolink derived their value directly or indirectly from Irish land:

- Revenue argued that the value of Eurolink was derived from its contract with the NRA/TII permitting it to collect motorway tolls, which ultimately meant that its value derived directly or indirectly from the use of land (being the motorway), and so s29(1A) applied [71].

- The court rejected this contention on the grounds that it would require the insertion of the additional words "use of" in the legislation [78] and, in any event, such use of land by third parties would be too remote to attribute to the value of Eurolink's shares [75]. The court further noted that as almost all businesses in the State "use" land in this sense, "reading the phrase 'use of' into the text before 'land' for the purposes of section 29(1A) makes the section impermissibly vague and indeed almost completely open-ended" [74].
- The court added, in an *obiter* comment, that the word "indirectly" in s29(1A)(b) should not be treated as extending the statutory definition of "land" for the purposes of s29(1A) [75].

02 Corporation Tax: Deduction for Excessive Director's Remuneration Disallowed

The appellant in Tax Appeals Commission determination **24TACD2023** was a company that provided the services of a doctor to the Health Service Executive on locum contracts. The company had two employees, the doctor ("W") and the doctor's husband ("H") (who managed the company). H was the company's sole shareholder; both W and H were its directors. The company paid H a director's salary of approximately €40,000 in each of the years in question and claimed a corporation tax deduction under s81 TCA 1997 on the grounds that the salary was "wholly and exclusively" for the purposes of the trade.

Revenue formed the view that the salary paid to H was excessive and initially sought to restrict the amount that the company could claim a deduction for to "€3,198 (based on average secretary wage of €12.30 per hour for 5 hours per week for 2 weeks) as this is commensurate with the expected duties of an administrator in a company of this size". Subsequently, Revenue allowed a further €2,000 on a concessionary basis, and it therefore concluded that the "salary will be restricted without prejudice to €5,198 as this is commensurate with the expected duties of an administrator/Director in a company of this size". It disallowed the balance of the director's remuneration as a corporation tax deduction and raised assessments. The company appealed the assessments to the TAC.

At the TAC hearing H gave evidence of the work that he performed for the company. He said that his functions included acting as the appellant's finance director, preparing and approving annual financial reports, submitting tax and Companies Registration Office returns, analysing spreadsheets, liaising with accountants, accepting contracts, invoicing clients, and monitoring the health and safety of the doctor employee.

The question before the Commissioner was whether H's director's remuneration was incurred "wholly and exclusively" for the purpose of the trade. The Commissioner upheld the assessment and dismissed the taxpayer's appeal, holding that:

- Section 81 TCA 1997 requires an expense to be "wholly and exclusively" incurred for the purpose of the trade to be deductible.
- The appellant bears the onus of proof and failed to discharge its burden of proof. Although the director had made "bald assertions" on the appropriate hourly rate that he should be paid, the appellant had not submitted evidence of comparators for a similarly sized company with similar complexity [20].
- No evidence was submitted to support the number of hours worked by H: his hours were estimated. The Commissioner also did not find his evidence on the number of hours worked to be credible [31].
- Accordingly, the Commissioner concluded that, having regard to the size of the

appellant, its number of employees and the evidence that it was assisted by an accountant with its financial reporting, the remuneration was not wholly and exclusively laid out or expended for the purposes of the appellant's trade.

"The deficiency in records and documentation, in particular, the absence of weekly time sheets and payslips, prove disadvantageous for the appellant in terms of the deductions claimed, in circumstances where the appellant bears the burden of proof in an appeal before the Commission. Consequently, the Commissioner is satisfied that the respondent was correct to raise the assessments, the subject matter of this appeal" [32].

03 PAYE: ARF Distribution and Ireland–Portugal DTA

Tax Appeals Commission determination **28TACD2023** concerned an appellant who was resident in Portugal and who took a distribution of €527,000 from his approved retirement fund (ARF) on 15 December 2017. PAYE (income tax and USC) totalling €259,243 was deducted from that payment by the fund administrator.

In September 2018 the appellant sought a refund of that tax from Revenue (he had previously received refunds of PAYE deducted in respect of distributions made in the years 2013 to 2016). However, in the interim period, on 22 December 2017, Revenue had revised its Pensions Manual in respect of such payments, and on 10 November 2018 it refused the refund claim and sought a further €11,261 in tax from the appellant. The appellant appealed the refusal and the assessment.

The appellant argued that the distribution was income in character and therefore Article 22 ("Other Income") of the Ireland–Portugal double taxation agreement (DTA) applied such that the income could be taxed only in Portugal. Revenue argued that the distribution was capital in nature and so Article 22 of the DTA had no effect. The main question before the Commissioner, therefore, was whether the distribution was income or capital in nature.

The TAC upheld Revenue's assessment and dismissed the taxpayers appeal:

- It held that the distribution was capital in nature. Although s784(A)(3) TCA 1997 treated it as an emolument and therefore taxed it as income under Schedule E, this did not have the effect of converting the distribution into income.

  "I am satisfied that the distribution does not come within the definition of 'earned income' in section 3(3) TCA 1997. Section 784A(3)(a) does not deem the distribution to be income chargeable to tax under Schedule E. The drawdown from the ARF is 'treated as' an emolument to which Schedule E applies pursuant to section 784A(3)(a) TCA 1997. The application of 784A(3)(a) TCA 1997 does not convert the ARF distribution to income by virtue of its application and does not deem the distribution to be income. It simply treats the distribution as equivalent to an emolument to which tax is chargeable under Schedule E. An interpretation of the provision that concludes that the provision deemed the distribution to be income would be at odds with the express statutory wording of the provision. I cannot accept the appellant's submission that subsection (3)(a) is in the nature of a deeming provision. It does not deem the distribution to be income nor does it convert the distribution into income. It creates no statutory fiction, it is simply a tax treatment which directs that the distribution be 'treated as...emoluments to which Schedule E applies'. As the provision does not deem the distribution to be income, it follows that the distribution does not constitute 'earned income' for the purposes of section 3(3) TCA 1997" [56].

- It further held that as the distribution was "capital" in nature (despite being taxed as income) and as Article 22 of the Ireland–Portugal DTA refers to "income", Article 22 could not be relied on to relieve Ireland of taxing rights in respect of the distribution.

04 Income Tax: Farm Payment Entitlements/Farming Company

In 2005 the appellant in Tax Appeals Commission determination **39TACD2023** and his brother incorporated a company for the purposes of carrying on a farming trade. Since that time the appellant would, each year, grant a licence to the company to graze sheep and cattle on his lands. The licence agreement included a clause that "the licence includes the right to utilise any basic payment scheme entitlements attached to the said lands".

In respect of the years 2016 and 2017, an application for the Basic Payment Scheme (BPS) entitlements was prepared by an employee of Teagasc and was submitted in the name of the appellant and his brother (rather than the company). However, the entitlement payments were made directly to the company's bank account. The appellant claimed that the herd number on the application form was held by the company but did not provide any documentary evidence of this. The company returned the BPS entitlement payments in its corporation tax returns.

The appellant did not inform the Department of Agriculture, Food and the Marine of the fact that the farming activity was now being conducted by the company, nor did he ever apply to have the BPS entitlements transferred to the company. In 2019 the appellant was audited by Revenue. He sought to rely on the fact that the licence agreement granted the company the right to use the entitlements. However, Revenue formed the view that the entitlements were the appellant's income and raised assessments for 2016 and 2017.

The question before the TAC was whether those BPS entitlements were income of the company or income of the appellant. The Commissioner held, in dismissing the appellant's appeal, that:

- the published regulations on the transfer of entitlements dictate how such entitlements can be transferred, and a formal transfer is required;
- the appellant did not take the necessary formal steps to transfer the entitlements to the company; and
- the legal entitlement to the BPS payments remained with the appellant, and thus they were income of the appellant, notwithstanding any contractual obligation that he may have had to transfer them to the company; in this regard the Commissioner cited the judgment of Maguire J in *J D Dolan (Inspector of Taxes) v "K" National School Teacher* [1943] I ITR 656 [34].

05 Income Tax: Assessment Out of Time

In Tax Appeals Commission determination **60TACD2023** the appellant was a farmer who incorporated his farming business on 31 May 2011. His farming company then carried on the farming trade from 1 June 2011. Owing to administrative rules in the Department of Agriculture, Food and the Marine (DAFM), the appellant was unable to transfer his Single Payment Scheme (SPS) entitlements to the farming company for 2011, the cut-off time for such transfers being 15 May. The appellant gave evidence that he was advised by his agricultural adviser, his accountants and the DAFM that because he was unable to transfer the SPS entitlements to the company in 2011, he should claim them in his own name so as not to risk losing them.

The SPS entitlements were paid into the appellant's bank account in October 2011 and subsequently transferred to the company's bank account. The appellant did not include the SPS entitlement income in his income tax return for 2011. That income was, instead, returned in the company's tax return for the year ended 31 May 2012.

In May 2014 Revenue started an audit of the appellant's income tax return for 2011. There were ongoing discussions between Revenue and the appellant's advisers about how the SPS entitlements should be treated, and Revenue agreed not to issue an assessment until those discussions were exhausted.

Revenue noted in its submissions before the TAC that the appellant's advisers in their discussions with Revenue, and the appellant in its submissions to the TAC, had conceded that the SPS entitlements ought to have been apportioned between the appellant and the company (five-twelfths and seven-twelfths, respectively).

In April 2017 Revenue issued a notice of assessment on the appellant assessing him to income tax on the SPS entitlements. The appellant appealed that assessment to the TAC.

The questions before the TAC were:

- Did the appellant make a "full and true" disclosure of all material facts in his income tax return, such that Revenue was precluded by s955 TCA 1997 from raising the assessment beyond the four-year time limit?
- If the answer to that preliminary question was "no", then were the SPS entitlements taxable in the hands of the appellant or his company?

The Commissioner found, in allowing the appellant's appeal, that:

- The appellant had made a "full and true" disclosure of all material facts in his tax return.

  In reaching this decision, the Commissioner placed emphasis on the intention and understanding of the appellant, the fact that he had relied on the advice provided to him by his professional advisers and government bodies, and the fact that the income had been returned on the company's return (in line with the appellant's understanding of the treatment). Essentially, the appellant had believed (based on the information provided to him) that the SPS entitlement income was the company's income. As he had returned that income on the company's return (consistent with his belief regarding the correct treatment), the Commissioner formed the view that the appellant's own income tax return was "full and true", notwithstanding the fact that it omitted the SPS entitlement income [42 and 43].
- The four-year time limit is not discretionary and cannot be extended by agreement between the parties [40].
- As the appellant's return was complete, accurate and truthful having regard to the facts, Revenue was incorrect to raise the

assessment beyond the four-year time limit, and the assessment must be set aside.

- As the matter was decided on the time limit point, the Commissioner did not make a determination on the substantive question of whether the SPS entitlements were the income of the appellant or his company.

The published determination notes that Revenue is appealing the Commissioner's decision to the High Court.

Note: The decision concerned s955 TCA 1997, which related to tax assessments for 2012 and earlier. For the years 2013 and later, Part 41 of TCA 1997 (which contained s955) was replaced by Part 41A, and the equivalent time limit provision is now contained in s959AA. Section 959AA uses the same "full and true disclosure of all material facts" language that was contained in s955, and so the determination ought to be of relevance in interpreting that provision also.

06 Income Tax: s817 TCA 1997 Schemes To Avoid a Distribution

In 2014 the appellant in Tax Appeals Commission determination **48TACD2023** disposed of her shares in a company (representing 90% of the share capital) to another company, which was owned solely by her husband. The consideration for the purchase was funded by the first company's lending the purchase price to the second company. The disposal was included in the appellant's husband's CGT return for the year 2014 (they must have been jointly assessed), and CGT was paid on the disposal proceeds.

In February 2018 Revenue commenced an audit of the appellant and her husband, and in October 2018 it raised an assessment for income tax on the basis that s817 TCA 1997 deemed the proceeds of the disposal of the shares to be a distribution subject to income tax rather than a capital disposal subject to CGT.

The main questions before the TAC were:

- whether the appellant had significantly reduced her shareholding and
- whether the transaction was carried out for bona fide commercial reasons.

The TAC held, in dismissing the appeal and upholding Revenue's assessment, that:

- The appellant bears the burden of proof to demonstrate that Revenue's assessment was raised in error [70].
- The appellant had not "significantly reduced" her shareholding, as the interests of connected persons (i.e. the shares held by the second company, which was controlled by her husband) had to be amalgamated with her interest in the first company (s817(1)(ca)(i). Furthermore, the TAC rejected the appellant's argument that the wording of s817(1)(ca)(i) and s817(3) required the appellant to have retained some interest in the company before this amalgamation provision could be applied. The appellant had argued that as she had disposed of all of her shareholding, not merely a portion of it, the anti-avoidance provision could not apply. The Commissioner rejected this argument, stating that he saw no ambiguity in the wording of the provision and, even if he were incorrect in that view, the interpretation argued by the appellant would give rise to an absurdity [82]. Accordingly, he held that "[n]othing in the wording of the provision suggests to the Commissioner that this interest can only be added to some shareholding actually retained by the disposing shareholder for it to be taken into account for the purpose of establishing whether there should be a charge to income tax" [81].
- The appellant had failed to demonstrate that the transaction was carried out for bona fide commercial reasons such that s817(7) would then disapply the anti-avoidance provision. In this regard the Commissioner noted that

the appellant had not provided any evidence of her bona fide commercial reasons for entering the transaction:

> “the Commissioner heard no evidence whatever about the appellant’s reasons for selling her shares. Whether it was because she had debts that needed to be paid or was for some other reason cannot be ascertained in the absence of evidence. A bald statement in written argument does not constitute evidence” [97].

07 CGT: s811 TCA 1997 – General Anti-Avoidance Rule

The joined appeal in Tax Appeals Commission determination **57TACD2023** concerned two taxpayers (although 11 other appeals related to the same structure). In December 2012 Revenue issued a Notice of Opinion (“Notice”) under s811(6) TCA 1997 (the general anti-avoidance rule) against the first taxpayer in respect of transactions entered into by that person in 2007. Revenue also raised a Notice in December 2014 in respect of the second taxpayer and transactions entered into by him in 2008.

The transactions in question consisted of the appellants’ entering into contracts whereby:

- they each made a significant gain on the disposal of Irish Government treasuries (which are ordinarily exempt from CGT per s607 TCA 1997) and
- they each made a significant (and corresponding) loss on the disposal of a foreign exchange contract for the difference (FECD) (the appellants then claimed a CGT loss in respect of that FECD loss and used it to shelter chargeable gains per s31 TCA 1997).

The effect of the transactions was to generate a significant CGT loss (e.g. €35m for the first appellant) in circumstances where only a small (relatively speaking) monetary loss (€723,248) had occurred. The Notices expressed the opinion that these transactions had been entered into by the appellants as “tax avoidance transactions” for the purposes of avoiding tax. The primary question before the TAC was whether the appellants had engaged in a tax-avoidance transaction.

The TAC, in dismissing the appeals, held that:

- The appellants were not permitted to raise time limit arguments at the hearing of the appeal as they had not included those arguments as grounds in their notices of appeal, as required by s949I(2) and (6) TCA 1997 [35].
- Revenue had the burden of proof to demonstrate that the transactions were tax-avoidance transactions [15] and had discharged that burden, the TAC finding that the transactions were entered into “primarily to give rise to a tax advantage having regard to the quantum of the generated CGT losses versus the monetary loss incurred by the appellants” [103].
- Having found that the transactions were entered into to create a tax advantage, the Commissioner was required to determine whether the appellants’ use of s31 to reduce their CGT liabilities would result directly or indirectly in a misuse or abuse of that provision, having regard to the purposes for which the provision was provided. He held that the appellants had not discharged their obligation to show that there had been no misuse of s31. The Commissioner determined that the intention of the Oireachtas in enacting s31 was to “alleviate financial hardship for actual monetary losses sustained” [119]. He then concluded that “the appellants engaged in a highly contrived series of steps that could not have been envisaged by the Oireachtas in enacting legislation that permits the calculation of ‘allowable losses’ in accordance with s546 TCA 1997 to reduce

'chargeable gains' pursuant to s31 TCA 1997" [121].

- The appellant's allowable loss should be reduced from €35m to €723,248 (the monetary loss).

The TAC's determination records that the decision is to be appealed to the High Court.

Note: Numbers in square brackets (e.g. [121]) refer to the paragraph number of the judgment/determination.


Direct Tax Cases: Decisions from the UK and European Courts

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	Topic	Court
01	**Income Tax – Dealing in Shares**	UK First-tier Tribunal
02	**Income Tax – Domicile of Choice**	UK First-tier Tribunal
03	**Income Tax – Debt Release**	UK First-tier Tribunal
04	**Corporation Tax – Group Loss Relief**	England and Wales Court of Appeal
05	**Merger Directive and Domestic Reorganisations**	Court of Justice of the European Union

01 Income Tax – Dealing in Shares

In ***N Henderson v HMRC*** [2023] UKFTT 281 (TC) the First-tier Tribunal (FTT) held that the buying and selling of shares did not constitute a trade. Accordingly, the taxpayer could not offset losses from the share dealing against other income.

Mr Henderson had inherited a large sum of money in 2014 and retired from his job soon after. He began buying and selling shares more frequently with the aim of generating an income. He claimed trading loss relief for the losses he made on his share dealings against his other income.

HMRC rejected the appellant's claim on the basis that he was not trading in shares. The taxpayer appealed to the FTT. However, the FTT dismissed his appeal, finding that he was not trading in shares. The FTT considered the following points, with references to the badges of trade, in arriving at that conclusion:

- Share dealing by an individual is generally presumed to be a non-trading activity unless the circumstances prove otherwise.
- The number and frequency of trades were not indicative of trading. For the periods under appeal, Mr Henderson made on average one trade per week, which was not sufficient to demonstrate a trading pattern.
- The time spent by Mr Henderson did not support the contention that he was trading. He spent an average of one to two hours per day on activities connected with his share transactions.
- The organisation and commerciality of the activity did not suggest that it was a trade.

Mr Henderson did not have a clear business plan or a systematic approach to his share dealings.

- He had reported his transactions as capital disposals in prior years, which was inconsistent with his claim that he was trading.

02 Income Tax – Domicile of Choice

In ***Coller v Revenue and Customs*** [2023] UKFTT 212 (TC) the FTT held that the taxpayer had a UK domicile of origin, thereby denying his claim to the remittance basis of taxation.

The judgment examined the domicile positions of the taxpayer's parents. His father had a domicile of origin in Austria. He was born in Austria in 1918 and arrived in England in 1938, having fled to escape the Nazi persecution of Jews. He died in England aged 50. The taxpayer's mother had a domicile of origin in Ireland. She moved to England aged 23. She continued to live in the UK, where she passed away in 2022. The taxpayer in question, Jeremy, was born in the UK in 1958. He lived and worked in London for the majority of his life.

The FTT held that there was significant evidence to demonstrate that the taxpayer's father had formed the settled intention to reside in England permanently and indefinitely. He had severed all ties with Austria and had a deeply settled way of life in England. He had married in the UK and raised his children there. Accordingly, on the date of the taxpayer's birth in 1958, his father had acquired an English domicile of choice, such that Jeremy's domicile of origin was England.

Although the FTT's conclusion that the father had acquired a domicile of choice in the UK was enough to determine the matter, it also considered some alternative arguments. This involved examining the domicile of the taxpayer's mother. The FTT found that she had also acquired an English domicile of choice. Similar to her husband, she was deeply settled in the UK and had little attachment to Ireland. This conclusion provided further support for HMRC's position.

The final alternative considered was whether Jeremy, himself, had acquired a UK domicile of choice. The factual matrix again supported a UK domicile of choice. Jeremy was educated in the UK; his social circle was in the UK; and he had raised his children in the UK. Irrespective of the domicile of his parents, the FTT found that Jeremy had acquired a UK domicile of choice. Accordingly, his appeal was dismissed.

03 Income Tax – Debt Release

In ***S England and another v HMRC*** [2023] UKFTT 313 (TC) the FTT had to determine when a debt had been released for the purposes of the UK equivalent of s439 TCA 1997. The taxpayers had entered into an agreement whereby part-payment would be accepted as full and final settlement of a total liability.

The two taxpayers were directors of a company that had made loans to them through a directors' loan account. The business was providing car finance to the motor trade. The company went into liquidation. A settlement agreement was entered into whereby an amount of £100,000 would be paid towards the debt over a period of time. The remaining balance of *c.* £900,000 would be released. If the part-payment was not made in accordance with the settlement agreement, the whole of the debt would become due and payable immediately.

HMRC argued that taxpayers should be assessed to tax on the release in the period in which the settlement agreement was entered into. The taxpayers claimed that no release could be considered to have taken place until the £100,000 was paid, as the release under the agreement was conditional on the instalments' being paid, i.e. the release would occur only when the condition was satisfied.

The FTT examined the wording of the settlement agreement. It decided that the release occurred at the time of the execution of the settlement agreement because of the wording of the clauses. There was a positive obligation under the agreement in respect of the liquidator making the release. The wording was plain and clear that the liability was released at the point of execution of the agreement.

Therefore, the taxpayers' appeal was dismissed, and the amounts released were taxed in the earlier period.

04 Corporation Tax – Group Loss Relief

The UK Court of Appeal (CoA) recently delivered its judgment in ***VolkerRail Plant Ltd & Ors v HMRC*** [2023] EWCA Civ. 210. The case concerned a UK-resident company whose ultimate parent was located in the Netherlands. Losses were incurred by a UK permanent establishment (PE) of a company resident in the Netherlands. The UK-resident company attempted to claim those losses through consortium and group relief.

HMRC disallowed the group relief claims. The basis was a piece of UK legislation, s403D(1)(c) of the Income and Corporation Taxes Act 1988, which permitted group relief for UK PE losses only if "no part of the loss…is represented in any amount which is deductible or allowable against non-UK profits for purposes of any foreign tax". The UK PE was part of a "fiscal unity" in the Netherlands, and some but not all of the losses of the PE had been offset against profits of that fiscal unity.

The CoA considered whether the restriction in s403D(1)(c) was compatible with the provisions of the Treaty on the Functioning of the European Union concerning freedom of establishment. It held that although there was a restriction on the freedom of establishment, the restriction was justified. There were a number of reasons for this conclusion. First, the court noted that a Member State must be able to prevent the risk of losses being taken into account twice. Also, it pointed out that relief was not precluded entirely, as a UK PE could carry the loss back or forward. Reliance was also placed on the case of *NN A/S v Skatteministeriet* C-28/17, where it was found that the objective of preventing losses being used twice can provide an independent justification for a restriction. The court also considered the domestic provision in question to be within the margin of discretion that the national legislators have in framing legislation that pursues a justified objective in the context of taxation.

Accordingly, no group relief was available to the taxpayer, as the restriction in the domestic UK section was considered to be justified and proportionate.

05 Merger Directive and Domestic Reorganisations

In the case of ***Banca A vs ANAF*** C-827/21 the Court of Justice of the European Union (CJEU) had to consider whether EU law required a national court to interpret domestic legislation applicable to a purely domestic transaction in accordance with the Merger Directive (Council Directive 2009/133/EC).

The case arose from a dispute between a Romanian banking group and the Romanian tax authorities. There had been a domestic merger by absorption, whereby a Romanian company transferred all of its assets and liabilities to its 100% parent and the shares in the subsidiary were cancelled. The merger resulted in incomes being recognised in the parent company. Domestic tax law meant that the amount was subjected to corporate tax in Romania. However, gains crystallised under a similar cross-border transaction would have been treated as non-taxable.

The taxpayer argued that the domestic merger should be a tax-neutral event (similar to a cross-border merger in the same circumstances). The Romanian tax authorities disagreed, and the CJEU was asked to consider whether the domestic legislation underpinning the purely internal merger had to be interpreted in a manner consistent with the Merger Directive.

The CJEU determined that EU law does not require a national court to interpret a provision that deals purely with a domestic transaction in accordance with the Merger Directive. The domestic transaction did not come within the scope of the Merger Directive. Different legislation was in force in Romania at the time of the merger for dealing with domestic and cross-border mergers. Romanian law did not "directly and unconditionally" provide for the applicability of the Merger Directive to purely internal situations.

Accordingly, the CJEU determined that it had no jurisdiction to consider the questions that were referred for a preliminary ruling.

International Tax Update

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01 BEPS: Recent Developments

02 US Tax Developments

03 EU Tax Developments

04 Jersey and Guernsey: Partnerships – Tax Compliance and Economic Substance

05 Barbados: 2023 Budget – Introduction of Transfer Pricing Legislation, No New Taxes

06 Australia: Government Consults on Public Country-by-Country Reporting Measures

07 Australia: Exposure Draft Denying Deduction for Payments Attributed to Intangible Assets Issued

08 Australia: Exposure Draft on New Debt Deduction Rules Issued

09 China: R&D Super-Deduction Rate Increased to 100% for All Eligible Sectors

10 Singapore: Tax Authority Updates e-Tax Guide on General Anti-Avoidance Provision

11 UK Budget and Finance Bill 2023

12 UK: Tax Authority Increases Interest Rates on Late Tax Payments

13 Germany: Legislation Published on CbC Report Exchange Agreement with US

14 Hong Kong SAR Remains on EU “Grey List” Due to Scope of FISE Regime

01 BEPS: Recent Developments

Irish Pillar Two consultation

On 31 March the Minister for Finance, Michael McGrath TD, launched a feedback statement on the transposition of the EU Minimum Tax Directive (the Pillar Two Directive). The feedback statement follows the May 2022 public consultation, which sought feedback on broad scoping questions regarding the implementation of the Pillar Two rules into Irish legislation. It includes a statement that Ireland intends to introduce a qualified domestic top-up tax (QDTT) with effect from 1 January 2024.

The feedback statement contains *c.* 120 pages of draft legislation in relation to the income inclusion rule and the undertaxed profits rule. It also presents potential legislative approaches to other key aspects of the Global Anti-Base Erosion (GloBE) Rules, including the QDTT, and outlines proposed approaches to administrative requirements such as registration, self-assessment, filing of returns, payments and record-keeping.

Stakeholders were invited to provide feedback by 8 May 2023. The plan is to publish a second feedback statement in mid-2023, before final legislation is included in the Finance Bill later this year.

Japan: Implementing OECD 15% minimum tax

At the end of March the Japanese Parliament approved legislation to implement an income inclusion rule (IIR) to effect the taxation of income at the 15% global minimum tax rate for fiscal years starting on or after 1 April 2024. The Japanese IIR is based on OECD Model Rules.

Legislation for the qualified domestic minimum top-up tax and the undertaxed profits rule is expected to be considered for inclusion in future tax reform measures.

Spanish Ministry of Finance starts transposition work for Pillar Two Directive

The Spanish Government took the first steps in transposing the Pillar Two Directive into its domestic legislation by releasing a public consultation document on 7 March 2023. This document pertains to the implementation of EU Directive (2022/2523), which seeks to establish a minimum level of taxation for multinational and domestic groups in the EU that have annual revenue of at least €750m. The public consultation was open until 24 March 2023. The consultation aligns with the Directive and includes the income inclusion rule and the undertaxed profits rule.

German implementation of Pillar Two Directive

The German Ministry of Finance released draft legislation for the domestic application of the EU Pillar Two Directive on 20 March 2023. The draft legislation was open to public review and commentary until 21 April, and the legislation should be enacted by the end of 2023. The proposed legislation closely follows the Pillar Two Directive, and Germany intends to implement a qualified domestic minimum top-up tax (QDMTT) to ensure that low-taxed profits of German entities that are part of a group become subject to a German top-up tax. However, given the 30% German tax rate, the QDMTT is not expected to have a significant impact in many cases.

The legislation would be introduced as a separate tax Act called the "Act to guarantee a global minimum tax for group companies", alongside existing tax legislation. The income inclusion rule and the QDMTT would be applicable for fiscal years starting after 30 December 2023 and the undertaxed profits rule for fiscal years starting after 30 December 2024, in line with the OECD and Pillar Two Directive timelines.

Liechtenstein draft Bill for domestic implementation of Pillar Two rules

At the end of March Liechtenstein started a consultation on a preliminary Bill concerning the implementation of Pillar Two. The Bill proposes the introduction of a qualified domestic minimum top-up tax (QDMTT), along with an income inclusion rule (IIR) and an undertaxed profits rule (UTPR), for business units of multinational enterprise groups that are subject to the GloBE Model Rules, and it seeks to directly implement the OECD Pillar Two Model Rules into legislation. Large domestic groups will also be subject to the rules. The IIR and the QDMTT will apply for accounting periods beginning on or after 1 January 2024 and the UTPR for accounting periods beginning on or after 1 January 2025. Consultation on the draft law will continue until 2 June 2023, and the corresponding report and motion will be presented to the parliament in early September.

Sweden: Implementation of Pillar Two Directive

In February an interim report and a draft Bill proposing Pillar Two legislation were released by the committee responsible for analysing the implementation of Pillar Two, specifically the EU Minimum Tax Directive. The draft law includes provision for the income inclusion rule, the qualified domestic minimum top-up tax and the undertaxed profits rule. The proposed legislation is expected to take effect from 1 January 2024 and would apply to fiscal years starting after 31 December 2023, in line with the Directive.

The consultation period for the draft Bill and other matters raised in the interim report concluded on 15 May 2023, and the committee is continuing to work on completing the report. The draft Bill is expected to be subject to further consultation before the legislation is finalised and enacted. At this point the draft legislation does not contain several rules, such as safe-harbour rules and transitional provisions for intra-group transfers. It is understood that these rules will be incorporated in later versions and that they have not been included in the current draft mainly due to time constraints.

Temporary exemption from accounting for deferred tax under Pillar Two Regulations

The Financial Reporting Council (FRC) has released a Financial Reporting Exposure Draft that proposes changes to the reporting of deferred tax. The proposed approach by the FRC aligns with the International Accounting Standards Board's recommendation to modify IAS 12. The draft introduces a temporary exemption from the deferred tax accounting requirement related to the Pillar Two rules.

The FRC proposal aims to modify Section 29: Income Tax of FRS 102: The Financial Reporting Standard Applicable in the UK and Republic of Ireland for international tax reform with respect to the Pillar Two Model Rules. Under the proposed amendments an entity would be required to disclose:

- the fact that it expects to fall within the scope of Pillar Two legislation,
- the current tax expense related to Pillar Two income taxes and
- information that will enable users of financial statements to understand a group's potential exposure to paying top-up tax when Pillar Two legislation has been enacted or substantively enacted but is not yet in effect.

The proposals were open to consultation until 24 May 2023, and the FRC plans to finalise the amendments in summer 2023.

Switzerland's Federal Council and Parliament propose acceptance of OECD's corporate minimum tax

On 18 June 2023 the Swiss electorate will vote on a constitutional amendment for the implementation of Pillar Two. The Swiss Federal Council and Parliament are advocating voting for the amendment.

The proposed amendment will introduce the minimum tax rate of 15% through a supplementary tax, which will cover the difference between the current tax burden and the minimum tax rate. The cantons where the current tax burden for the companies is less than 15% will receive 75% of the supplementary tax revenue, and the Confederation will be entitled to 25% of the revenue.

The popular vote on the proposal will enable Switzerland to introduce the minimum tax rate by ordinance, allowing the country to be ready for the same timeline as other jurisdictions. The Federal Council will submit an implementation law to the Parliament within six years, which will replace the ordinance.

02 US Tax Developments

2 US Tax Developments

US Budget 2024

On 9 March 2023 the US Treasury Department released the Green Book for fiscal year 2024. It includes a number of measures that would increase the tax burdens for companies. The headline announcement in the Green Book for companies is the increase of corporation tax from 21% to 28%, a measure previously put forward by President Biden. It is proposed that this increase would apply for taxable years beginning on or after 1 January 2023. The increase to 28% would mean a GILTI (global intangible low-taxed income) rate of 14%, but there is a separate proposal to revise GILTI, which would include, in effect, an increase in the GILTI rate to 21%. It is also proposed that GILTI be computed on a country-by-country basis.

Some other proposals that may be of relevance to US multinational groups are:

- an undertaxed profits rule (UTPR) to replace the BEAT, which is intended to be in line with the UTPR under the OECD's Model Rules;
- repeal of the FDII (foreign-derived intangible income deduction);
- revisions to rules for the allocation of subpart F income and GILTI between taxpayers to ensure that both are fully taxed; and
- restrictions on deductions of excessive intra-group interest costs.

To be enacted, each proposal would be required to be passed by Congress, which appears unlikely given the political landscape in the US.

03 EU Tax Developments

European Commission publishes feedback received on DAC8 proposal

During its plenary meeting on 22 March 2023 the European Economic and Social Committee (EESC) expressed support for the DAC8 proposal. The proposal is concerned with tax transparency rules for service providers that facilitate crypto-asset transactions for customers resident in the EU. The EESC affirmed that the DAC8 proposal would improve the current DAC Directive and effectively deter non-compliance with fiscal rules by crypto-asset holders. It also concluded that the proposal is consistent with the principle of fair and effective taxation.

The EESC recommended that reporting obligations cover overall crypto-currency holdings for transparency and certainty purposes, even though taxation should be applicable only to effective gains. Furthermore, it deemed the proposed tax identification number (TIN) reporting system the most effective compliance method for ensuring the effectiveness of the new rules. The EESC also highlighted the need to fully respect the proposal's data protection provisions and safeguards to protect the fundamental rights of individuals whose data will be collected, exchanged and stored. It emphasised that penalties, which will be determined by Member States, should strike a balance between the effectiveness of the rules and proportionality. Additionally, it suggested enhancing cooperation between tax authorities and the authorities responsible for combating money laundering and the financing of illegal activities and terrorism. The EESC opinion is not binding on the Council of the European Union. The DAC8 proposal requires unanimity in the Council for its adoption.

04 Jersey and Guernsey: Partnerships – Tax Compliance and Economic Substance

From 2022, all partnerships residing in Jersey or Guernsey are required to file tax returns and determine whether they fall within the scope of the economic-substance rules. This obligation extends to partnerships established outside Jersey/Guernsey with an effective management place in Jersey/Guernsey. The schema for the 2022 Jersey returns has been finalised, and the returns are now available for submission. The first tax return filing deadlines for partnerships are 30 November 2023 in Jersey and 28 February 2024 in Guernsey, with a registration deadline in Guernsey of 14 July 2023. Failure to comply with these compliance obligations carries financial penalties.

05 Barbados: 2023 Budget – Introduction of Transfer Pricing Legislation, No New Taxes

On 14 March 2023 the Budget speech for the fiscal year 2023–4 was delivered by the Prime Minister of Barbados, Mia Mottley. She made clear that no new taxes will be introduced, contrary to some expectations. Barbados does not currently have transfer pricing legislation, and a notable announcement was the Government's intention to introduce such legislation during the upcoming financial year.

06 Australia: Government Consults on Public Country-by-Country Reporting Measures

In April the Australian Treasury launched a consultation on draft legislation proposing that certain large multinational entities (MNEs) will be required to publish specific tax information on a country-by-country (CbC) basis, along with a statement of their tax approach. This measure is intended to apply to income years commencing on or after 1 July 2023. Certain types of constitutional corporations, partnerships and trusts that are members of a CbC reporting group would be subject to these rules.

The parent entity of the CbC reporting group will have to publish the required tax information on an Australian Government website, and penalties will be imposed for non-compliance.

The disclosed information includes the group's approach to tax, each entity's name, and details including the following for each jurisdiction in which the group operates: description of business activities, number of employees, expenses from related-party transactions, list and values of tangible and intangible assets, explanation of the difference between tax accrued and tax due, effective tax rate and the currency used for the information provided.

Although many MNEs may be preparing for EU public CbC reporting (with Romania applying from 2023), the Australian provisions are likely to accelerate the timing of such reporting, and their application will need to be assessed by MNEs with a presence in Australia.

07 Australia: Exposure Draft Denying Deduction for Payments Attributed to Intangible Assets Issued

On 31 March 2023 the Australian Treasury released the Exposure Draft Treasury Laws Amendment (Measures for Consultation) Bill 2023: Deductions for Payments Relating to Intangible Assets Connected with Low Corporate Tax Jurisdictions ("the ED") as part of its consultation on multinational tax integrity and transparency. The ED will introduce an anti-avoidance rule to deny tax deductions for payments made by significant global entities to associates in low-corporate-tax jurisdictions for the exploitation of intangible assets. It would appear that the scope of the provisions is very broad (e.g. it would not relate just to royalties). There is currently uncertainty in relation to a number of the definitions, which hopefully will be clarified in the final legislation.

The proposed rule is intended to apply to relevant payments made on or after 1 July 2023. "Low corporate tax jurisdiction" is defined as a jurisdiction with a headline tax rate of 15% or less, but this does not appear to take into account additional tax that may arise under existing controlled foreign company rules or the expected global minimum tax under Pillar Two, which is a point that has been raised during the consultation process. It is hoped that such taxes will be taken into account when the final legislation is published.

08 Australia: Exposure Draft on New Debt Deduction Rules Issued

The Australian Treasury has proposed changes to the thin-capitalisation rules, with the consultation ending on 13 April 2023. The new rules would reduce the current asset-based system to a 30% EBITDA (earnings before interest, taxes, depreciation and amortisation) approach based on the OECD-recommended approach, with a modified group ratio rule and a modified arm's-length test. The EBITDA interest limitation rules would apply for years of income commencing on or after 1 July 2023.

The draft law provides for a consolidation of the current entities, introducing a "general class investor" concept. It also amends the definition of "debt deduction" to capture interest and amounts equivalent to interest and introduces three new earnings-based tests for general class investors. However, there are concerns that the proposed amendments may lead to unexpected outcomes for some taxpayers and may also deny debt deductions related to the derivation of non-assessable non-exempt foreign non-portfolio dividends. These changes may be highly problematic for Australian-based multinationals and will need to be assessed.

09 China: R&D Super-Deduction Rate Increased to 100% for All Eligible Sectors

China's State Council announced on 24 March 2023 that the super-deduction rate for research and development (R&D) expenses would be increased from 75% to 100% for all eligible sectors. The 100% rate is retroactively effective from 1 January 2023. The State Taxation Administration has also updated its official website with policy guidance on the R&D super-deduction.

The R&D super-deduction is a long-standing preferential treatment in China to encourage businesses to engage in R&D activities. In addition to the deduction available for actual

R&D expenses, businesses may claim a deduction (known as the "super-deduction") that is calculated as a percentage (i.e. the super-deduction rate) of their qualifying R&D expenses. For instance, if the super-deduction rate is 100%, a total deduction of 200% of the qualifying expenditure incurred is available. If the R&D expenses are capitalised as an intangible asset, the corresponding super-deduction amount may also be included in the intangible asset's tax base. The following are not eligible sectors for the purpose of the super-deduction: tobacco manufacturing; accommodation and catering; wholesale and retailing; real estate; leasing and business services; and entertainment.

10 Singapore: Tax Authority Updates e-Tax Guide on General Anti-Avoidance Provision

The Inland Revenue Authority of Singapore (IRAS) has added two new examples of tax-avoidance arrangements to the e-tax guide on the general anti-avoidance provision under s33 of the Income Tax Act 1947 (ITA 1947). The two new categories are:

- creating a conduit entity to obtain a treaty benefit with the aim of avoiding withholding tax and
- assigning debt to an offshore jurisdiction with the main purpose of obtaining a tax advantage.

The IRAS highlights that the list of tax-avoidance arrangements in the e-tax guide is not comprehensive and that the absence of examples from the guide does not imply exemption from the ambit of s33(1) ITA 1947. The updated e-tax guide also provides details on the surcharge that will be imposed under s33A on tax or additional tax arising from an adjustment made by the Comptroller of Income Tax if an arrangement falls within s33.

11 UK Budget and Finance Bill 2023

The UK's Spring Finance Bill 2023 was published on 23 March. In addition to announcements made in Budget 2023, the Finance Bill includes the draft legislation for the UK's implementation of the income inclusion rule and the qualified domestic minimum top-up tax. (See also article by Marie Farrell "UK and Northern Ireland Tax Update – Summer 2022"in this issue).

The UK corporation tax rate increased from 19% to 25% from 1 April 2023, as previously announced. The increase applies to companies with taxable profits of more than £250,000 (there are tapering provisions for companies with taxable profits of between £50,000 and £250,000).

The UK Chancellor announced reform of the creative industries reliefs, which will apply from 1 April 2025 with a transitional period from 1 January 2024. The existing tax reliefs for film production, high-end and children's TV, animation and video games will be consolidated. The existing tax reliefs for film, high-end and children's TV, and animation will be replaced by a new audio-visual expenditure credit. This will take the form of a 34% credit for film and high-end TV and a 39% credit for animation and children's TV. There will also be a new video games expenditure credit of 34%. The relief will now be available only for expenditure incurred on goods and services in the UK, instead of the current EEA expenditure rules.

An enhanced R&D regime for investment-intensive SMEs was introduced. A higher rate of relief for loss-making SMEs that are R&D-intensive was introduced from 1 April 2023. To be eligible, the qualifying R&D expenditure of an SME must make up 40% of the company's total expenditure. Eligible SMEs will be able to claim a repayable tax credit at a rate of 14.5% for qualifying R&D expenditure. This is an increase on the 10% announced in the Autumn Statement.

A new capital allowance scheme, which replaces the super-deduction regime, will also be introduced to encourage capital investment. The scheme allows for a 100% first-year capital allowance for qualifying plant and machinery and a 50% first-year capital allowance for qualifying special rate assets.

12 UK: Tax Authority Increases Interest Rates on Late Tax Payments

HMRC has increased the interest rates on late tax payments and repayments. The late payment interest rate is now 6.75% and the repayment interest rate 3.25%, after the Bank of England Monetary Policy Committee's announcement on 23 March 2023 of an increase in the Bank's base rate from 4% to 4.25%.

The interest rates that apply to late payment and repayment of taxes are linked to the Bank of England base rate. The late payment rate is set at the base rate plus 2.5%, and the repayment rate at the base rate minus 1%, with a floor of 0.5%. These new rates apply from 13 April 2023 and aim to encourage prompt payment of liabilities while compensating taxpayers for overpaying and losing the use of their money.

13 Germany: Legislation Published on CbC Report Exchange Agreement with US

German legislation on the ratification of the competent authority agreement (CAA) between Germany and the US for the exchange of country-by-country (CbC) reports was published on 15 March 2023 in the Federal Gazette. The agreement will come into force once Germany notifies the US that all necessary internal procedures have been completed, and this date will also be published in the Federal Gazette. The CAA will provide the legal basis for the exchange of CbC reports between the two countries, replacing the annual joint statements that previously allowed for spontaneous exchange. A separate agreement is expected to clarify the parameters for the exchange of CbC reports.

As a consequence of the CAA, a German entity that is part of a US-based multinational enterprise will be exempt from local German filing obligations under the "secondary mechanism" if the US ultimate parent entity correctly files the CbC report. This is likely to be welcomed by German taxpayers in light of the expanded transfer pricing compliance provisions.

14 Hong Kong SAR Remains on EU "Grey List" Due to Scope of FISE Regime

In April 2023 the Hong Kong SAR Government published a consultation paper proposing changes to the foreign-sourced income exemption (FSIE) regime to align with the EU's latest guidance on such regimes. Even though Hong Kong SAR already implemented the FSIE regime for foreign-source income from 1 January 2023, it remains on the EU's "grey list" because the scope of foreign-source disposal gains under the FSIE regime is considered too narrow.

Therefore, Hong Kong SAR needs to revise its FSIE regime by 31 December 2023. The Government is requesting feedback from stakeholders on the proposed changes by 6 June 2023 and plans to introduce the amendment Bill for the Legislative Council's reading in October 2023, with the new regime's taking effect from 1 January 2024.

VAT Cases & VAT News

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VAT Cases

01 **Intra-Community Supply of Goods – Compliance with Substantive Requirements and Time Limit for Submission of Evidence**: CJEU Judgment

02 **Insurance Transactions – Resale of Parts from Written-off Vehicles**: CJEU Judgment

03 **Meaning of Taxable Person and Economic Activity – Public Authority**: CJEU Judgment

04 **Recharging Points for Electric Vehicles – Supply of Goods or Services**: CJEU Judgment

05 **Waiver of Exemption – Cancellation Sum**: TAC Determination

06 **Election to Register – Cancellation Implications**: TAC Determination

07 **VAT Registration Refusal**: TAC Determination

08 **Student Recruitment Services – VAT Status of Commission**: TAC Determination

01 Intra-Community Supply of Goods – Compliance with Substantive Requirements and Time Limit for Submission of Evidence

The Court of Justice of the European Union (CJEU) delivered its judgment in the case of ***Nec Plus Ultra Cosmetics AG v Republika Slovenija*** C-664/21 on 2 March 2023, which dealt with the interpretation of Articles 131 and 138(1) of the VAT Directive, together with the principles of tax neutrality, effectiveness and proportionality.

NEC is established in Switzerland and supplies cosmetic products. During 2017 it supplied goods to a Croatian customer and to a Romanian customer. The goods were taken charge of by a purchaser in Croatia or by a third party acting on behalf of the purchaser when they were located in a Slovenian warehouse.

The goods were transported from Slovenia to another Member State, and the supply was zero-rated for VAT (Article 138(1) provides that Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began).

Article 131 outlines the exemptions that apply, with Chapter 4 thereof detailing the exemptions applicable to intra-Community transactions. The exemptions are:

> "to apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse".

The Slovenian VAT rules set out various time limits in the event of interventions by the tax authority. After a tax inspection the tax authority has to prepare a report within 10 days and notify the taxpayer. That report is to set out the factual situation established, including all facts and circumstances relevant to the decision. The tax authority informs the taxpayer of the possibility to submit new facts and evidence, and it has 20 days to submit same. Extensions to the time limit can be sought. A supplementary report is then drawn up within 30 days if the additional information affects the tax liability amount. Any new facts and evidence taken into account must have existed before the issue of the report, and the taxpayer must have been unable to provide same with good reason. An assessment will then issue.

The Slovenian tax authorities requested supporting documentation in respect of the zero-rating of supplies by NEC. NEC submitted invoices and copies of consignment notes demonstrating that goods were transported from Slovenia to another Member State. However, the delivery notes and other documents mentioned in the consignment notes were not produced as NEC did not possess this documentation at the time and was attempting to obtain it. Its Hamburg office, which was responsible for Croatian deliveries, closed in August 2018 and had not provided it with all of the necessary documentation.

The tax authorities issued a tax assessment demanding additional VAT on the basis that NEC had not adequately demonstrated that the goods had actually been transported to a Member State other than Slovenia and therefore the conditions for zero-rating were not satisfied.

The question referred was whether Articles 131 and 138(1) of the VAT Directive, together with the principles of tax neutrality, effectiveness and proportionality, preclude national legislation that prohibits the submission and gathering of new evidence to demonstrate that the substantive requirements in Article 138(1) are satisfied during the audit but before a tax assessment is raised.

The court noted from previous case law that the fundamental principle of VAT neutrality requires the deduction or refund of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements. This, of course, may be different if non-compliance with the formal requirements prevents the production of conclusive evidence that the substantive requirements have been satisfied. However, the court noted that this case did not concern the infringement of formal requirements that would prevent the production of evidence that the substantive requirements of the right to exemption from VAT for the supplies of goods have been satisfied but, rather, when that evidence may be adduced.

The court considered the provisions of the Eighth Directive (which deals with refunds of VAT) by way of analogy and earlier case law on refund applications. In those cases it was held that Member States are entitled to enact national legislation discounting evidence produced after a refund application has been rejected, provided the principle of equivalence is not breached (i.e. the measures are not less favourable than legislation governing similar domestic situations) and provided the principle of effectiveness is not breached (i.e. the exercise of rights under EU law is not made impossible in practice or excessively difficult).

The court noted that where it is possible to provide additional evidence in a VAT adjustment procedure, the absence of a temporal limit would be contrary to the principle of legal certainty (as tax affairs could be open to challenge indefinitely). Where evidence establishing the conditions for exemption of an intra-Community supply is not taken into account, this would limit the principle of fiscal neutrality. The exemption may be refused in certain situations, but the Member State must ensure strict compliance with the tax neutrality principle if the refusal is made early in the audit procedure, or the refusal must be based on certain circumstances, such as there being no reason or justification for the delay or the delay's having resulted in lost tax revenue.

The court indicated that refusing to take into account evidence to support the exemption before the issue of the tax assessment was difficult to reconcile with the principles of proportionality and neutrality, and it is up to the referring court to assess whether the refusal to take into account the various circumstances is in breach of the principle of effectiveness. It will also need to assess whether national provisions in relation to the exemption for intra-Community supplies are on a par with those that apply to similar domestic supplies. The court held that the VAT Directive does not preclude the national provisions outlined provided the principles of equivalence and effectiveness have been complied with. This case highlights the importance of ensuring that all documentation is available at the time of the transaction to support the claim for exemption with credit.

02 Insurance Transactions – Resale of Parts from Written-off Vehicles

The CJEU handed down its judgment in the case of ***Generali Seguros SA, formerly Global – Companhia de Seguros, SA v Autoridade Tributária e Aduaneira*** C-42/22 on 9 March 2023. The court had to consider whether the resale of parts of written-off vehicles by an insurance company that had underwritten the motor insurance policy was taxable or exempt. The legislative provisions under consideration were Articles 135(1)(a) and 136(a) of the VAT Directive. Exemption for insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents, is provided for in Article 135(1)(a). Certain supplies of goods (e.g. goods used solely for an activity exempt under Article 135) are also exempted under Article 136(a) if the goods did not give rise to an input entitlement.

In the course of its insurance business Generali Seguros purchases parts from written-off motor vehicles damaged in accidents involving the insured and subsequently sells the parts to third parties. No VAT is accounted for on the sales. It argued that the sales should be exempt from VAT under the insurance exemption and on the basis that the goods were used solely for an exempt activity where they did not give rise to an input credit. It argued that the resale of the parts is connected with its insurance activity and is inseparable from the normal activity of negotiating and paying compensation in the event of an accident so that it falls within the scope of its business purpose. The Portuguese tax authority, however, took the view that the sales were transfers of tangible property for consideration and were liable to VAT rather than qualifying for exemption.

The first question referred was whether the sales by an insurance company to third parties of parts from written-off motor vehicles that have been involved in accidents covered by that insurance company, which it has purchased from the insured, is exempt under Article 135(1)(a).

Under the Portuguese compulsory motor vehicle civil liability insurance scheme, where an insured vehicle is completely written off after an accident, the insured and the insurance company can decide on the transfer of ownership of the parts from that written-off vehicle to the insurance company. The company informs the insured of the purchase value, and if the insured proceeds, the company resells the written-off parts to a third party. The insured would receive the insurance settlement and the value of the written-off parts.

The court noted that the concept of "insurance transactions" is that the insured person is exempted from the risk of bearing financial loss (which is uncertain but potentially significant) by the premium paid (which is certain but limited). In this context the identity of the recipient of the service is relevant as the definition of insurance transactions implies the existence of a contractual relationship between the insurer and the insured. With regard to the sale of the parts, however, those sales take place under an agreement with the insurance company and a third party (i.e. a party not covered by the insurance relationship). The court also noted that the sale of the parts bears no relation to covering a risk and that the price of the goods relates to the value of the goods at the time they are sold. The price of the goods does not form part of the insurance settlement itself and is payable under a separate sale contract and is therefore separable from the insurance agreement.

The court held that the transactions for the sale of parts from a written-off motor vehicle do not constitute "insurance transactions" within the meaning of Article 135(1)(a). The sale transaction was not inseparably linked to the insurance contract and therefore did not have to be subject to the same VAT treatment. Although an insurance transaction is linked with the item that it provides cover for and there will be connections between this transaction and other transactions, such connections are not in themselves sufficient to determine that there is a single composite supply. In this case the owner of the vehicle, the insured, was not obliged to transfer the parts to the insurance company. A decision to make the transfer is separate to the insurance agreement and is a decision made after the risk has materialised. Even though the sales are made by an insurance company, this does not mean that the sales and insurance agreements are so closely linked that they form objectively a single indivisible supply that it would be artificial to split.

The second question referred related to whether the supply of the goods came within the scope of Article 136(a). The court considered the concept of "use" in the provision and indicated that it refers to the fact that the goods are intended for a specific use – i.e. are they intended for the purposes of carrying out insurance transactions? The goods here were not intended to be used in the course of providing insurance services but, instead, were sold to a third party in an unaltered state, without having been used (in the context of the insurance activity). The court held that the exemption did not apply to the sale of the goods.

The final question related to the principle of fiscal neutrality and whether not applying the exemption to the sale of the parts where there was no right of deductibility offends the fiscal neutrality principle. The court stated that the:

> "principle cannot extend the scope of an exemption in the absence of clear wording to that effect. That principle is not a rule of primary law which can condition the validity of an exemption, but a principle of interpretation, to be applied concurrently with the principle of strict interpretation of exemptions."

Therefore, taxing the sale of the parts was not contrary to that principle.

03 Meaning of Taxable Person and Economic Activity – public authority

The CJEU delivered its judgment in the case of ***Dyrektor Krajowej Informacji Skarbowej v Gmina L.*** C-616/21 on 30 March 2023. It concerned the interpretation of Articles 2(1), 9(1) and 13(1) of the VAT Directive in the context of proceedings between Gmina L. ("the Municipality"), located in Poland, and the tax authority concerning an advance tax ruling addressed to the Municipality in respect of its liability to pay VAT on asbestos removal activities that it sought to carry out and the right to deduct the input VAT incurred on those transactions.

Article 13(1) provides that:

> "States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions. However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition. In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible."

A multiannual programme, National Programme for the Removal of Asbestos for 2009–2032, was established in Poland, and the Municipality was entrusted with responsibility for implementing it (it was, in effect, a statutory task) and was responsible for financing the programme with support from the Environmental Protection Fund. It involved removing products and waste containing asbestos from residential and commercial buildings (immovable properties on which an economic activity is carried out were excluded from the programme).

Under the procurement laws the Municipality is to select a contractor to remove the asbestos and enter into a contract with said contractor. When the contractor carries out the work, it will issue an invoice including VAT to the Municipality, which it will settle out of its own funds and then seek reimbursement for in the form of a subsidy for all or part of the cost. The occupants did not bear any of the costs, nor did they enter into an agreement with the Municipality.

The Municipality, which is already VAT registered, sought an advance tax ruling to determine whether it would be subject to VAT in the context of the transactions outlined above. In its view it would not be subject to VAT as it was acting in its capacity as a public authority. The tax authority took the view that it acted as a taxable person and should have input VAT recovery.

The question to be determined was how Articles 2, 9 and 13 of the VAT Directive were to be interpreted in assessing whether the Municipality is providing a VATable supply of services to the occupants in circumstances where the activity is not intended to obtain income on a continuing basis and no payment is made by the occupants. In dealing with this question the court needed to consider whether there is a supply of services for consideration (i.e. is there is a supply of services by the Municipality to the occupants for consideration?) and whether the services are carried out in the course of an economic activity.

The court reiterated that there must be a direct link between the supply of services and the consideration actually received by the taxable person. This is established where there is a legal relationship in which there is reciprocal performance, the remuneration received by the provider of the transactions constituting the actual consideration for the service supplied to that recipient. The Municipality will engage a contractor to carry out the work for the occupants (at their request); those transactions constitute a supply of services, and it is up to the referring court to determine the supplier and the recipient of those services.

The tax authority argued that the Municipality acted as a commission agent for the occupants. If it undertook the work in its own name but on behalf of the occupants, then it would be treated as having carried out the work itself. However, Article 28, dealing with commission agents, provides that the agent would have to be mandated to so act (i.e. there needs to be an agreement between the commission agent and the principal), but this was not evident in this case. Here the occupants had no influence on the provision of the services. The court indicated that the conditions of Article 28 were not met. So the question was whether the Municipality is the supplier of the services.

Although there must be a supply of services for consideration, it is not necessary that the consideration for the supply of services be obtained directly from the recipient of the services, as it can be obtained from a third party. In this regard the court noted that the fact that the price paid for a supply of a service is higher or lower than the cost price, and therefore higher or lower than the open-market value, is irrelevant for the purpose of establishing whether it was a transaction for consideration. This is because it did not affect the direct link between the transactions supplied and the consideration received or to be received. The consideration is determined in advance and according to well-established criteria.

The fact that the Municipality bears the cost of the service and receives a subsidy in whole or in part, it stated, is not conclusive. The subsidy is paid only when the work is undertaken, and even though there is no contract between the occupants and the fund, there is still a direct link as the supply of services and the consideration are mutually linked. The court held that two supplies of services coexist in this case – the supply by the contractor and paid by the Municipality (the court noted that this supply corresponds to the definition of supply of services), and the supply involving the Municipality (as provider), the occupants (as recipients) and the subsidy paid to the Municipality by the fund. The court indicated that if the referring court determines that the second supply also falls within the definition of supply of services, then it has to be determined if the supply is an economic activity of the Municipality.

An activity is generally classified as "economic" where it is permanent and is carried out in return for remuneration that is received by the person carrying out the activity. But the court stated that all of the circumstances in which it is supplied have to be examined by making a case-by-case assessment, referring to the typical conduct of an active entrepreneur in the relevant sector (in this case an asbestos removal company). In this case the Municipality does not employ staff for asbestos removal and does not seek customers. It merely sets up in the context of a national programme asbestos removal activities as requested by occupants under the programme. The particular activity engaged in by the Municipality is not of a recurrent nature.

The court contrasted the approach that would be taken by a commercial operator with that taken by the Municipality (where it bears only risks of loss and no prospect of profit) in the context of pricing, invoicing, payment and risk. This is for the referring court to determine, but the court indicated that it did not appear that the Municipality was engaged in an economic activity. The case is important in relation to considering the activities undertaken by public bodies, in particular when reviewing the nature of the agreements and the form of consideration payable.

04 Recharging Points for Electric Vehicles – Supply of Goods or Services

The decision in the CJEU case of ***Dyrektor Krajowej Informacji Skarbowej v P. in W., interested party: Rzecznik Małych i Średnich Przedsiębiorców*** C-282/22 was published on 20 April 2023. P. in W. had sought a tax ruling that the planned activities it was going to engage in consisted of a supply of services in respect of which it would levy a single fee for the supply.

It plans to carry on activities consisting of the installation and operation of electric vehicle (EV) recharging stations that are accessible to the public. Those stations would be equipped with "multi-standard" chargers, which would have both direct current quick-charge connectors and alternating current slow-charge connectors. The time required to charge the EV and the pricing structure will vary depending on the charger used and the pricing structure. The supply provided during each recharging session could, in principle, include (depending on the needs of the user concerned) transactions consisting of access to recharging devices, including integration of the charger with the vehicle operating system; the supply of electricity, within duly adjusted parameters, to the batteries of the vehicle; and the necessary technical support. It also plans to create a special platform, a website or an IT application, that would enable users to reserve a particular connector and to view the transaction and payment history.

The tax authority considered that the supply of the electricity necessary to recharge an EV had to be regarded as the principal supply, whereas the other services offered had to be regarded as ancillary. Therefore the provision of devices enabling EVs to be recharged quickly was not to be regarded as the predominant element of the transaction concerned, and the recharging of the EV was not of secondary importance.

The referring court asked whether a single complex supply comprising the elements outlined above constitutes a "supply of goods" within the meaning of Article 14(1) of the VAT Directive or a "supply of services" within the meaning of Article 24(1). In considering this issue the court reiterated the key matters applicable when considering a transaction that comprises a bundle of elements – where there is a single supply with two or more elements, whether it would be artificial to split them where they form a single indivisible economic supply; whether the distinct supplies are independent; and which supply is the principal supply and which is the ancillary supply or supplies.

The referring court considered that the supply and provision in question form a single transaction for the purposes of VAT. The court reiterated that the concept of "supply of goods" means the transfer of the right to dispose of tangible property as owner and that concept covers any transfer of tangible property by one party that empowers the other party actually to dispose of it as if the latter were its owner. In this regard, electricity is to be treated as tangible property.

The court stated that the predominant elements in question:

> "must be determined from the point of view of the typical consumer of recharging points and having regard, in an overall assessment, to the qualitative and not merely quantitative importance of the elements of supply of services in relation to the elements of supply of goods".

The court held that, in principle, the transfer of electricity constitutes the characteristic and predominant element of the single complex supply at issue and the pricing structure does not change this. It outlined its reasoning as follows:

- The transaction consisting of the supply of electricity to the batteries of an EV constitutes a supply of goods, in so far as that transaction enables the user of the recharging station to consume the electricity transferred (to propel the EV), which is to be treated as tangible property.
- Such a supply of electricity to the batteries of an EV requires the use of suitable recharging devices, which may include a charger that is to be integrated with the vehicle operating system. Granting access to those devices constitutes a minimal supply of services that necessarily accompanies the supply of electricity and may not, accordingly, be taken into account for the purpose of assessing the part played by the supply of services within the whole of a complex transaction that also involves that supply of electricity.
- The technical support that may be necessary for the users concerned constitutes, for its part, not an end in itself but a means of better enjoying the supply of the electricity necessary to propel the EV. It thus constitutes a supply that is ancillary to that supply of electricity.
- The provision of IT applications enabling the user concerned to reserve a connector, to view his or her transaction history and to purchase credits for the purpose of paying for recharging sessions is also ancillary to the supply of electricity.

This case is of relevance when considering the VAT treatment of complex supplies of goods and the weight attached to the perception of the customer.

05 Waiver of Exemption – Cancellation Sum

The Tax Appeals Commission (TAC) determination **40TACD2023** dealt with the cancellation sum payable after the automatic cancellation of a waiver of exemption where excess input VAT was claimed over output VAT accounted for. The question at issue was whether the domestic provision imposing the VAT liability was in breach of EU law – i.e. was it incompatible with principle of fiscal neutrality?

Property was purchased by the appellant in 2004. Fifteen apartments were developed, and VAT was reclaimed in 2006. The property was let between 2006 and 2009 to an adjoining hotel owner, and VAT was accounted for on rents as the appellant had exercised a waiver of exemption. The hotel went into liquidation, and the appellant took back the lease and was unsuccessful in letting it again. The property was sold in 2017, resulting in an automatic cancellation of waiver of exemption. Assessments were raised by the respondent for the differential between VAT reclaimed and paid.

The letting of property is exempt from VAT under Article 137 of the VAT Directive, but the right to opt for taxation is provided for by Member States; they can restrict the scope of the right and are required to set out the details of its use. Member States are provided with discretion under Article 137, and numerous CJEU cases have considered the scope of that discretion, the most relevant here being *Imofloresmira* C-672/16. Article 17 provides that the right of deduction arises at the time when VAT is incurred. The Irish legislation, s7 of the Value-Added Tax Act 1972 as amended, permitted a landlord to exercise a waiver of exemption and outlined details of its application, and the Regulations set out the rules relating to the cancellation amount calculation.

The appellant argued that the payment of a cancellation sum when the property had been used for a taxable purpose was in breach of the principle of fiscal neutrality. A retrospective restriction of the right of deduction was not permitted unless allowed under the VAT Directive, and the VAT Directive does not permit such restrictions except where there is a change of use. The appellant argued that the Irish provision is applied irrespective of use and therefore is related purely to quantum. The distinction between restricting the scope of the waiver and restricting the consequences of exercising the waiver, it noted, is critical.

The respondent argued that the principle of fiscal neutrality was not offended as the cancellation amount balances the input recovered with the output VAT paid. The effect of the cancellation amount was that the person who did not exercise the waiver was treated equitably compared with the person who exercised a waiver that was subsequently cancelled. It also argued that the discretion provided to Member States was very broad – designed to ensure fiscal neutrality between those who waived and those who did not.

The question considered by the Appeal Commissioner was whether the obligation to pay the cancellation sum is within the discretion provided to Member States. In applying Article 137, Member States are required to observe the principle of fiscal neutrality. In this context the CJEU decision in *Zimmermann* C-174-11 held that VAT should be neutral as regards the tax burden on business, and supplies of goods or services that are similar may not be treated differently for VAT purposes. The Commissioner referred to the *Imofloresmira* CJEU decision, where it was held that:

> “the principle of fiscal neutrality precludes national legislation which, by making the final acceptance of the VAT deductions dependent on the results of the taxable person’s economic activity, creates, as regards the tax treatment of identical investment activities, unjustified differences between undertakings with the same profile and carrying on the same activity”.

Even if Member States have wide discretion regarding the rules on option to tax and can even withdraw the option, they cannot use that power to infringe Articles 167 and 168 of the VAT Directive to revoke a right of deduction that has already been acquired.

It was determined that s96(12), in effect, does what is impermissible as per CJEU. The limitation imposed by s96(12) concerns the consequences of exercising the option to tax rather than the scope of that right. The VAT deductions were limited after exercising the waiver of exemption as the appellant was unable to let the property, and this is prohibited as per CJEU cases. Section 96(12) limits the input VAT deductions and therefore is in breach of EU law and should be disapplied. It was decided not to refer the case to the CJEU, but a case stated has been referred to the High Court.

This case is highly relevant to landlords who continue to hold waivers of exemption, and they will need to consider the implications of the automatic cancellation of waiver of exemption.

06 Election to Register – Cancellation Implications

The TAC determination **44TACD2022** dealt with the election to register for VAT and payment of an election cancellation amount. The appellant was a start-up business that provided online services. It elected to register for VAT and had not made taxable supplies at that stage but planned to exceed the services threshold. The registration application indicated that the expected turnover was €5,000, and since its registration the appellant had reclaimed input VAT on various costs. The appellant sought to de-register four years later as no taxable supplies had been made. The respondent raised an assessment for the repayment of the input VAT amount.

The appellant argued that it should not have to repay input VAT as there was a mistaken expectation when registering that it would exceed the services threshold. It was a start-up supported by State agencies and was aggrieved that it had to repay input VAT for genuine business costs. The respondent argued that the legislation provides for a clawback of VAT repayments where input VAT exceeds output VAT in the prior three years, and it was obliged to seek repayment when the registration was cancelled.

The Appeal Commissioner reviewed the definition of accountable person in s5 VATCA 2010 and noted that under s6 a person who makes supplies below the registration threshold is not an accountable person unless the person elects to become one. The appellant in this case had elected to register for VAT, and the cancellation of an election results in a clawback of input VAT in the prior three years. It was noted that if the appellant had not registered for VAT, it would not have been entitled to claim input VAT. The Appeal Commissioner stated that he was limited to establishing whether tax is owed by reference to the applicable legislation (including the VAT Regulations), and Regulation 3(5) clearly sets out the requirements on the cancellation of an election; therefore the assessments stood.

This case highlights the importance of registering for VAT on the correct basis and understanding the implications of de-registration/cancellation.

07 VAT Registration Refusal

The TAC determination **46TAC2023** was published on 18 January 2023 and related to the refusal of the respondent to VAT-register the appellant. The appellant was an Irish-incorporated entity, its registered address being its solicitor's office, and had one employee in the State, working from home. The appellant supplied services to non-Irish entities for a fee (which related to the recharging of employee costs plus uplift). The appellant expected to have another employee, and those costs would also be recharged. It sought an Irish VAT number to enable it to raise invoices to other entities.

The appellant argued that it was an accountable person and provided the information as above in support of its application. The respondent refused the registration application as it considered the appellant not to be an accountable person. Additional evidence or documentation was not provided over and above the initial application. The respondent indicated that there was a requirement to provide sufficient evidence of trade or substantive evidence of capacity to trade.

The Appeal Commissioner highlighted the fact that the burden is on the appellant to prove that it is engaged in making taxable supplies in the State (ref. *Menolly Homes* [2010] IEHC 49). He noted that being an Irish-incorporated company is not sufficient to show that it is engaged in VATable activities and a statement that it is engaged in such activities is also not sufficient. The appellant had an opportunity to provide additional information/documentation to the TAC, but it did not do so on the basis that the required documentation was already provided. The Appeal Commissioner stated that he would "expect to see some sort of documentary or other evidence, over and above simple assertions, to show that the appellant should be considered to be an 'accountable person'". In this case it was determined that the appellant did not meet burden of proof.

There have been a number of cases recently relating to registration refusals that give important insight into what evidence and documentation are required to support an assertion that a person/entity is an accountable person.

08 Student Recruitment Services – VAT Status of Commission

The issue in TAC determination **56TACD2023** concerned whether recruitment agency services provided by the appellant related to education and whether the commission paid was exempt or VATable. The meaning of the term "closely related" in the exemption for education was considered.

The appellant supplies services to schools/universities by recruiting students from abroad. A fee is paid by the student to the appellant to cover a variety of supplies, including transport, accommodation, school fees and medical insurance. It was agreed that the outlays were not subject to VAT (as exempt supplies). The appellant earned a commission from the school/university. Some limited education services were provided by the appellant, depending on the circumstances.

The appellant argued that its services were closely related to education services and that the commissions were in respect of the procurement and placement of students and therefore were closely related to educational activities. The appellant pointed out, in support of the "closely related" argument, that it was required to refund fees or provide another remedy if, for example, a school went out of business. It argued that the commissions were exempt or, in the alternative, they were VATable only in respect of income relating to EU-resident students.

The respondent was of the view that the appellant was not an undisclosed agent but a disclosed agent, as separate services were supplied to the principal. It also indicated that there was no definition in EU legislation of "closely related" and that to comprise "closely related" services the services would need to comply with the three conditions set out in the CJEU case of *Brockenhurst* C-699-15 – the principal supply and the supply of services closely related thereto must be provided by bodies referred to in Article 132(1)(i) of the VAT Directive; the supplies of services must be essential to the exempt activities; and the purpose of supplies must not be to obtain additional income (where in direct competition with commercial entities). With regard to the place-of-supply point, it stated that the place of supply of education services was the place where the service is delivered, so where students come from is irrelevant.

The Appeal Commissioner had two issues to consider – the quantum of the assessment and the VAT status of the commission. The calculation of the VAT liability under the assessment had taken into account all monies received by the appellant and the amount paid to the schools but had not taken into account costs that were not liable to VAT and that should not form part of the commission calculation. The Appeal Commissioner outlined the appropriate calculation and requested the respondent to recalculate the assessable amount.

The substantive issue related to the VAT status of the commission payments. The appellant had been advised that the commission amount liable to VAT related only to students located within the EU. It was pointed out that the place of supply of services relating to the provision of education and any ancillary services to non-taxable persons is the place where the course is delivered. The Commissioner found that the place of supply of the outlays was Ireland and that the place of supply of the commissions is Ireland.

Consideration was given to whether the appellant was acting as a disclosed or an undisclosed agent. The Appeal Commissioner found that it was acting as a disclosed agent – the agreements indicated that the appellant acted as agent on behalf of the schools; the appellant was prohibited from representing the school as itself; the students were aware that the schools were providing the education services, not the appellant; and the appellant was not authorised to provide education services. In acting as a disclosed agent, it provided services to the schools in respect of which it received payment in the form of commissions, which were subject to VAT.

VAT News

Ireland

Revenue eBrief No. 105/23, published on 28 April 2023, sets out the VAT treatment of the supply and installation of solar panels. The supply of solar panels is subject to the standard rate of VAT. However, the reduced rate or zero rate may apply when solar panels are supplied and installed as part of a supply-and-install contract. The Tax and Duty Manual sets out the rates and rules relating to different type properties and different supplies.

VAT measures in Finance Act 2023

Finance Act 2023 was signed on 15 May 2023. Section 5 of the Act amended certain provisions of the Value-Added Tax Consolidation Act 2010 (VATCA 2010). Section 46(1)(caa) of VATCA 2010 was amended to provide for the extension of the 9% VAT rate on the supply of electricity and gas until 31 October 2023. Also extended was the 9% rate on the supply of certain goods and services that are mainly related to the hospitality and tourism sectors, under the amendment to s46(1)(cb) VATCA 2010, which will apply until 31 August 2023.

There were two amendments to Schedule 2 of VATCA 2010, which deals with the zero rate of VAT. Paragraph 11(5) of Schedule 2 continues the application of the zero rate to the supply of Covid-19 testing kits (this is effective from 1 January 2023). A new paragraph 14 is added to Schedule 2 to apply the zero rate of VAT to the supply and installation of solar panels on or adjacent to private dwellings. A related amendment is made to Schedule 3, paragraph 9, to exclude the supply and installation of solar panels on or adjacent to private dwellings from the reduced rate of VAT. The effective date of thes latter amendments is 1 May 2023.

Accounting Developments of Interest

Aidan Clifford
Advisory Services Manager, ACCA Ireland

Insolvency Practitioners and Anti-Money Laundering

The Insolvency Committee of the Consultative Committee of Accountancy Bodies – Ireland has published a guidance dowcument for insolvency practitioners on the impact of sanctions. The guide provides information on the legal obligation not to transfer funds or make funds or economic resources available, directly or indirectly, to any person or entity that has been sanctioned under EU financial sanctions.

New Solicitors Accounts Regulations Issued

The Solicitors Accounts Regulations 2023 have been published in S.I. No. 118/2023. This is a substantial revamp and modernisation of the rules on the accounting and reporting by solicitors for their client money. It will also affect accountants reporting to the Law Society on the compliance with the rules of their solicitor clients. The new rules come into effect on 1 July 2023 and apply to accounting periods commencing after that date. It has been commented that the new Regulations would be particularly difficult for any solicitor still using manual accounting. The new rules will impose additional responsibilities on both the solicitor and the reporting accountant, and it is expected that they will result in an additional cost to perform the Solicitors Accounts Regulations assurance work.

Sustainability Reporting Standards Applicable from 1 January 2024

Disclosures under the European Sustainable Reporting Standards (ESRS) will shortly become mandatory for EU businesses. The implementation dates are based on company size, and the first companies come in scope next year. The ESRS are as complex as IFRS to implement and will require some planning and data capture. There are more EU businesses required to use ESRS than IFRS; this is a fundamental change to reporting by companies in the EU. The draft standards are available here. These standards will also apply to non-EU companies with substantial operations in the EU.

In a simultaneous exercise the International Sustainable Standards Board (ISSB) is developing its own sustainable reporting standards. The ISSB standards are supposed to be global, whereas the ESRS are EU; and although they are supposed to be “interoperable”, the ESRS require much more disclosure than the proposed ISSB standards.

The ESRS have a “double materiality” element that is not in the ISSB standards. Double materiality means what is material to the company and what is material to society or the planet. As an example, a factory fishing trawler company may report that a shortage of fish stocks will materially affect its ability to catch fish and therefore its long-term viability. The "double" part of this is to report also on how its business is affecting local and world fish stocks.

For the avoidance of doubt, the ESRS are compulsory for in-scope Irish companies, with an application date commencing 1 January 2024; the ISSB standards have yet to be adopted anywhere in the world.

Proposal for a Directive on False Environmental Claims

The EU is proposing a Directive on "explicit environmental claims". The Directive would remove any market distortion caused by different requirements in different EU countries. The new requirements would stop companies making misleading claims about the environmental merits of their products and services. If environmental claims are not reliable, comparable and verifiable, then they will simply not be allowed. The text of the draft Directive can be downloaded here.

"Explicit environmental claim" means an environmental claim that is "in textual form or contained in an environmental label"; it does not seem to include photos. It would appear, for example, that as long as the text on an egg carton refers to caged hens, it would be acceptable to have an image of a free-range hen on the packaging.

Who Can Do an Audit Quality Review

The Financial Reporting Council (FRC) in the UK has issued guidance on who can and who cannot do an audit engagement quality review (EQR) and confirmed that for a public-interest entity (PIE) client the EQR must be done by a person qualified to be the auditor, but they need not be a PIE Registered Responsible Individual. The engagement (and group engagement) partner and key audit partner for a UK PIE must be registered with the FRC, but the person performing the EQR needs only to be audit registered (hold an audit qualification). The legislative underpinning this position is here.

In Ireland, similar to the UK, the requirement set out in the ISQM standards is that the quality reviewer has "the competence, capabilities and appropriate authority", and for PIE audits they also need to be a statutory auditor.

IFRS 13: Fair Value Measurement – Information Requests

The Irish Audit and Accounting Supervisory Authority (IAASA) has published "IFRS 13: Fair Value Measurement – Information Requests". It notes that the extent of compliance with IFRS 13 has been and continues to be an issue identified in its monitoring. The paper outlines the information deficits that are being identified.

PPS Numbers on Annual Returns To Be Delayed

The Companies Registration Office (CRO) has announced a "short delay" in the implementation of the requirement to include directors' PPS (Personal Public Service) numbers on certain CRO filings. If a director does not have a PPSN, they can use an existing Register of Beneficial Ownership number or apply fora Verified Identity Number ("VIN") here.

PPS numbers will be required in applications to incorporate a company, make annual returns and notices of change of directors or secretaries. The PPS number, although included in the filing and visible to CRO staff, will not be visible in public searches of the registers. The CRO will verify the name, date of birth and PPS number by comparing them with data held by the Department of Social Protection (DSP). The CRO has said that the details must match exactly. Filing agents will need to allow additional time to file where there is any doubt about the exact personal details maintained by the DSP. DSP data can be incorrect due to the use of maiden names, nicknames and incorrect addresses.

Pay Transparency Directive

Agreement has been reached between the European Parliament and the Council on the Directive on pay transparency measures. Key measures in the Directive are pay transparency for jobseekers; the right to information to compare your pay to that of others in the organisation; and the requirement to report gender pay gap information and to do a gender pay gap assessment where the gap exceeds 5%. The Directive also provides for compensation for gender inequality, an employer burden of proof and a sanctions regime. More detail is available here.

Audit Exemption

Automatic loss of audit exemption for late filing of an annual return is a significant regulatory burden in Irish company law. Minister Calleary has announced a consultation process that should “remove automatic loss of audit exemption and put in place a two-step, graduated procedure to deal with late filing”. A previous suggestion was allowing a company to be late one year in five and not lose audit exemption. Changes to the late-filing penalty regime would be welcome.

Revenue Commissioner's Update

EU Cross-Border eCommerce Payments Reporting

Overview

On 18 February 2020, the European Union (EU) adopted a legislative package to require payment service providers ("PSPs") to transmit information on cross-border payments originating from EU Member States.

The aim is to enable tax administrations in each Member State to detect underpayment or non-payment of VAT by cross-border sellers established in other Member States or outside the EU, thus ensuring a level playing-field for compliant EU businesses.

From January 2024, PSPs will submit data on cross-border payments received by businesses and individuals from other EU Member States. PSPs will submit this data to the tax administrations in each EU Member State in which they provide services.

The PSPs within scope of the reporting obligation are:

- credit institutions
- electronic money institutions
- post office giro institutions
- payment institutions.

The types of payment methods which fall within scope are:

- card payments (debit and credit cards)
- credit or bank transfers
- direct debit payments
- e-money payments
- money remittances.

Payment transactions to be reported

PSPs will need to report payments where an account holder, who uses their services, has received more than 25 payments from payers based in another EU Member State or a Non-EU country within a calendar quarter.

If a payee based outside the EU receives more than 25 payments from payers in the EU, then the payer's PSP must report the payments.

Information to be transmitted

The "CESOP- Guidelines for the reporting of payment data" outline the full scope of the reporting requirements as well as providing greater detail on the data that must be submitted. These guidelines can be accessed at www.ec.europa.eu.

In order to assuage any concerns that might emerge, it is important to note that any information which would identify consumers, or the nature of their purchases, will not be sent to tax administrations.

The Central Electronic System of Payment Information Database

After receipt, all tax administrations will send the data onwards to a centralised EU database, known as the Central Electronic System of Payment Information (CESOP). All the data will then be collated and aggregated, before being made available to designated staff within each tax administration for analysis.

Reporting payments

PSPs will need to report data on cross-border payments every quarter. The report to each tax administration is required by the last day of the month following the end of the calendar quarter.

Reports must be made electronically by each PSP in a specified XML format. The EU Commission has set out the technical details of the formatting and data requirements in a Payment data XSD User Guide. This is available on the Europa website or through the CESOP webpage on www.revenue.ie.

Revenue engagement and updates

Revenue is engaging directly with PSPs, payment industry representative bodies and service providers on an ongoing basis. PSPs who provide services within the scope of the reporting obligation will be required to register online in order to access the CESOP reporting function in ROS.

All updates from Revenue on CESOP will be published to our dedicated webpage available at https://www.revenue.ie/en/companies-and-charities/international-tax/cesop/index.aspx.

Any enquiries regarding CESOP may be submitted by email to CESOPEnquiries@revenue.ie.

Further information

All documentation and guidelines are available through the EU CESOP Webpage available on www.ec.europa.eu.

What is the ROS Return Preparation Facility?

The ROS Return Preparation Facility (RPF) is a tool that can be used to complete forms without logging into ROS. Forms can be saved as files on your local computer and uploaded to ROS online when complete. In order to meet filing requirements, the file must be successfully uploaded on ROS.

The ROS Offline application is based on old technology and the RPF is being developed as its replacement. There are currently a small number of forms available in the RPF and it is planned to make newly issued forms available in the RPF, rather than in the ROS Offline application. Additional forms will be moved to the RPF over time. Messages are being added to the ROS Offline application to indicate which forms are available in the RPF from now on [back year forms that were developed in the ROS Offline continue to be available].

Advantages of RPF

Unlike the ROS Offline application, no installation or downloads are required to access forms in the RPF. The RPF is accessible from Microsoft Edge, Google Chrome and Opera browsers. Such browser- based access overcomes problems which occurred with the ROS Offline due to incompatible operating systems and network access.

The RPF always accesses the latest available version of the form, unlike the ROS Offline application where the latest version had to have been installed.

Using the RPF

Many forms can be completed using ROS online and, for most filers, this is the preferred option. For those familiar with offline, the RPF operates in a similar way to the ROS Offline Application. After completing the required mandatory information, the form can be saved on your computer as a file. That file can be opened in the RPF subsequently to review, update and save any changes. The completed form must be uploaded to ROS online when finalised in order to meet the filing requirement.

Prepopulated forms such as Form 11 are offered online when available or a file can be downloaded to be completed using the RPF.

The RPF can also be used to review ROS compatible files produced from third party software.

Tips

- The RPF is available from a link under the 'News' items on the ROS Login page. This link can be saved as a Bookmark or Favourite in your browser for easy access.
- The RPF times out if there is no activity for 30 minutes. A timer at the top of the page helps you track this. You should save regularly to avoid losing your work.
- To print a full page of a form within the RPF you must use a print button. Print buttons are available on summary pages, such as Print View.
- It is important to know where your forms are located so that you can find previously saved forms and upload completed forms to ROS. You may find it convenient to create folders on your computer to organise your work.

For detailed information on the RPF, please refer to Tax and Duty Manual (TDM) Part 38-06-01B.

Additional information is also available in the ROS online help RPF section. Any difficulties encountered with the RPF itself can be reported to the ROS Technical Helpdesk.

Solutions to form completion queries can usually be found in the form help or the relevant TDM on www.revenue.ie, or by submitting an enquiry to the relevant taxes team.

Legal Monitor

Philip McQueston
Of Counsel, A&L Goodbody

Selected Acts Signed into Law from 1 February to 30 April 2023

No. 5 of 2023: Central Bank (Individual Accountability Framework) Act 2023

This Act provides for Central Bank of Ireland powers to strengthen and enhance individual accountability in the financial services industry. The Act introduces a new regime of responsibility, governance and sanctions for senior executives who are managing and operating regulated financial service providers by means of a senior executive accountability regime. The Act also provides for a fitness-and-probity regime and an administrative sanctions procedure.

No. 8 of 2023: Work Life Balance and Miscellaneous Provisions Act 2023

This Act gives effect to the EU Directive on work–life balance for parents and carers and amends the Parental Leave Act 1998 to entitle certain employees to leave for medical care purposes and to request flexible working arrangements for caring purposes.

Selected Bills Initiated from 1 February to 30 April 2023

No. 19 of 2023: Finance Bill 2023

The purpose of this Bill is to provide for the imposition, repeal, remission, alteration and regulation of taxation, stamp duties and excise duties. The Bill will amend the Finance Act 2022 with regard to the Temporary Business Energy Support Scheme and make provision for the further extension of certain agriculture-related tax reliefs that are currently due to expire on 30 June 2023. The Bill also provides for the extension of the 9% rate of VAT on the supply of electricity and gas until 31 October 2023 and on the supply of certain goods and services that primarily relate to hospitality and tourism until 31 August 2023.

No. 23 of 2023: Unfair Dismissals (Increased Protections for Workers) (Amendment) Bill 2023

The purpose of this Bill is to amend the Unfair Dismissals Act 1977 to expand the protections provided to workers excluded from that Act. This will include all employees, regardless of the period of employment. The Bill also provides for further protection of workers from discriminatory dismissals and proposes to reform the system for employee compensation under the Act.

Selected Statutory Instruments from 1 February to 30 April 2023

No. 22: European Union (Money Laundering and Terrorist Financing) (Use of Financial and Other Information) Regulations 2023

These Regulations transpose into Irish law an EU Directive that sets out the precise conditions under which national authorities can use financial information for the prevention, detection, investigation or prosecution of certain criminal offences. The Regulations give national authorities direct access to bank account information contained in national centralised bank account registries.

No. 26: European Union (Customs) Regulations 2023

These Regulations implement an EU Regulation on market surveillance and the compliance of products. The Regulations provide that the Revenue Commissioners are the State's designated authority in charge of the control of goods entering the European Union market, such designation being required under the EU Regulation.

No. 73: Finance Act 2022 (Temporary Business Energy Support Scheme) (Energy Costs Threshold Aggregate Amount) Order 2023

This Order amends s101(9)(a) of the Finance Act 2022 to increase the aggregate amount that may be claimed by a qualifying business in respect of a relevant electricity bill or a relevant gas bill from €10,000 to €15,000, effective from 1 March 2023.

No. 74: Finance Act 2022 (Temporary Business Energy Support Scheme) (Energy Costs Threshold Aggregate Amount) (No. 2) Order 2023

This Order amends s101(9)(b)(i) of the Finance Act 2022 to increase the aggregate amount that may be claimed by a qualifying business in respect of relevant electricity bills or relevant gas bills in one claim period from €30,000 to €45,000, effective from 1 March 2023.

No. 75: Finance Act 2022 (Temporary Business Energy Support Scheme) (Specified Period) Order 2023

This Order amends s101(1) of the Finance Act 2022 to extend the expiry date in the definition of "specified period" from 28 February 2023 to 30 April 2023.

No. 106: Land Development Agency Act 2021 (Valuation of Relevant Public Land) Regulations 2023

These Regulations prescribe the method by which the market value of relevant public land to be sold to the Land Development Agency by other relevant public bodies is determined.

No. 118: Solicitors Accounts Regulations 2023

These Regulations provide increased protection for client monies and amend provisions of the Solicitors Accounts Regulations 2014. The Regulations require solicitors to prepare balancing statements in respect of transactions on client accounts every three months instead of every six months and require solicitors to clearly state in writing where monies held are applied in satisfaction of outstanding fees.

No. 135: Finance (Covid-19 and Miscellaneous Provisions) Act 2022 (Section 15(1)) (Commencement) Order 2023

This Order provides for the commencement of s15(1) of the Finance (Covid-19 and Miscellaneous Provisions) Act 2022 (No. 9 of 2022), which relates to the tax treatment of certain payments to holders of sea-fishing boat licences.

Tax Appeals Commission Determinations

Catherine Dunne
Barrister-at-Law

Determinations of the Tax Appeals Commission Published from 1 February to 30 April 2023

Income Tax

25TACD2023

Appeal regarding the application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

29TACD2023

Appeal regarding the application of high-income earners' restriction

s485C TCA 1997; s485D TCA 1997

Case stated requested: Unknown

38TACD2023

Appeal regarding transborder worker relief in respect of UK employment income received from the company during the period in which the appellant was employed as a non-proprietary director

s825A TCA 1997

Case stated requested: Unknown

39TACD2023

Appeal regarding the tax treatment of Basic Payment Scheme payments paid by the Department of Agriculture, Food and the Marine to an incorporated farm

s18 TCA 1997

Case stated requested: Unknown

42TACD2023

Appeal regarding the application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

43TACD2023

Appeal regarding the application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

47TACD2023

Appeal regarding the application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

48TACD2023

Appeal regarding whether money received from the disposal of shares should be charged to CGT or be deemed a distribution chargeable to income tax

s817 TCA 1997

Case stated requested: Unknown

52TACD2023

Appeal regarding the treatment of a preferential loan to a director

s112 TCA 1997

Case stated requested: Unknown

59TACD2023

Appeal regarding the application of the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

60TACD2023

Appeal regarding the tax treatment of Single Payment Scheme payments paid by the Department of Agriculture, Food and the Marine to an incorporated farm and the application of the four-year statutory limitation period

s18 TCA 1997; s865 TCA 1997

Case stated requested: Yes

61TACD2023

Appeal regarding the correct quantum of income received by the appellant, allowances entitled to be claimed and whether the Notices of Amended Assessment were excessive

s58 TCA 1997; s65 TCA 1997; s886 TCA 1997

Case stated requested: Unknown

63TACD2023

Appeal regarding assessable income of spouses and incorrect information on Statement of Liability

s15 TCA 1997

Case stated requested: Unknown

66TACD2023

Appeal regarding claims for the repayment of tax outside the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

69TACD2023

Appeal regarding claims for the repayment of tax outside the four-year statutory limitation period

s865 TCA 1997

Case stated requested: Unknown

Corporation Tax

35TACD2023

Appeal regarding a genuine expression-of-doubt claim

s959P TCA 1997

Case stated requested: Unknown

55TACD2023

Appeal regarding income tax deduction as part of the corporation tax liability of a close company

s438 TCA 1997

Case stated requested: Unknown

Capital Gains Tax

57TACD2023

Appeal involving 13 appellants and tax-avoidance transactions

s811 TCA 1997

Case stated requested: Yes

CAT

27TACD2023

Appeal regarding credit for CGT paid against a CAT liability

s104 CATCA 2003

Case stated requested: Unknown

45TACD2023

Appeal regarding inheritance of a dwelling-house from a former partner

s10 CATCA 2003; s28 CATCA 2023

Case stated requested: Unknown

50TACD2023

Appeal regarding assessment to CAT for UK resident with joint bank account in Irish State

s2 CATCA 2003; s4 CATCA 2003; s5 CATCA 2003

Case stated requested: Unknown

Stamp Duty

53TACD2023

Appeal regarding application of the four-year statutory limitation period

s159A SDCA 1999

Case stated requested: Unknown

VAT

30TACD2023

Appeal regarding a VAT refund as sought by the appellant for taxable persons not established in the Member State of refund but established in another Member State

s101 VATCA 2010; Council Directive 2006/112/EC; Council Directive 2008/9/EC

Case stated requested: Unknown

31TACD2023

Appeal addressing the appellant's contention that its right to defence under EU law was breached by the respondent and whether the appellant knew or should have known that it was involved in transactions connected with the fraudulent evasion of VAT

s111 VATCA 2010

Case stated requested: Yes

36TACD2023

Appeal regarding Revenue's refusal to allow a partnership to offset against its VAT liabilities overpayments of VAT made by the partnership during certain periods

s865B TCA 1997

Case stated requested: Yes

40TACD2023

Appeal regarding cancellation of the appellant's waiver of exemption from VAT and whether the requirement for the appellant to pay the cancellation sum is incompatible with the principle in EU law of fiscal neutrality

s96 VATCA 2010

Case stated requested: Yes

44TACD2023

Appeal regarding clawback of VAT repayments made that exceed the VAT returned on sales and supplies of goods and services after cancellation of election

s6 VATCA 2010; s8 VATCA 2010

Case stated requested: Unknown

46TACD2023

Appeal regarding refusal of Revenue to grant a VAT registration

s5 VATCA 2010

Case stated requested: Unknown

54TACD2023

Appeal regarding assessment to VAT on taxable receipts for unrecorded sales

s3 VATCA 2010; s84 VATCA 2010

Case stated requested: Unknown

56TACD2023

Appeal regarding exemption from VAT for activities "closely related" to educational services s3 VATCA 2010; s28 VATCA 2010; s46 VATCA 2010; Schedule 1 VATCA 2010; Sixth VAT Directive, Article 13A

Case stated requested: Unknown

58TACD2023

Appeal regarding refusal of application for VAT registration

s5 VATCA 2010; s65 VATCA 2010

Case stated requested: Unknown

68TACD2023

Appeal regarding eligibility for relief under the margin scheme for VAT purposes

s9 VATCA 2010; s24 VATCA 2010; s29 VATCA 2010; s87 VATCA 2010; SI 639 of 2010; VAT Regulations 2010; EC Directive 2006/112/EC

Case stated requested: Unknown

Income Tax and PSWT

32TACD2023

Appeal regarding appellant's overclaim of credit arising from professional services withholding tax borne by a partnership of which she/he was a member (one of three determinations)

s528 TCA 1997; s526 TCA 1997; s529A TCA 1997

Case stated requested: Unknown

33TACD2023

Appeal regarding appellant's overclaim of credit arising from professional services withholding tax borne by a partnership of which she/he was a member (two of three determinations)

s528 TCA 1997; s526 TCA 1997; s529A TCA 1997

Case stated requested: Unknown

34TACD2023

Appeal regarding appellant's overclaim of credit arising from professional services withholding tax borne by a partnership of which she/he was a member (three of three determinations)

s528 TCA 1997; s526 TCA 1997; s529A TCA 1997

Case stated requested: Unknown

Income Tax and VAT

70TACD2023

Appeal regarding entitlement to bring an appeal where an assessment has been filed but the related tax liability has not been paid

s959AH TCA 1997; s959AC TCA 1997; s959V TCA 1997; s77A VATCA 2010; s99 VATCA 2010

Case stated requested: Unknown

Income Tax and PAYE

49TACD2023

Appeal regarding incorrect information on Statement of Liability

s112 TCA 1997

Case stated requested: Unknown

PAYE and USC

28TACD2023

Appeal regarding the treatment of a distribution from an approved retirement fund as income rather than capital and the application of the double taxation treaty between Ireland and Portugal

s784A TCA 1997; s784B TCA 1997

Case stated requested: Unknown

PAYE and PRSI

37TACD2023

Appeal regarding the treatment of travel and entertainment expenses if incurred wholly and exclusively for the purpose of the business

s114 TCA 1997

Case stated requested: Unknown

PAYE

41TACD2023

Appeal regarding application of a single person child carer credit

s462B TCA 1997

Case stated requested: Unknown

67TACD2023

Appeal regarding the operation of payroll taxes on a cumulative basis and the underpayment of tax based on the total income received by the appellant in the years of assessment

s986 TCA 1997; ss983–997A TCA 1997; Regulation 28(3), Income Tax (Employment) (Consolidated) Regulations 2001

Case stated requested: Unknown

PREM

24TACD2023

Appeal regarding a claim for a deduction for wage payments incurred wholly and exclusively for the purposes of a trade

s81 TCA 1997

Case stated requested: Unknown

VRT

26TACD2023

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

s133 Finance Act 1992

Case stated requested: Unknown

62TACD2023

Appeal regarding the application of transfer-of-residence relief and the jurisdiction of the Tax Appeals Commission to deal with the seizure of a vehicle

s127 Finance Act 2001; s128 Finance Act 2001; s144 Finance Act 2001; s134 Finance Act 1992

Case stated requested: Unknown

EII Relief

51TACD2023

Appeal regarding "qualifying company" for Employment Investment Incentive relief

s494(4A) TCA 1997

Case stated requested: Unknown

Covid Restrictions Support Scheme

64TACD2023

Appeal regarding the eligibility of a company for relief under the Covid Restrictions Support Scheme

s484 TCA 1997; s485 TCA 1997

Case stated requested: Unknown

Temporary Covid-19 Wage Subsidy Scheme and PRSI

65TACD2023

Appeal regarding the eligibility of domestic employers for relief under the Temporary Covid-19 Wage Subsidy Scheme

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

Case stated requested: Unknown

Tax Technology Update: Tax Authority Technology

Andrew Egan
Director, Tax Transformation & Technology, KPMG

Introduction

The use of technology has revolutionised the way in which governments around the world collect taxes. Technology has made it easier for tax authorities to engage with their stakeholders and to efficiently undertake their primary tax collection function. Technology is now used extensively in tax authority audits and other interventions, leading to more focused and comprehensive interventions than in previous times. This article discusses the use of technology by tax authorities in different areas and explores what taxpayers and advisers should do to keep pace with the rapidly changing landscape. The broad areas considered are:

- online services,
- real-time reporting,
- advanced data analytics and
- technology in audits.

Online Services

The Irish Revenue Commissioners started the provision of online services in the mid-1990s, with the launch of www.revenue.ie. In September 2000 Revenue launched ROS (Revenue Online Service). The initial phase of ROS allowed taxpayers to file VAT returns, employer PAYE/PRSI returns and Part 1 of the Form P45 electronically.

Both www.revenue.ie and ROS have been steadily enhanced over the years and now provide a full range of services, which include:

- Tax registration: Businesses can use ROS to register for various taxes, such as VAT, employment taxes and corporation tax.
- Tax filing and payment: ROS enables taxpayers to file their tax returns and make payments online. The ROS system allows for some initial verification checks to be performed on the tax returns before they are filed by the taxpayer.
- ROS Offline tools: These allow taxpayers to prepare certain complex filings offline to facilitate appropriate review before submission. These are being phased out in favour of the Return Preparation Facility. See also article "Revenue Commissioners' Update" in this issue.
- 24/7 online account access: ROS provides taxpayers and their agents with full access to their tax information, including tax statements and notifications. Historically, taxpayers would have had to call Revenue/Collector-General to get this information.

In addition to the core services, Revenue has developed several other services in recent years, including:

- communication tools such as MyEnquiries, which provides taxpayers with a secure online service that allows them to send, receive and track correspondence to and from Revenue;
- the Revenue File Transfer System (RFTS), which Revenue can use to provide invited taxpayers with a secure and fully encrypted data transfer service; and
- a secure online service called myAccount for individuals to access PAYE services, including reviewing tax affairs, making payments and applying for tax relief.

Real-Time Reporting

After the successful roll-out of PAYE Modernisation in 2019, real-time reporting is now a key feature of Revenue's technology service. However, this technology is not as new to Revenue as most of us might think. Real-time reporting has been a feature of tax reporting in Ireland for many years, Revenue's initial foray into it involving the relatively niche relevant contracts tax (RCT). Although RCT does not impact most taxpayers, the successful deployment of RCT real-time reporting demonstrated the capability of the system with regard to other taxes.

Why use real-time reporting?

As tax rules have largely remained the same and online filings already exist, what is the rationale for implementing real-time reporting? A useful case study is the data and information derived from PAYE Modernisation. After the system had been operational for only one year, the Covid-19 pandemic triggered the need for government-funded employment support schemes. Responsibility for these essential support schemes was placed on Revenue, which developed and deployed the Temporary Wage Subsidy Scheme (TWSS) within days.

The data arising from PAYE Modernisation formed the backbone of the TWSS and was used for the effective deployment of the following scheme functions:

- determining the criteria for employees to qualify for the scheme;
- determining the level of subsidy that each employee could benefit from;
- recording and administering the scheme in line with each weekly/monthly payroll period; and
- making subsidy repayments to employers within a two-day period.

As the scheme was based factually on the PAYE Modernisation returns submitted just before the pandemic, this reduced the risk of its being misused and helped to ensure that it was quickly and effectively deployed.

Real-time reporting – next steps

Real-time reporting continues to be expanded into new areas and is due to be implemented for employer reporting of benefits from January 2024. This will see employers being required to report to Revenue the following reimbursement payments before the payment is made to the employee:

- certain travel and subsistence payments (across six categories, including both vouched and civil service rates),
- remote working daily allowance and
- payments benefiting from the small-benefit exemption (i.e. Christmas vouchers and similar).

The consultation on this new reporting is continuing, but it may be a more difficult ask for employers than under PAYE Modernisation. Payroll was predominately outsourced to a specialist payroll provider, or effectively outsourced to specialist payroll software, and this software or specialist provider did much of the heavy lifting for PAYE Modernisation. This is not the case for expenses. Although several employers (predominantly large ones) have migrated to expense management software in recent years (e.g. Coupa, SAP Concur and Chrome River), the vast majority are yet to digitise or have implemented a bespoke digital solution in their existing finance systems. The new reporting could be a bigger ask for these employers, Employers may need to review their current processes and consider implementing changes to their IT (e.g. new expense management software) or finance systems to address the new reporting requirements.

What about VAT Modernisation?

Revenue has already commenced a VAT Modernisation review. Although some other European tax authorities have moved forward with the digitisation of VAT, Revenue has been keen to ensure that its VAT Modernisation programme is consistent with European Commission developments. In this regard, the European Commission recently announced its VAT in the Digital Age (ViDA) proposals, which seek to harmonise certain intra-EU digital reporting. Under ViDA, from 2028 taxpayers will be required to report certain transactions (both purchase and sale transactions) to their tax authority within two days. As the Commission requirements become clearer, we can expect a significant digitisation of VAT in the coming years across all European countries, and this will have a major impact on how taxpayers manage their tax processes and, more importantly, their wider business processes. Although 2028 might seem a long way off, the changes are far reaching, touching everything including interaction with customers, how finance systems operate and, ultimately, the information shared with Revenue. As a result, businesses will need considerable time to address the impact of the changes.

Advanced Data Analytics

One of the most significant changes that technology has brought to tax authorities is the use of advanced data analytics. This technology allows tax authorities to analyse substantial amounts of data quickly and accurately, making it easier to identify discrepancies and potential issues. Advanced data analytics can help to detect fraud, identify errors or omissions, and uncover hidden patterns and behaviours in tax data. Tax authorities can also use this technology to monitor taxpayers' compliance on a continuous basis. Two areas where this technology is evident is in the selection of taxpayers for compliance intervention and the continuous monitoring of PAYE Modernisation.

Compliance intervention selection

Other than a small number of randomly selected cases, taxpayers are selected for compliance interventions based on the presence of various risk indicators. These risk indicators can come from many different data sources, including tax returns, other periodic filings (e.g. iXBRL), third-party reports (e.g. AEOI reports from banks around the world, letting reports from Airbnb) and data obtained from real-time reporting.

Continuous monitoring of PAYE Modernisation

Over the past couple of years we have also seen Revenue deploy automated data analytics to continuously monitor employers' payroll compliance. This has been made possible by automatically analysing each PAYE Modernisation submission for errors and discrepancies. Some of the most common payroll errors being picked up by this monitoring are:

- charging the incorrect amount of tax when emergency tax is reported;
- charging the incorrect amount of tax when no PPSN is reported;
- employees' reported gross pay being less than their pay for income tax or pay for USC;
- employees' pay for USC not corresponding to their pay for employee PRSI;
- employers omitting certain pay items from the charge to tax, e.g. employee pension contributions.

Many taxpayers and tax practitioners will have seen this monitoring in action in Level 1 interventions in recent times.

Taxpayers are increasingly using their own data analytics to identify errors in their tax returns or areas that require enhanced controls before any Revenue intervention.

Technology in Audits

The use of technology in tax authority audits has been on the rise for several years. Advances in technology have made it easier for businesses and tax authorities to collect and analyse data. Revenue typically uses analytics software to organise, interrogate and examine the data. This can assist with identifying patterns of non-compliance and flag unusual transactions or discrepancies in taxpayer data, some of which can be indicators of potential tax errors and omissions.

The use of such technology has revolutionised how Revenue approaches audits and compliance interventions. In the past, manual audits often focused on one tax period out of a year-long audit. However, audits will now require taxpayers to provide details of all transactions for the full audit period, which can span multiple years or periods.

Better-targeted audit selection and a full data-led approach appear to be bearing fruits for Revenue. The graph in Fig. 1 displays two items for 2017 to 2022:

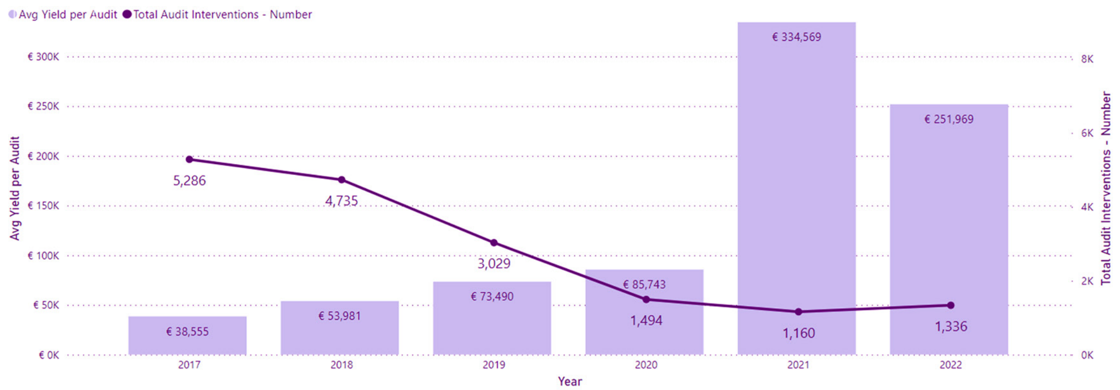
- the number of audits and
- the average yield per audit.

The number of audits decreased from more than 5,000 in 2017 to just over 3,000 in 2019 and to 1,100–1,400 in recent years. The pandemic may have impacted the number of audits in 2020–2022, but there is clearly a trend. Although not shown on the graph, the number of audits each year in the 1990s was over 20,000.

Although audit numbers are decreasing, there has been a significant increase in the average yield being generated. This increased steadily from €38.6K per audit in 2017 to €85.7K in 2020 (a 122% increase in four years). In 2021 and 2022 the yield skyrocketed to €335K and €252K, respectively.

The 2021 and 2022 yields might not be sustained; however, it is clear that Revenue's use of technology for audit selection and data interrogation has enabled auditors to focus on high-risk areas more effectively and allowed for a reduced number of audits.

This comprehensive approach has now placed a heightened emphasis on taxpayers' possessing high-quality data and ensuring that they remain compliant with all regulations. Effective data management at all stages, detective and preventative controls, and the use of data analytics are key to taxpayers' managing their tax compliance process.



Audit Interventions

Year	Number	Yield	Avg Yield per Audit
2022	1,336	€ 336.6M	€ 252K
2021	1,160	€ 388.1M	€ 335K
2020	1,494	€ 128.1M	€ 86K
2019	3,029	€ 222.6M	€ 73K
2018	4,735	€ 255.6M	€ 54K
2017	5,286	€ 203.8M	€ 39K

Fig. 1: Number of audits and average yield per audit, 2017–2022.

Conclusion

We have explored the applications of technology in different areas by tax authorities. The sweeping impact of technology on tax collection has ushered in a new era of efficiency and engagement for governments and tax authorities worldwide. With its transformative power, technology has reshaped the relationship between tax authorities and stakeholders, simplifying interactions and facilitating more seamless tax collection processes. The advantages for tax authorities of using technology and analytics solutions are clearly demonstrated through the examples discussed in this article, particularly the trend in audits performed by Revenue. However, there are also clear opportunities for taxpayers to leverage technology to make compliance more efficient and to get ahead of potential gaps in their processes or tax data.

Leveraging technology in tax is a necessity for tax authorities, taxpayers and tax practitioners. As the realm of tax technology continues to evolve at a rapid pace, it is crucial for taxpayers and advisers to remain informed of these changes. By embracing emerging technologies, taxpayers can navigate the shifting landscape of tax with more confidence and ensure that they remain compliant in an increasingly digital world.

UK and Northern Ireland Tax Update – Summer 2023

Marie Farrell
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Introduction

The beginning of 2023 has been a less turbulent period in UK politics after a somewhat chaotic end to 2022. The main event from a UK tax perspective was the Chancellor's Spring Budget, in which he sought to deliver on three key priorities of the Government: grow the economy, reduce inflation and ensure that government debt falls. The impact of the tax measures announced against the backdrop of a difficult economic climate remains to be seen. However, what is clear is that confirmation of the hike in the main rate of corporation tax to 25% (for taxable profits above £250,000) from 1 April 2023 will have a significant impact on many Northern Ireland businesses, given that their competitors based in the Republic of Ireland are subject to a tax rate of only 12.5%.

The main tax announcements from the Spring Budget, along with a number of other changes and developments in UK tax law and practice, are highlighted and examined below.

Key Spring Budget Announcements

Pension Reform

Reform to pension tax thresholds was one of the headlines emerging from the UK Spring Budget. The Chancellor, in a bid to encourage workers over the age of 50 to extend their working lives, announced significant changes to the thresholds and limits on tax relieved pension savings in registered pension schemes.

The key announcements include the increase in the Annual Allowance from £40,000 to £60,000, the Removal of the Lifetime Allowance charge for the tax year April 2023 to April 2024 and abolition of the Lifetime Allowance from April 2024 onwards which also means the abolition of the penal 55% tax rate that previously applied when any excess amounts over the Lifetime Allowance were taken out as a lump sum.

The suite of pension tax changes announced may lead many to take stock and evaluate their current pension position and consider whether there are any actions they should take now to maximise their pension pot in the future. For example, because of the changes, some individuals might consider making enhanced pension contributions where they have previously dismissed this due to the Annual Allowance and Lifetime Allowance thresholds. Pension contributions will attract tax relief up to the level of the Annual Allowance and in certain circumstances an individual may consider contributing more than the Annual Allowance in order to transfer their wealth to a tax efficient pension vehicle.

It will also be important for individuals with relevant lifetime allowance protections to take professional advice to confirm how these reforms will affect their tax-free pension commencement lump sum.

Tax Incentives – R&D

The Government has made several changes to the R&D schemes over the past year, more changes have been announced with more to come. One of the recent changes, as a result of perceived fraud and abuse of the SME R&D scheme, was to reduce the cash credits available to loss making SMEs on expenditure incurred on or after 1 April 2023 from a maximum of 33.35% of qualifying expenditure to a maximum of 18.6%. For R&D focused SMEs this has been partially reversed. Changes announced in the Spring Budget 2023 will increase the maximum cash credit to 27% for R&D intensive SMEs that spend at least 40% of their total expenditure on R&D.

Other recent changes included the introduction of rules that limit expenditure on sub-contractors and externally provided workers to activities undertaken in the UK. These rules have now been delayed by a year and will take effect for accounting periods beginning on or after 1 April 2024.

As expected, there was also confirmation that "Additional Information" forms containing details of R&D claims will be required to support all claims made on or after 1 August 2023. The forms will require technical and financial information supporting the claim to be submitted and will also require information about agents that have supported the claim, named senior officers of the claimant company endorsing the claim as well as information such as VAT registration numbers. This reporting process has been introduced to help HMRC prevent fraud and carry out compliance checks on the R&D claims.

Tax incentives – capital allowances

Following the end of the super-deduction on 31 March 2023, the Government has introduced "full expensing" for qualifying expenditure on plant and machinery for three years beginning on 1 April 2023, with the intention to make this permanent in the future. The introduction of this enhanced relief has been welcomed by companies facing the increase in the main rate of corporation tax to 25%. The relief available under full expensing is designed to give the same amount of relief in cash tax terms that would have been available under the super-deduction and the rules covering which assets are eligible for the relief mirror the super-deduction rules.

A three-year extension was also announced to the 50% First Year Allowance for expenditure on assets that qualify for the special rate pool, including long life assets. The permanent increase to the Annual Investment Allowance (AIA) announced in the Autumn Statement 2022 to £1 million per annum will mean most small businesses are already entitled to 100% relief for expenditure on qualifying plant and machinery, including expenditure on assets that qualify for the special rate pool.

Larger businesses with significant capital spend should ensure that, where relevant, the AIA is allocated first to special rate pool expenditure, thus getting 100% relief in the year of acquisition, rather than allocating the AIA to plant and machinery pool qualifying expenditure for which a 100% first year allowance can already be claimed.

Other developments

HMRC publish guidance on 'associated companies' definition

Since 1 April 2015, how a UK company pays its corporation tax liability can depend on the number of its related 51% group companies. This is because the thresholds for whether a company is considered 'large' or 'very large' and therefore within the quarterly instalment payment regime, are reduced proportionately by dividing the relevant threshold by the total number of related 51% companies including the reference company.

However, from 1 April 2023, the thresholds are proportionately reduced by the number of associated companies a company has (thus reverting back to the position that applied for accounting periods beginning before 1 April 2015). For larger multinational groups, the associated company approach is expected to be more complex to apply in practice than the current 'related 51% companies' rule and thus businesses potentially impacted by this change should consider its implications as soon as possible. For many businesses, they may have to divide the relevant thresholds by a much larger number than was previously the case under the related 51% companies' rule, possibly resulting in accelerated tax payment deadlines. Furthermore, where payment deadlines are missed, and as interest rates continue to rise (as discussed below) significant unexpected late payment interest charges may arise.

Mandatory Disclosure Rules Reporting

Taxpayers, accountants and tax advisers should take note of the new UK mandatory disclosure rules (MDR) which came into effect on 28 March 2023. The new MDR rules require "intermediaries" to disclose details of certain types of arrangements to HMRC. Broadly, arrangements that need to be reported are those designed to facilitate non-compliance through the use of Common Reporting Standard (CRS) avoidance arrangements and opaque offshore structures. It is also important to note that there is a look back period to 25 June 2018 for reporting any pre-existing arrangements entered into prior to 28 March 2023 and not already reported under the existing DAC6 rules. "Intermediaries" should review all transactions they have been involved in throughout the look back period and going forward and ensure where relevant arrangements are appropriately reported.

HMRC successfully challenging a taxpayers' domicile

The UK non-domicile/remittance regime continues to be a topic of much debate and press coverage. The recent decision by the First Tier Tribunal in *Coller v HMRC*, in which HMRC successfully challenged a living taxpayer's domicile position, while the facts are case specific, it does highlight some important factors which non-UK domiciled taxpayers should be aware of in relation to managing their domicile, which includes:

- the number of links retained to the country of their domicile of origin,
- taxpayers need to understand the impact of their actions rather than simply stated intention,
- the need for taxpayers to proactively manage their domicile position
- ensuring taxpayers understand the documentation and evidence requirements should they be subject to HMRC scrutiny in the future.

See also article by Stephen Ruane, Patrick Lawless "Direct Tax Cases: Decisions from the UK and European Courts" in this issue.

Tax-advantaged Company Share Option Plan changes

Increasingly businesses are introducing some form of share-based payments to complement their existing employee reward packages. New rules, introduced from 6 April 2023, increase the flexibility of tax advantaged Company Share Option Plans (CSOP) and make them more generous. One of the key changes is that the limit on the market value of shares that an individual can hold under option will double to £60,000. Businesses, who do not already operate a CSOP, should consider whether they should set one up to provide employees with an alternative renumeration option while also encouraging greater employee participation and company loyalty.

HMRC late payment and repayment interest rates increase again

Due to the further increase in the Bank of England base rate, HMRC have announced the late payment and repayment interest rates applied to the main taxes, effective from 31 May 2023, are as follows:

- late payment interest rate - 7%
- repayment interest rate - 3.5%

Noting interest rates charged on underpaid quarterly instalments is 5.5%, effective from 22 May 2023, 1.5% lower than the interest rate that then applies from the normal due date of payment of the corporation tax liability.

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

Further changes in processing VAT option to tax forms

Over the past 9 months, HMRC has made changes to how it deals with option to tax notifications. In September 2022, HMRC changed its' process from issuing an acknowledgement letter to a receipt letter. From 1 February 2023, HMRC have now stopped issuing hard copy receipt letters, which has led to some confusion where taxpayers are not sure whether an option to tax has been validly made and accepted. HMRC has advised that options to tax should be notified to HMRC by email and their system will issue an automated email response with the date the notification was received by HMRC. If notification of an option to tax is made by another means other than email, no receipt will be received.

Lauren Clabby
Director, Tax, KPMG

Preparing for Pay and File 2023: Tips and Tricks

Introduction

For the first time in a number of years, the upcoming compliance season is not being overshadowed by Covid-19 and the tax-related measures that were introduced as a result. Unfortunately, a shadow remains, nonetheless – inflationary pressure means that many of our clients may struggle to pay their taxes.

One thing, of course, that remains stable is our role as tax advisers in the annual personal tax filing process. As has been customary since the introduction of ROS, Revenue has announced an extended deadline for ROS return filing – it will be Wednesday, 15 November 2023. Although the subtitle of this article is "Tips and Tricks", it will also endeavour to reveal traps throughout, and perhaps this will contribute to a smooth lead-up to the personal tax compliance season.

eBriefs: Overview

During 2022 and to date in 2023, Revenue has published a significant number of eBriefs that are relevant to completion 2022 Forms 11 or the calculation of 2023 preliminary tax if it is being paid on an estimated basis.

eBrief No. 088/23: Pay and file 2023

Revenue announced an extension to the ROS return filing and payment date for certain self-assessment income tax customers and for customers liable to capital acquisitions tax. For customers who file their 2022 Form 11 return **and** make the appropriate payment through ROS for:

- preliminary tax for 2023 and
- income tax balance due for 2022.

the due date is extended to Wednesday, 15 November 2023.

eBrief Nos 004/22 and 060/23: Pre-letting expenditure in respect of vacant residential premises

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

It was amended again this year to reflect changes to s97A TCA 1997 made by Finance Act 2022, as follows:

- Paragraph 1 states that the period for which the property must have been vacant has been reduced from 12 months to 6 months.
- Paragraph 4 states that the cap on the allowable deduction for the expenditure has been increased from €5,000 to €10,000.

Both changes take effect from 1 January 2023 and may be relevant if a client is estimating 2023 preliminary tax.

eBrief No. 111/22: Case V excess capital allowances and Case V losses – order of set-off for individuals and between jointly assessed spouses and civil partners

Tax and Duty Manual Part 04-08-08 has been updated at paragraph 3 to include reference to s97A TCA 1997 (pre-letting expenditure in respect of vacant premises). The manual also confirms that allowances under s285A TCA 1997 (acceleration of wear-and-tear allowances for certain energy-efficient equipment) cannot be claimed against rental income.

eBrief No. 013/22: Non-residents and tax credits

Tax and Duty Manual Part 45-01-01 has been updated to reflect that s1032 TCA 1997 has been updated to include the amendments inserted by the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020. A citizen, subject or national of the UK is treated as though the UK is in the EU for the purpose of determining whether he or she is entitled to tax credits (typically, they will be entitled to claim a portion of tax credits that is determined by comparing their income subject to Irish income tax with their worldwide income).

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

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

- TDM Part 27-01a-02, “Investment Undertakings”, has been updated to include guidance on how investors in Irish-regulated ETFs pay the tax arising on a chargeable event.
- TDM Part 27-02-01, “Offshore Funds”, has been updated to clarify that the offshore funds rules apply to ETFs and ETCs in the same way as to other offshore funds – that is, whether an investment in an ETF or an ETC is a material interest in an offshore fund should be determined by following the decision trees set out in this TDM.
- TDM Part 27-01a-03, “Exchange Traded Funds”, has been updated to direct users to the above-mentioned TDMs rather than providing separate guidance on the taxation of investments in ETFs and ETCs.
- TDM Part 27-01a-03 was further updated in 2022 to confirm the interaction of the eight-year “deemed disposal” rule with updated guidance published on 1 September 2021, where applicable, which takes effect from 1 January 2022.

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

eBrief No. 081/23: Offshore funds – taxation of income and gains from EU, EEA and OECD Member States and from certain offshore states

The Tax and Duty Manuals concerning the taxation of offshore funds have been updated as follows:

- TDM Part 27-04-01 has been updated at paragraph 2.1.1 to provide a non-exhaustive list of general legal and regulatory criteria that should be considered to assist in establishing whether the threshold of "similar in all material respects" is met when determining the equivalent nature of an offshore fund to its Irish counterpart.
- TDM Part 27-02-01 has been updated for the following amendments introduced by recent Finance Acts:
  - Finance Act 2022, which clarifies the tax treatment of an authorised unit trust where particular conditions are satisfied; and
  - Finance Act 2020, which clarifies the interaction of the offshore funds legislation with the migration of Irish securities from the CREST system to Euroclear Bank in March 2021, after Brexit.

eBrief No. 069/22: Remote working relief

Tax and Duty Manual Part 05-02-13, which provides guidance on the conditions and operation of remote working relief, has been updated, mainly to include the new measure for remote working expenses, contained in s114A TCA 1997 and introduced by Finance Act 2021. Expenditure incurred on electricity, heating or broadband is apportioned over the number of days in the year the employee worked remotely, and 30% of the apportioned amount qualifies for tax relief.

eBrief No. 095/22: Taxation of crypto-asset transactions

Tax and Duty Manual Part 02-01-03 has been updated to provide clarity on the tax treatment of transactions involving crypto-assets, including through the provision of worked examples. The treatment of income or gains arising from crypto-assets is not subject to special rules. Each case must be considered on the basis of its own individual facts and circumstances, but the eBrief states that the sale, transfer or redemption of crypto-assets is most likely to be a disposal for capital gains tax purposes.

eBrief No. 128/22: Employed person taking care of an incapacitated individual

Tax and Duty Manual Part 15-01-20 has been updated to provide additional clarity on the criteria for claiming this tax relief. A tax deduction is allowed where an individual or their spouse/civil partner employs a carer, either directly or through an agency, to take care of themselves or a relative who is incapacitated by reason of physical or mental infirmity.

eBrief No. 178/22: ROS pay and file 2022 – tips and tricks

Tax and Duty Manuals Part 38-06-01, "Revenue Online Service", and Part 38-06-01a, "ROS Pay and File Useful Tips", have been updated. Although they are aimed at pay and file requirements for 2022, they remain relevant.

TDM Part 38-06-01 includes updated information on:

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

TDM Part 38-06-01a contains useful tips to help customers and agents to comply with their ROS pay and file obligations, including information on:

- filing, self-assessment and payment deadline,
- preliminary tax 2022 – calculation and payment,
- CGT return and self-assessment,
- CAT (IT38) return deadline,
- PAYE (Form 12) return deadline,
- help in completing the 2021 Form 11,
- updates to the 2021 Form 11,
- tips on accessing and using ROS,
- tips for ROS payments and refunds,
- ROS Offline and
- contact details.

eBrief No. 233/22: Rent tax credit

Tax and Duty Manual Part 15-01-11A outlines the conditions that must be met for an individual to be eligible to claim the new rent tax credit. This credit was introduced by Finance Act 2022 and is available for the tax years 2022 to 2025, inclusive. The manual also outlines the process by which the credit may be claimed. It may be claimed by individuals paying rent in respect of their principal private residence, as well as those who rent a "second" home to facilitate attendance at or participation in an employment, office, trade, profession or approved course (the last item also applies to parents who rent a property used by a child to attend an approved course).

eBrief No. 001/23: Universal social charge

Tax and Duty Manual Part 18D-00-01 has been updated to reflect the following changes resulting from the passing of Finance Act 2022:

- Paragraph 4 has been updated to account for the increase in the USC rate thresholds in line with increases to the national minimum wage.
- Paragraphs 6.1 and 11.3 have been updated to confirm that employer contributions to a PEPP (pan-European pension product) are not considered relevant emoluments for the purposes of USC.
- Paragraph 11.2 has been updated to reflect that, from 1 January 2023, employer contributions are not considered a taxable benefit-in-kind after an amendment to s118 TCA 1997.
- The following USC-exempt payments provided for in TCA 1997 have been added to the list of exemptions in paragraph 12.2:
    - s192J: Electricity costs emergency benefit payment;
    - s192JA: Payments under Electricity Costs Emergency Benefit Scheme II;
    - s192K: Pandemic Special Recognition Payment;
    - s192L: Ex Gratia Payment in Respect of an Incorrect Birth Registration;
    - s192M: Payments under Covid-19 Death in Service Ex-Gratia Scheme for Health Care Workers and
    - s192N: 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.

eBrief No. 019/23: Special assignee relief programme (SARP)

Tax and Duty Manual Part 34-00-10 has been updated to reflect the extension of the relief, by Finance Act 2022, to the 2025 year of assessment. In addition, the TDM has been amended as follows:

- A new paragraph 5 has been inserted to reflect the new qualifying requirements applying to assignees who arrive in the State on after 1 January 2023 (requirement to get a PPS number within

90 days of arrival in Ireland and employer PAYE registration requirements).

- Example 1 in Appendix I has been amended to refer to the new minimum relevant income threshold (€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, which is required to be completed in respect of new arrivals to the State from 1 January 2023.

eBrief No. 028/23: Tax treatment of Ukrainian citizens who work remotely in the State for Ukrainian employers

On 14 April 2022 Revenue issued eBrief No. 090/22, outlining its concessional treatments with regard to Ukrainians who:

- came to Ireland as a result of the war in their country and
- continued to be employed by their Ukrainian employer while performing the duties of their employment remotely from Ireland.

The concession provided that in relation to Ukrainian employment income:

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

This concession applied solely to employment income paid to the Irish-based employees by their Ukrainian employer.

Revenue has confirmed that the concessional treatments as set out above will continue to apply for the tax year 2023, subject to the qualifying conditions, which are outlined in eBrief No. 090/22.

eBrief No. 068/23: Annual average exchange rates and Lloyds sterling conversion rates

Tax and Duty Manual Part 04-06-12 has been updated to reflect the exchange rates to be used when it is appropriate to use average annual rates to covert income from a foreign currency to Euro.

Changes to the Form 11

The Form 11 for 2022 remains at 44 pages and contains a relatively small number of changes when compared with the 2021 version. The changes can be summarised as follows:

- Headings have been simplified, e.g. the “Trades, Profession or Vocation” heading has been changed to “Self-Employed Income”.
- The line relating to force majeure in the residence section has been removed because this is no longer relevant after Covid-19.
- Line 506 has been amended to ask for details of interest paid either without the deduction of tax or with its deduction at a reduced rate (because double taxation relief is being claimed).
- The line relating to the Stay and Spend Scheme has been removed (because this scheme was not in place for 2022).
- In the context of SCI (Start-up Capital Incentive) claims, the taxpayer is now required to distinguish whether an undertaking has been given to hold the shares for seven years or more.
- A number of detailed lines have been inserted relating to claiming the reintroduced rent tax credit (see above also), e.g. confirmation must be given that the housing is not social in nature and the Residential Tenancies Board registration number of the tenancy must be inserted.
- At the time of writing Revenue have not yet published a TDM in relation to the Form 11 for 2022. Readers are reminded that this is always a very useful reference guide and may give insight into changes which have been made.

The Administrative Basics

Preliminary tax

Preliminary tax for 2023 should be equal to:

- 90% of the final liability for 2023,
- 100% of the final liability for 2022 or
- 105% of the final liability for 2021.

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

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

Taxation of married couples/civil partners

Joint assessment is the default method of assessing married couples/civil partners.

The deadline for claiming separate assessment for 2022 income tax purposes was 31 March 2022. Such a claim cannot be backdated and continues into future years until it is withdrawn. The spouse or civil partner who made the initial claim for separate assessment must be the person to withdraw it, and a 31 March deadline in the year in question also applies.

Should it transpire that, under separate assessment, one spouse has some unused standard rate band or personal tax credits, it may be possible to transfer these to the other spouse after a review of both spouses' taxes for the year in question. This ensures that in net tax terms the couple are in the same position that they would have been in had they been jointly assessed.

The above is not possible where a couple opt for separate treatment. A spouse can elect for separate treatment, which must be done within the year in question. Again, for the election to be withdrawn, the same spouse must withdraw the original election.

Self-correction

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

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

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

Local property tax

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

Debt warehousing

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

Revenue announced in October 2022 that all taxpayers who availed of the debt warehousing scheme have until 1 May 2024 to agree a phased payment arrangement with Revenue and can avail of the reduced 3% interest rate from 1 January 2023.

Finance Act 2022 allows proprietary directors to claim a credit for the PAYE payable on their emoluments when filing their tax return where that PAYE has been warehoused by their company.

The Complexities

Domicile levy

For 2022 the domicile levy of €200,000 and the filing of a Form DL1 apply where an individual[1]:

- is Irish domiciled (the requirement to be an Irish citizen does not apply for 2012 and subsequent years),
- has worldwide income for 2022 in excess of €1m,
- holds Irish property valued at in excess of €5m on 31 December 2022 and
- has an Irish tax liability for 2022 of less than €200,000.

The scope of the domicile levy is wider than anticipated when it was introduced by Finance Act 2010. Initially, it was thought to apply only to individuals who are not Irish tax resident; however, although it was introduced to target such taxpayers, the underlying legislation does not limit the charge in this way. Accordingly, it can apply to all taxpayers who otherwise satisfy the criteria. Tax practitioners should also be mindful that Revenue does not consider that universal social charge (USC) comprises part of a taxpayer's Irish tax liability for the purpose of determining whether the €200,000 threshold above has been exceeded. This view has been upheld by the Tax Appeals Commission (66TACD2021). Where the €200,000 levy is payable for 2022, it may be offset by income tax (not USC) paid for 2022.

High-income earner restriction

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

Property relief

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

In addition "guillotine" measures introduced by Finance Act 2012 mean that passive investors should not claim any unused accelerated capital allowances carried forward beyond

1 See also article by Jeananne McGovern and Sara-Jane O'Brien "Recent Issues in Residence, Domicile and Double Taxation Relief" in this issue.

2014 (or the tax life of the building or structure, if later).

Investment portfolios

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

- An eight-year charge applies to EU/EEA/OECD-regulated funds, i.e. a disposal is deemed to occur based on the uplift in value of the fund in the eight-year period. The onus is on the taxpayer, not the fund manager, to calculate the tax due and return details of the deemed disposal in their tax return.
- The death of the holder of an EU/EEA/OECD-regulated fund triggers an exit charge. The units of the fund are deemed to have been disposed of and immediately reacquired by the deceased for market-value consideration (this is often overlooked and is particularly detrimental where the fund is bequeathed to a spouse, and it was assumed that no tax would arise).
- Loss relief is not available in respect of losses arising from an EU/EEA/OECD-regulated fund.
- The remittance basis does not apply to gains arising from regulated funds within the EU/EEA/OECD.
- As regards ETFs, see discussion under relevant eBriefs above.

Guidance on the appropriate tax treatment of investments is ever evolving, and tax advisers should review it regularly. As mentioned above, certain ETFs that previously were not thought to fall into the regime may now do so after updated Revenue guidance was published in September 2022.

Foreign bank accounts

Opening a foreign bank account (including those operating via online platforms) deems a taxpayer to be a "chargeable person" for self-assessment purposes in the year in which the bank account is opened. Full details of the bank account, including the amount of money deposited, must be reported.

Foreign authority reporting

As tax advisers will be well aware, clients with foreign assets are coming to Revenue's attention as a consequence of the sharing of information by foreign authorities under exchange-of-information provisions such as FATCA and CRS.

Capital gains tax

Capital gains tax (CGT) is an integral part of a Form 11 tax return.[2] Taxpayers who are not required to file a Form 11 are still obliged to return to Revenue details of any chargeable disposals made by filing a Form CG1, even where no tax is due because of the availability of reliefs, losses etc. A typical example of this would be the disposal of a residential property in the UK. Such a disposal before April 2015 would not have been subject to UK CGT if the property was owned by a non-UK tax resident. However, UK CGT now applies, and Irish CGT on such a disposal may be mitigated by claiming a credit for the UK tax paid.

CGT on disposals made between 1 January 2022 and 30 November 2022 should have been paid by 15 December 2022, and that on disposals made in December 2022 paid by 31 January 2023.

2 See also article by Siobhán O'Moore and Adrian Farragher "Capital Taxes Compliance Considerations" in this issue.

Capital acquisitions tax

Capital acquisitions tax (CAT) is not an integral part of a Form 11 tax return, but it is mandatory to disclose receipt of a gift or inheritance on a personal tax return. Delivery to Revenue of a return and discharge of any CAT liability in respect of gifts or inheritances with a valuation date arising between 1 January 2023 and 31 August 2023 must be undertaken by 31 October 2023. The applicable date for gifts/inheritances with a valuation date arising between 1 September 2022 and 31 December 2022 is also 31 October 2023.

Conclusion

Although the Form 11 for 2022 appears similar to previous versions, on closer inspection there are a number of issues that require additional consideration in the coming months. Being a compliant taxpayer is difficult, especially in a climate where Revenue's advancements in data interrogation and analytics are leading to more interventions. As regards the tax adviser's role in the process – the devil is in the detail!

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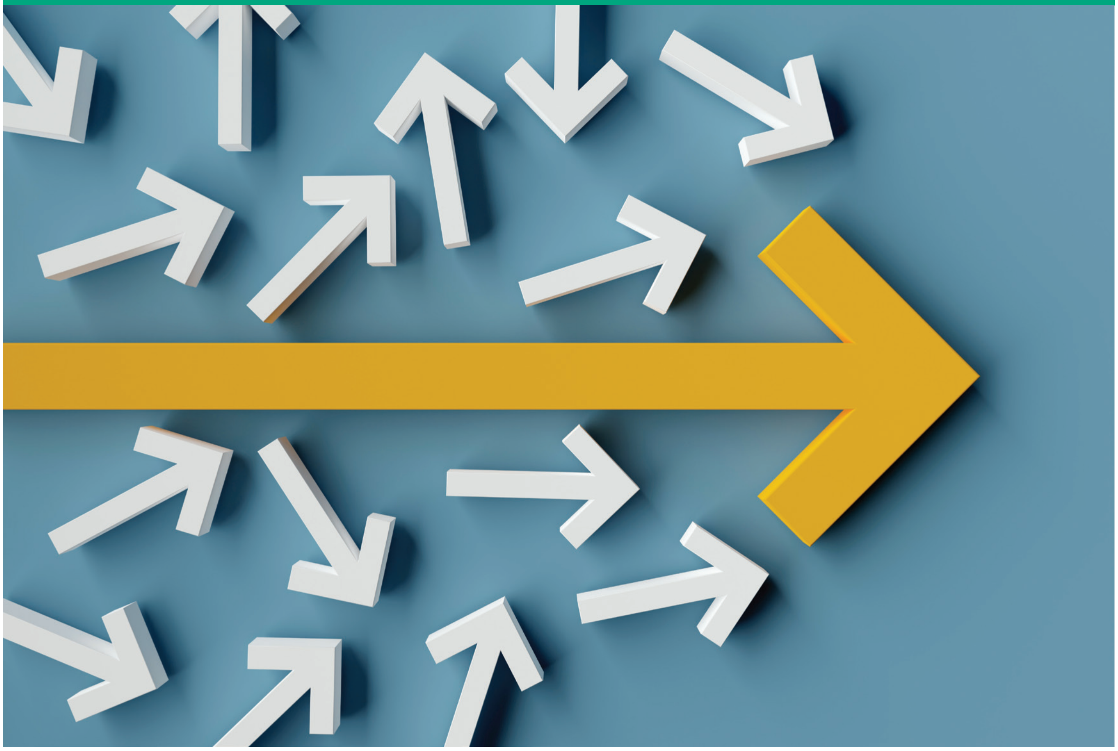
ePSWT: A Guide for the Tax Practitioner



History

Professional services withholding tax (PSWT) has been with us since 1987.[1] A cynic might say that it was introduced to accelerate the receipt of tax revenue by the Exchequer – self-employed professionals make a payment of income tax as late as 11 months into the year, whereas the deduction of PSWT means that at least some of their tax liability is withheld at source and in the coffers almost immediately. Regardless of why or how it arrived, we are, as they say, where we are.

Until mid-2021, compliance was through a paper-based system, one party issuing paper to a second party, who then filed it with Revenue. From 1 July 2021 the paper trail is fully electronic (hence the "e" in ePSWT).

1 Introduced by FA 1987 ss13-21 and incorporated into TCA 1997 ss520–529A.

Overview

Broadly, a State or semi-State body paying a fee to a person for professional services rendered retains tax at the standard rate from the fee and pays that tax over to Revenue. The professional is entitled to a tax credit for the PSWT so withheld. (These concepts will be examined in detail below.)

Terminology

Accountable person

The "accountable person" (AP), i.e. the payer of the fee, is generally a public body and includes:

- Government Departments and offices,
- local authorities,
- the Health Service Executive,
- authorised health insurers and
- commercial and non-commercial semi-State bodies and their subsidiaries.[2]

Specified person

The "specified person" (SP) is the provider of a "professional service" and the recipient of the fee. An SP can be an individual, a company or a partnership.

Professional services

"Professional services" include (TCA 1997 s520(1)):

- services of a medical, dental, pharmaceutical, optical, aural or veterinary nature;
- services of an architectural, engineering, quantity surveying or surveying nature, and related services;
- services of accountancy, auditing or finance, and services of financial, economic, marketing, advertising or other consultancies;
- services of a solicitor or barrister and other legal services; and
- geological services.

Services not regarded by Revenue as professional services for this purpose are:

- teaching, training or lecturing services;
- translation services, including services of an interpreter;
- proof-reading services;
- services of stenographers;
- setting and assessing oral, aural or written examinations;
- contract cleaning services; and
- maintenance and repair work.

Revenue has also issued opinions on specific services, and a list of these is contained in Tax and Duty Manual Part 18-01-04.

Payment Notification

In ePSWT, when an AP makes a payment for professional services to an SP, it files a Payment Notification (PN), including the SP's tax reference number, with Revenue as it pays the PSWT. SPs can then see a list of their PNs using their ROS account.

F30

The F30 is a monthly return made to Revenue by the AP of the PNs filed and payment of the relevant PSWT. This must be filed and PSWT paid within 23 days of the end of each income tax month. If no PSWT is withheld by an accountable person in a month, a nil return should be filed.

F35

The AP files an annual return, F35, of PSWT deducted and paid in the calendar year. This was also the case for paper PSWT. This must be filed by 23 February following the end of the year. Similar to the F30, where no PSWT is deducted by an AP a nil return should be filed.

F45 (and F43)

Under paper PSWT, the AP issued a certificate to the SP showing the gross payment, the VAT and the PSWT deducted, along with various

2 The full list of APs is in TCA 1997 Schedule 13.

other details of both the AP and the SP, dates etc. This was an F45. If it was mislaid, the AP could be asked to issue a duplicate, and this was an F43. The use of these forms ceased on the introduction of ePSWT.

Role of the Accountable Person

On payment to an SP for services, the AP retains 20%. To file the PN with Revenue, the AP completes a form in ROS with the SP's:

- residence status,
- name,
- address,
- tax type and
- tax reference number;

and:

- the payment date,
- the gross amount of the payment and
- the tax withheld.

Should APs wish to file more than one PN, they can do so using a .csv file in the prescribed format. This can contain up to 4,000 individual PNs and includes the specific items above.

When validated by Revenue, the PNs for a given SP will be reflected in the SP's ROS account (or myAccount, if appropriate).

An AP can amend a PN filed until the F35 covering that period is filed. In certain circumstances an amendment is not possible. For example, if a PN is included in a claim already made by an SP, and that claim has been processed into a refund or offset, the PN cannot be amended.

Use of PSWT

As mentioned above, PSWT retained in or for a period can be claimed as a credit against the tax liability of the SP – income tax or corporation tax, as appropriate – for that period. SPs make the claim by entering the PSWT retained in the relevant accounting period on their tax return. (Note that failure to include the gross PSWT on a return will lead to credit's not being given, despite the fact that Revenue already has the information.) This can lead to a long gap between when the PSWT was retained and when it is used, by taxpayers, as a credit against their tax liability, with consequent cash-flow difficulties, which brings us to interim refunds.

Interim refunds

There is provision for an interim refund to be claimed where certain conditions are met. These are set out in TCA 1997 s527 and are summarised below.

For ongoing periods

An interim refund may be claimed for ongoing periods if (TCA 1997 s527(2)):

- the profits or gains of the preceding accounting period (corporation tax) or basis period (income tax) are finalised,
- the tax for that preceding period has been paid and
- the SP making the claim provides the PNs for the PSWT being claimed.

The amount of PSWT that will be refunded is the excess of whatever has been retained in the current period over the tax liability of the preceding period.

For commencement periods

TCA 1997 s527(4) provides that an interim refund may be claimed in the commencement year, and the amount is determined by applying a formula including the estimated trading profits, expenses and periods of trading activity.

Particular hardship

Under TCA 1997 s527(5), where the taxpayer can prove that the retention of PSWT is causing particular hardship, Revenue may waive one or more of the conditions above and may make such refund as it considers "just and reasonable".

There is also provision for the offset of PSWT against taxes other than the main tax head of the SP (TCA 1997 s527(3)).

Non-residents

Non-residents who are not within the charge to Irish tax should make a claim to:

International Claims Section,

Office of the Revenue Commissioners,

Government Offices,

St Conlon's Road,

Nenagh,

Co. Tipperary.

Non-residents chargeable to Irish tax should file a claim with the Revenue office that deals with their affairs, including a Form IC11, a completed questionnaire and acknowledgements of the PNs from the AP.

Claiming interim refunds

From the practitioner's point of view, the change to ePSWT should be welcomed, if for no other reason than it reduces the volume of paper to be handled. In the larger cases, the F45s to be processed on a regular basis throughout the year easily numbered thousands and, apart from the time taken, this had great potential for data entry errors. Then there was the physical delivery of these from the client to the practice and thence to Revenue, the need to keep copies for files and the need to obtain F43s should F45s go missing.

The e-process is simpler and faster, certainly involves less paper and should have less potential for data entry error, although care should be exercised to ensure that the PNs filed by the AP are correct.

To file a claim for an interim refund, the steps are:

1. Log on to your client's page on ROS.
2. Navigate to the PSWT section.
3. Select the year for which you wish to claim.
4. Download, in .csv format, the list of PNs that the APs have filed for payments made to the SP.
5. Filter out the PNs that have already been claimed.
6. Complete Form F50A on Revenue's website (note that the fields are not all properly formatted, and you are required to list the PN numbers in a box, separated by a comma).
7. Send the completed and signed F50A through MyEnquiries, specifying whether you require a refund or offset against other liabilities.

Steps 1 to 4 should also be followed when preparing an income tax or corporation tax return, to ensure that any PSWT withheld is properly claimed.

Comparison of Paper PSWT with ePSWT

Paper PSWT	ePSWT
AP deducts 20% of payment for service	AP deducts 20% of payment for service
AP pays 80% to SP	AP pays 80% to SP
AP pays 20% to Revenue	AP pays 20% to Revenue
AP issues F45 to SP	AP files PN with Revenue
AP files annual return (F35) with Revenue	AP files annual return (F35) with Revenue
To claim interim refund	*To claim iagterim refund*
SP files F50 with Revenue, enclosing F45s	SP files F50A with Revenue, including details of the PNs

Further Reading

The legislation is contained in TCA 1997 ss520–529A, and the relevant Revenue guidance is in Tax and Duty Manuals Parts 18-01-04 and 18-01-05A.

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Key Considerations for the Corporation Tax 2022 Cycle

Introduction

As we approach the busy season for corporation tax compliance, it is timely to look at the key considerations for the 2022 compliance cycle. The majority of Irish companies have a 31 December year-end, which results in a corporation tax filing deadline of 23 September. As it falls on a Saturday this year, there will be a push to get everything filed by Friday, 22 September. With the last two years having been dominated by the Covid-19 pandemic and its impacts, there should be more of a semblance of normality to the 2022 cycle.

Changes to Form CT1

Company details panel

Transfer pricing

Questions have been added with regard to transfer pricing, the purpose of which is to facilitate work relating to the global minimum effective tax. Companies are now required to identify whether they are part of a multinational group that is required to file a country-by-country report (whether in Ireland or elsewhere). Furthermore, the filer is required to identify the country of residence of the global ultimate parent of the company and the name of the global ultimate parent entity.

Controlled foreign company

There is an additional question to reflect the amendments to the CFC provisions in FA 2021. For accounting periods ending on or after 1 January 2021, companies must report instances where a CFC change arises because the effective tax rate exemption, low profit margin exemption or low accounting profit exemption are not available because the CFC is resident in a non-cooperative jurisdiction.

Interest limitation panel

A new section has been added relating to interest limitation rules. The initial question requires companies to state whether they are a standalone entity. It is emphasised that standalone entities should not fill in the remainder of the panel. Further questions are required to be answered by entities that are not standalone entities, and companies should follow the instructions on the Form CT1 and ensure that there are no errors in filing. (See also article by Angela Flemming and Yvonne Diamond "Interest Limitation Rule: CT1 Disclosures and Updated Revenue Guidance" in this issue)

Branch or agency

Where a company is trading in Ireland through a branch or agency, it is now mandatory to select the country of residence of the branch. Previously, it was possible to file a return without disclosing this information.

Trading results

Capital allowances

This section has been updated to reflect accelerated capital allowances for farm safety equipment introduced by FA 2021. To claim such allowances, certification is required from the Department of Food, Agriculture and the Marine, and the Form CT1 requires details in relation to same. These accelerated allowances allow farmers to claim allowances over two years (50% per annum) on qualifying equipment.

The revised Form CT1 also has a requirement to disclose separately surplus capital allowances not included in your claim by virtue of s403 and s404 TCA 1997, being the restriction on use of capital allowances for certain leased assets, machinery or plant.

Extracts from accounts

Companies are required to disclose, for information purposes only, total CRSS (Covid Restrictions Support Scheme) and BRSS (Business Resumption Support Scheme) payments received. There is also a new data entry box to allow for notes relating to expenses or deductions.

There are also some wording changes, split of line items and additional disclosures in the extracts from accounts, so be sure to consider this in completing the Form CT1.

Where a company has no adjusting items for disclosure in the Form CT1, there is a box that can be ticked to confirm that there are no adjustments. Where there are any adjustments, they are required to be disclosed in the relevant detailed box or in "Other addbacks" or "Other deductions", as appropriate.

Irish rental income

A new panel for non-resident landlords or their collection agents has been added. The Form CT1 also allows credit for tax withheld from tenants under s1041 TCA 1997. Information must be disclosed in respect of each tenant. Where a filer has more than 10 tenants, this information should be submitted on a spreadsheet via MyEnquiries.

Irish investment and other income

A new section has been introduced to capture "reverse hybrid" entities. Broadly, this charges the income of an Irish partnership or an Irish common contractual fund (both tax-transparent entities) to corporation tax in Ireland.

Deductions, credits and reliefs

The Form CT1 will be pre-populated with information from the PSWT notifications filed via ePSWT.

Research and development credit

The Form CT1 includes a cell relating to the provisions increasing allowances for SMEs from 25% to 30%. This option is greyed out in the Form CT1 as the provisions were not commenced. In fact, Finance Act 2022 has repealed these provisions for State Aid reasons and as such, we don't expect this cell to be available for use at any stage.

Close company surcharge

There has been a clarification in this section asking filers to confirm the tax reference number of the company that paid and the company that received the distribution as two separate questions.

Recovery of income tax

The Form CT1 has been updated to capture instances where the filer has paid interest or royalties without the deduction of Irish tax, in line with Tax and Duty Manual Part 08-03-06.

Corporation tax self-assessment

An advisory message will flag if there is likely to be a local property tax (LPT) surcharge raised on the return, as the LPT surcharge will, where relevant, be raised on filing of the return. It is advisable to ensure compliance with LPT before filing the Form CT1.

Changes in Legislation

Interest limitation rules

The interest limitation rules (ILR) were introduced by FA 2021 and are effective for accounting periods commencing on or after 1 January 2022, so returns for 2022 are the first time that they need to be considered from a compliance perspective. Broadly, the net interest deduction is limited to 30% of EBITDA, with any interest in excess of that amount deferred until future periods where there is sufficient EBITDA to allow such deduction. Exemptions from the ILR include companies with a net interest expense of €3m or less, standalone companies, interest on legacy debt (pre-17 June 2016) and borrowings for long-term public infrastructure projects.

Transfer pricing

Section 25 FA 2021 provides for the application of the authorised OECD approach for the attribution of income to a branch or agency of a non-resident company that is operating in Ireland. This is applicable for accounting periods commencing on or after 1 January 2022.

For the purposes of this legislation, the relevant branch income is "the amount of income which it would have earned, in particular from its dealings with the other parts of the company, if it were a separate and independent company engaged in the same or similar activities under the same or similar conditions". There are also additional documentation requirements to ensure that the income of the branch has been computed in line with the new legislation, and there are penalties for taxpayers that do not provide such branch records to Revenue when requested to do so.

Accelerated capital allowances

FA 2021 amended s285A TCA 1997 to allow for accelerated capital allowances on farm safety equipment. It should also be noted that where equipment is operated by fossil fuel (other than equipment operated on electricity generated using such fuel), such capital expenditure incurred on or after 1 January 2022 does not qualify for accelerated allowances.

Anti-hybrid rules

FA 2021 introduced a new Chapter 10A to Part 35C TCA 1997, relating to the reverse hybrid rules. This is in line with the Anti-Tax Avoidance Directive Article 9a, which attempts to prevent the non-taxation of income because an entity is treated as tax-transparent in its home jurisdiction and as tax-opaque in the territory of a participator in the entity (i.e. a reverse hybrid).

A reverse hybrid mismatch outcome will arise when some or all of the profits or gains of a reverse hybrid entity that are attributable to a relevant participator are subject to neither domestic nor foreign tax. The reverse hybrid rules apply to a reverse hybrid entity other than a "collective investment undertaking" as defined in Chapter 10A of Part 35C (s835AVB TCA 1997).

A reverse hybrid mismatch outcome shall not arise in respect of the profits or gains of a reverse hybrid entity where the profits or gains are attributable to a relevant participator that:

- under the laws of the territory in which it is established, is exempt from tax that generally applies to profits or gains in that territory,
- is established in a territory, or part of a territory, that does not impose a foreign tax or
- is established in a territory that does not impose a tax that generally applies to profits or gains derived from payments receivable in that territory by enterprises from sources outside that territory.

A reverse hybrid mismatch outcome is neutralised by charging the untaxed profits or gains to corporation tax on the reverse hybrid entity concerned as if the business carried on in Ireland by the reverse hybrid entity were carried on by a company resident in Ireland.

Dividends paid out of foreign profits

Section 129A is an anti-avoidance provision, designed to remove the benefit of s129 TCA 1997 where dividends are paid out of foreign profits. Section 129 refers to what is commonly referred to as franked investment income, whereby corporation tax is not chargeable on dividends and other distributions of an Irish-resident company and such dividends and distributions are not taken into account in computing income for corporation tax purposes. Sub-section 129A(3) treats certain distributions in excess of distributable profits for a certain period as arising from the period when the payor was non-Irish resident. The amendment now means that interim distributions paid out of the profits arising when a company was tax resident in Ireland are not unnecessarily caught by the anti-avoidance provisions of s129A.

Relief for investment in films

The definition of "eligible expenditure" for the purposes of s481 TCA 1997 (relief for investment in films) is expanded to include payments made on the provision of labour-only services by an individual not employed by the qualifying company for the production of a qualifying film.

Start-up companies relief

Start-up companies relief has been extended from three years to five years for qualifying companies that commence a trade on or after 1 January 2018. The relief has also been extended so that it will continue to apply until 31 December 2026.

Controlled foreign companies

Section 835YA was added to Part 35B TCA 1997 relating to non-cooperative jurisdictions. Where, in the accounting period of a controlled foreign company, the territory in which the controlled foreign company is resident is a listed territory, the effective tax rate exemption, the low profit margin exemption and the low accounting profit exemption will not apply in respect of that accounting period.

Interest on loans to defray money applied for certain purposes

Section 36 of FA 2021 amended s840A TCA 1997, which denies a tax deduction on interest arising on certain loans between connected parties. First, the definition of "loan" has been expanded to include promissory notes and any other agreement or arrangement having a similar effect. Second, the amendment provides that no sum shall be deducted in respect of interest payable on the refinancing of a loan used in acquiring assets from a connected company.

Transfers arising from certain mergers under the Companies Act 2014

Section 617A has been introduced to TCA 1997, to the effect that domestic mergers by absorption do not give rise to a chargeable gain. Where there is a transfer to a parent company of all of the assets and liabilities of a company that is a wholly owned subsidiary of the parent company, it is not treated as involving a disposal of share capital by the parent company.

Timing of Reliefs/Claims

It is always worth bearing in mind that there are certain time limits on reliefs that companies may wish to claim.

Loss relief

Where a company has trading losses in a period, these can be offset against other trading income of the same period or trading income of the immediately preceding accounting period (of the same length) on a euro-for-euro basis, or on a value basis against non-trading income. A claim for loss relief must be made **within two years** of the end of the accounting period in which the loss is incurred. Unused losses can be carried forward indefinitely against trading income of the same trade for future periods.

Group relief

For corporation tax purposes, companies form a group if one is a 75% subsidiary of another or both are 75% subsidiaries of a third company. Losses can be surrendered in part or in full to another member of the group in respect of the same accounting period only. Such losses can be used to offset trading or non-trading losses in the recipient company. All claims for group relief must be made **within two years** of the end of the surrendering company's accounting period to which the claim relates.

Section 291 TCA 1997 IP allowances

Where a company is claiming s291A TCA 1997 allowances in respect of capital expenditure relating to specified intangible assets, any such claim must be made **within 12 months** of the end of the accounting period in which the capital expenditure giving rise to the claim is incurred. This is particularly important if the intangible assets have not been brought into use in the accounting period in which they were acquired and the allowances will not be effective until a future period, in which case Revenue must be notified of the intention to claim such allowances within 12 months of the end of the period in which the capital expenditure was incurred in order to avail of the Revenue concession in respect of same.

R&D credit

A claim in respect of R&D credits must be made **within 12 months** of the end of the accounting period in which the expenditure was incurred.

Section 626B TCA 1997 claim

Where an election is required under s626B TCA 1997 (providing for an exemption from tax in respect of certain capital gains arising from the disposal of holdings in subsidiaries), this should be made on the Form CT1.

Close company considerations

Where a company is a close company (broadly, a company that is under the control of five or fewer participators or any number of directors), a surcharge may apply to undistributed estate and investment income (and the professional income of a "services" company, where applicable) where a distribution is not made in respect of such income **within 18 months** of the end of the accounting period, subject to company law requirements. The surcharge payable with 2022 returns will broadly relate to surchargeable income arising in the 2021 financial period. A distribution to the shareholders of the company can be made within 18 months to avoid the surcharge. It is worth reviewing in a timely manner whether such a distribution is advisable.

Where two companies wish to jointly elect, under s434(3A) TCA 1997, for a dividend to be disregarded and not treated as a distribution for close company purposes, such election must be made on the Form CT1.

Other Returns/Submissions Required

Section 891A TCA 1997 returns

Taxpayers are required to make a return providing information relating to interest paid to non-residents **within nine months** of the end of an accounting period. This relates to interest paid to a non-resident where there was no withholding tax due on the interest by virtue only of a double taxation agreement that Ireland has entered into with the jurisdiction to where the interest is paid.

iXBRL

A corporation tax return is deemed incomplete where it is not accompanied by iXBRL financial statements if the exemption criteria for iXBRL filing are not met. Legislatively, iXBRL financial statements are due to be filed at the same time as the corporation tax return (i.e. nine months after the accounting period end and no later than the 23rd day of the month). However, by Revenue concession, companies have an additional three months in which to file the iXBRL financial statements.

Form 46G

Form 46G is due for filing nine months after the end of the accounting period in question.

Revenue updated its Tax and Duty Manual relating to the Form 46G to include information on change in accounting period. The Form 46G is considered a "linked return" by Revenue, and therefore it must have the same accounting period as the Form CT1. This is something to be considered for any companies with changing accounting periods to ensure that there are no issues when it comes to filing the Form 46G.

Country-by-country report filing

Where a company is part of a multinational enterprise group (broadly, a group with annual consolidated turnover in excess of €750m in the immediately preceding fiscal year), it has country-by-country (CbC) reporting and notification requirements. Generally, the parent company of the group will have responsibility for filing the CbC report for the group, and other members of the group have a requirement to file a CbC notification, with the relevant tax authority – in our case, the Revenue Commissioners.

The CbC report must be filed with Revenue no later than one year after the last day of the fiscal period to which the report relates. The CbC notification must be filed with Revenue no later than the last day of the fiscal period to which the CbC report of the group relates.

Dividend withholding tax returns

Where a company pays a dividend, a DWT return must be filed with Revenue by the 14th day of the month following the payment of the dividend.

Preliminary Tax

For large companies (i.e. companies that had a corporation tax liability of €200,000 or more in the previous tax period, pro rata for a period under 12 months), preliminary tax is due and payable in two instalments. The first instalment is due within six months of the start of the accounting period and no later than the 23rd day of that sixth month. The second instalment is due one month before the end of the accounting period and no later than the 23rd day of that month. The first instalment must equal 50% of the final liability of the prior year or at least 45% of the current-year liability. The second instalment must equal at least 90% of the current-year liability.

For small companies (i.e. companies that had a corporation tax liability of less than €200,000 in the preceding tax period, pro rata for a period under 12 months), preliminary tax must be paid one month before the end of the accounting period and no later than the 23rd day of that month. This can be based on 100% of the prior-period liability or 90% of the current-period liability. Where no preliminary tax is due, a nil preliminary tax slip should be filed with Revenue.

A new additional preliminary tax payment date has been introduced on a temporary basis which will allow companies to calculate the tax impact of the ILR and establish the amount of preliminary tax due. In assessing whether the payment to bring the preliminary tax paid up to 90% of the final tax due for the current accounting period, and the company would have met this requirement but for a disallowable amount under the interest limitation rules and the company makes a top-up payment of preliminary tax within 6 months of the end of the accounting period bringing the total preliminary tax paid to 90% of the current accounting period liability, then the company will have met its preliminary tax obligations. This provision applies for periods ending on or before 31 December 2027.

Revenue have also recently clarified that if close company surcharges apply, those amounts should be included in calculating the corporation tax for the preceding accounting period when determining if a company is small for the purposes of calculating preliminary tax.

Interest may be applied by Revenue on the underpayment of preliminary tax.

Implications of Late Filing

Where a corporation tax return is filed late, a company must include the relevant surcharge in the return. The surcharge amounts to 5% of the tax due to a maximum of €12,695 if filed within two months of the filing date, or 10% of the tax due to a maximum of €63,485 if filed more than two months after the filing date. As mentioned above, it is worth nothing that iXBRL is considered part of the Form CT1 for the purposes of late filing.

Where a return is being filed late, the restrictions under s1085 TCA1997 should also be considered and applied, as relevant.


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Interest Limitation Rule: CT1 Disclosures and Updated Revenue Guidance

Introduction

The time has arrived when the practicalities of the much discussed interest limitation rule (ILR) should be considered and implemented by filers. It is important to note that regardless of whether there is an interest restriction, relevant disclosures are required to be made on the Form CT1 for accounting periods commencing on or after 1 January 2022.

Filers of the annual CT1 will have noticed a lengthy addition to the form: there are a further thirty-nine new panels three-and-a-half pages (pages 5–8 of the CT1) of disclosures to negotiate. Thinking that a company may not need to concern itself with the detail of these disclosures, on the basis that the filer is aware that the filing entity should qualify for one of the exemptions, could prove to be incorrect. Care should be taken that the correct disclosures are made whether or not an interest restriction applies.

Accounting Period

The ILR applies only to companies with an accounting period commencing on or after 1 January 2022. The first item in the ILR section of the CT1 is: "If the accounting period commenced on or before 31 December 2021, please tick the box. No further details are required in this section." So for accounting periods starting before 31 December 2021, no disclosures are required (other than ticking this box).

Standalone Entity

Panel 1.1 of the Interest Limitation section on the 2022 CT1 asks: "Is the company a standalone entity within the meaning of Sec. 835AY? If yes, no further questions in this section need be completed." The definition of a standalone entity is a company resident in the State that:

- is not a member of a worldwide group,
- has no >25% associated enterprises and
- does not have a permanent establishment in a territory other than the State.

The definition of associated enterprises is key in determining whether the company is a standalone entity. It should be borne in mind that, in accordance with s835Z(1) TCA 1997, the term "enterprise" means an entity or an individual. Therefore, there will be some instances where a company is a standalone entity, but these are expected to be limited.

Long Term Public Infrastructure Projects

If the filing entity is carrying on a "Long Term Public Infrastructure Project" (LTPIP), a number of disclosures are required, including:

- income (net of interest) directly connected with the LTPIP,
- expenses (net of interest) directly connected with the LTPIP and
- net interest expense directly connected with the LTPIP

in the accounting period.

De Minimus Exemption

For a certain proportion of filers, the ILR may not apply on the basis that the *de minimus* exemption is applicable (i.e. the company has net interest expense of less than €3m in a 12 month period). For these entities, six questions are relevant and required to be answered in this section of the CT1 (i.e. 1.1–1.6).

Example 1

Company A, a small manufacturing company, has two shareholders, Mr and Mrs A, who each own 50% of the company's ordinary share capital. Company A has a working capital loan repayable to a third-party institution, and interest on this loan amounts to €10,000 annually. The accounting period is the year ended 31 December 2022 (commencing 1 January 2022). Therefore, the first box of the current ILR panel would not be ticked. Below is outlined how the panels of the CT1 could be completed for this entity:

- 1.1 Standalone entity: Company A should not be considered a standalone entity as it has >25% associated enterprises. Therefore "No" should be ticked in this panel.
- 1.2 Interest group: In this case, Company A is not a member of a group. This disclosure is mandatory. (Please see below for more details on interest group disclosures.)
- 1.3 and 1.4 need to be completed only if the answer to 1.2 above is "Yes", so for Company A they would not need to be completed.
- 1.5 Long Term Public Infrastructure Projects: Company A is not carrying on an LTPIP, so "No" should be selected.
- 1.6 *De minimus*: The answer for Company A would be "Yes".

Fig. 1: Completed extract from CT1 for Company A.

Interest Limitation

If the accounting period commenced on or before 31 December 2021, please tick the box. No further details are required in this section ☐

1.1 Is the company a standalone entity within the meaning of Sec. 835AY? If yes, no further questions in this section need be completed. ○ Yes ◉ No

1.2 If the answer to 1.1 is no, is the company a member of an interest group in accordance with Sec. 835AAK? (Mandatory if the answer to 1.1 is □No□. The first period where 'yes' is indicated above shall satisfy the election requirement in section 835AAK TCA 1997. Where the aforementioned election has previously been made, then the first period after that election where 'no' is indicated above shall be consdidered the withdrawal of that election.) ○ Yes ◉ No

1.3 If the answer to 1.2 is yes, If the answer to 1.2 is yes, is the company the reporting company within the meaning of Sec. 835AAM? (Mandatory if answer to 1.2 is □Yes□) ○ Yes ○ No

1.4 If the answer to 1.3 is no, please provide details of the reporting company (Mandatory if the answer to 1.3 is □No□)

Reporting company name ____

Tax Reference No ____

1.5 Is the company carrying on a Long Term Public Infrastructure Project in this accounting period? If yes, please provide the amount of income, expenses and net interest expense directly connected with the qualifying long term infrastructure project(s) in respect of this accounting period: ○ Yes ◉ No

Income (net of interest) ____

Expenses (net of interest) ____

Net interest expense ____

Where the answer to 1.2 is yes, please complete points 1.17 to 1.25 in all instances with regard to amounts allocated from the interest group

Interest Limitation

Interest Limitation

1.6 Does the de minimis exemption apply to this company? (Mandatory if the answer to 1.1 and 1.2 is □No□. If 1.2 is □Yes□ then should not be answered)

Yes No

Single Company Worldwide Group

A "single company worldwide group" is a company that is:

- not a member of a worldwide group, i.e. a member of a group that consists of an ultimate parent and all consolidating entities in the ultimate consolidated financial statements,
- not a member of an interest group, i.e. not a member or not deemed to be a member of the same worldwide group and has not elected to be part of an "interest group" for the purposes of the ILR, and
- not a standalone entity.

Panel 1.7 of ILR section of the CT1 is where this disclosure should be made if the company is a member of a single company worldwide group.

Equity Ratio

Panels 1.8–1.10 of the ILR section of the CT1 is where the disclosures regarding the Equity Ratio should be made if the equity ratio is being claimed. The disclosure requires the company to confirm that it is making an election to apply the equity ratio in the accounting period, disclosing the equity of the company and that of its worldwide group, as well as disclosing the total assets of the company and of its worldwide group.

Group Ratio

The group ratio is expressed by group net borrowing costs/group EBITDA. If this ratio is over 30%, the company can apply that percentage restriction to its tax-adjusted EBITDA (thereby allowing a higher percentage of interest in computing taxable profits).

Disclosures for this relieving provision should be made in 1.11–1.13 of the ILR section of the CT1. The disclosure requires the company to disclose whether it elects to apply the group ratio and, if so, to disclose group EBITDA, as well as group exceeding borrowing costs.

Carry-Forward Provisions

The carry-forward provisions apply where the restriction applies. Where interest is restricted in the period, this can be carried forward indefinitely. The CT1 requires a disclosure of the amount of interest disallowed in the period (Panel 1.17). The form does not include total disallowed interest from current and prior years, but there is an option to include deemed borrowing costs carried forward (Panel 1.20) and deemed borrowing costs utilised in the period (Panel 1.21), although these may not be relevant in a 2022 CT1.

Disclosures of "interest spare capacity" (i.e. where interest income exceeds interest expense) should be made in Panel 1.18 of the ILR section of the CT1.

Disclosures of "limitation spare capacity" (i.e. 30% EBITDA greater than allowable interest) should be made in Panel 1.19 of the ILR section of the CT1.

The aggregate of interest spare capacity and limitation spare capacity is known as "total spare capacity". Where this is being carried forward, it may be carried forward for 60 months from the end of the accounting period in which the spare capacity arose.

ILR Disclosures

Many tax professionals will by this stage be familiar with the legislation surrounding the ILR and the method for calculating the restriction. Where the restriction applies to a company, Panels 1.14–1.25 of the ILR section of the CT1 need to be completed.

Example 2

Below is an example of the disclosures required for Company B in the 12 month accounting period ended 31 December 2022. Company B has a net interest equivalent of €5m. However, the tax-adjusted EBITDA of Company B is €12m. Therefore, with the restriction applied, 30% of €12m results in an allowable interest amount of €3.6m.

Company B	€m
Interest equivalent in the period	
Interest expense	8
Interest income	-3
Net interest equivalent	5
Tax EBITDA	
Tax EBITDA	12
Calculate restricted interest amount	
30% of EBITDA	3.6
Compare restriction to net interest equivalent	
Net interest equivalent	5
Allowable interest amount	- 3.6
Restriction	1.4

Fig. 2: Completed extract from CT1 for Company B.

Components of interest limitation calculation

1.14 EBITDA of the company	12,000,000
1.15 Allowable amount	3,600,000
1.16 Exceeding borrowing costs	5,000,000
(For 1.14 to 1.16 -> Mandatory if the answer to 1.1, 1.2, 1.6 and 1.8 is "no", otherwise optional. If 1.2 is "yes" then should not be answered.)	
1.17 Disallowable amount	1,400,000
1.18 Interest spare capacity	
1.19 Limitation spare capacity	

Groups

If a company wishes to make an election into an interest group, Panel 1.2 should be completed in the first instance (marked "Yes"). This Panel is mandatory for all filers that have completed Panel 1.1 as "No" i.e. that are not standalone entities. Then Panel 1.3 and 1.4 need to be completed: Panel 1.3 discloses whether the company is the reporting company. If the answer to this is "No", Panel 1.4 should be completed, However, if the answer to Panel 1.3 is "Yes", i.e. the company is the reporting company, Panels 1.26 onwards should be completed.

- Panels 1.28–1.30 relate to the disclosure of the equity ratio of the group.
- Panels 1.31–1.33 relate to the disclosure of the group ratio of the group.
- Panels 1.34 onwards relate to components of the interest limitation calculation.

Filers should be conscious that there are a different set of disclosures for interest groups, these are from panels 1.26 onwards.

Updates to Revenue Guidance

The latest update to Revenue's ILR guidance was circulated in eBrief No. 26/23 on 2 February 2023. The eBrief notified of the updates to the Tax and Duty Manual (Part 35D-01-01) based on amendments in Finance Act 2022. The sections amended were as follows.

Interest equivalent

The term "interest equivalent" is updated at section 4.1 to include "interest or amounts economically equivalent to interest which are claimed under section 420A(3) or section 420B(2) [TCA 1997], and treated under section 247(4G) [TCA 1997] as relevant trading charges on income", and any of the amounts referred to in the paragraph treated as excess expenses of management under s83(3) TCA 1997.

Legacy debt

Section 4.4 includes a clarification of the operation of the exemption for interest on legacy debt, to specify that a "first in, first out" basis applies where there is a repayment in respect of facilities that have a mixture of legacy debt and non-legacy debt.

Relevant profit or loss

Section 5 now includes:

> "In calculating the relevant profit, no account is to be taken of losses carried forward or back from other accounting periods or amount claimed or surrendered under group relief. However, where interest that is treated as a charge on income would be surrendered to a group company but for Part 35D or expenses of management that may be surrendered to a group company but for Part 35D, the charge is to be taken into account in the calculation of the relevant profit or loss of the company which would have claimed the charge but for Part 35D."

Long term public infrastructure project

The definition of a large-scale asset was updated at section 9 to include a large-scale residential development within the meaning of the Planning and Development Act 2000, approved by a planning authority under s34 or s170 of that Act.

Additional rules regarding deemed borrowing costs

Section 11.4 now states:

> "The total of relief available in an accounting period in respect of:
>
> (a) a deemed borrowing cost under section 835AAD(3), (8) or (12) [TCA 1997], and
>
> (b) relief in respect of an amount of interest that was carried forward under s291A [TCA 1997] having been restricted under the ILR...
>
> cannot exceed the amount of total spare capacity in that accounting period.
>
> Where the total relief exceeds the total spare capacity, relief is given under

[s835AAD(8)] in priority to [s835AAD(3) or (12)]. When calculating the amount of relief available for deemed borrowing cost under [s835AAD(3), (8) and (12)], the amount is reduced by any amount relieved in prior accounting periods.

Any amount of deemed borrowing cost carried forward will not form part of the relevant entity's deductible interest equivalent for that accounting period."

Carry-forward of total spare capacity (12)

Section 12 now includes text stipulating that where an amount that is not deductible in respect of a deemed borrowing cost is deducted in a subsequent accounting period, having been treated as an amount of interest for which relief cannot be given by virtue of s291A(6)(a) TCA 1997 for the purposes of s291A(6)(b)(ii) TCA 1997, the amount of total spare capacity available for any subsequent claims or deductions shall be reduced by the amount so deducted. (See also article by Lorraine Sheegar "Policy and Representations Monitor" in this issue).

Conclusion

After an intensive and lengthy process of interpreting legislation and providing feedback, filers now have a tangible understanding of what is required from the filing entity in terms of disclosures. Although it may take a certain amount of time for filers to become familiar with the additional disclosures, it is imperative that they have an understanding of the underlying legislation, particularly in relation to some of the definitions therein. Some filers will have noticed that certain tax filing software products automatically select some default disclosures. It is important that filers remain aware that there is a possibility and that these default disclosures do not apply to their particular fact pattern, all disclosures should be reviewed and considered individually. An incorrect disclosure on the corporation tax return could lead to Revenue's determining that the returns are incorrect and treating them as late until the correct returns have been filed. Care should be taken to ensure that disclosures in relation to the ILR are completed correctly.


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Capital Taxes Compliance Considerations

Introduction

For many practitioners, tax compliance has been, and will continue to be, a significant part of our daily work routine. In that role, there are a variety of issues that we need to be mindful of. This article sets out many of the pertinent matters that arise in respect of capital taxes – capital gains tax (CGT), chargeable gains for corporation tax purposes and capital acquisitions tax (CAT). The article covers compliance-related issues in respect of capital taxes for both individuals and corporate entities.

Capital Gains Tax

The fundamental rules for CGT, whether for an individual or a company, stem from the same pieces of legislation. It is therefore useful to review the basic rules that can be relevant when looking at CGT issues.

Section 542 TCA 1997 sets out the rules for determining the time at which an acquisition and a disposal of an asset take place. The time of disposal and acquisition is normally the date of contract, subject to certain exceptions, i.e. conditional contracts.

Section 552 TCA 1997 sets out the basic rules for determining the expenditure to be allowed in computing chargeable gains. As can be seen in Tax Appeals Commission determination 30TACD2022, taxpayers may consider some expenses to be allowable, but it is important that we, as practitioners, have a full understanding of the expenses that are deductible for tax purposes.

Under s532 TCA 1997 any currency other than euro is an asset for the purposes of CGT. Consequently, an allowable loss or chargeable gain can arise on the buying and selling of foreign currency otherwise than in the course of a trade.

Section 580 TCA 1997 applies the FIFO (first in, first out) rules for share histories. It is also important to remember that the single exception to FIFO is where the disposal occurs within four weeks of acquisition, in which case s581 TCA 1997 rules come into account. Losses arising on shares bought and sold in a four-week period cannot be offset against other gains, and a loss can be deducted only from a gain made on a subsequent disposal of the same class of shares acquired within the four weeks.

It is important to note that the UK's HMRC does not use FIFO rules for shares but uses average costs. It is good practice to always go back to a UK stockbroker and get the actual transaction report showing the various acquisitions and disposals to be able to prepare the Irish CGT calculation under our FIFO rules.

Rates of CGT/tax on chargeable gains

The general rate of CGT for the majority of gains (for both individuals and corporates) is 33%. However, there are other rates for specific types of gains:

- 40% for gains from foreign life policies and foreign investment products,
- 15% for gains from venture capital funds for individuals and partnerships,
- 12.5% for gains from venture capital funds for companies and
- 10% for certain gains to which entrepreneur relief may apply.

CG50 clearance

Certain disposals require a CGT clearance certificate (CG50A) to be in place on certain Irish assets before a disposal, otherwise the purchaser must withhold 15% of the consideration and pay the amount withheld to Revenue. A CG50A is required for a sale exceeding €500,000 for commercial assets or €1m for residential property.

Application for the CG50A through Revenue Online Service (ROS) requires a number of documents to be submitted in various CG50A scenarios, including:

- the signed contracts,
- a CGT computation,
- a letter of undertaking to pay the CGT if not yet paid.

If the contract has not been signed, then the unsigned contract, plus a letter of undertaking to furnish a signed contract when actioned, is required. (See Revenue's Tax and Duty Manual (TDM) Part 42-03-01a "eCG50 – Guide for Applicants".).

CGT clearance for non-resident vendor

Sections 1034 and 1043 TCA 1997 provide that a CGT liability incurred by a non-resident vendor may be imposed on a representative of the non-resident vendor if the vendor does not pay the tax liability themselves. An example of a representative would be a tax agent or legal agent.

Practitioners should note that a new online process has been established to manage the clearance applications. The application is now completed through MyEnquiries by the representative. Revenue issued a manual in October 2022 (TDM Part 45-01-05, "Requests for Clearance – Capital Gains Tax and Non-Resident Vendors") setting out the details, including the documentation required.

If Revenue does not respond within 35 working days of the application, the representative may distribute the sales proceeds to the non-resident vendor. The applicant is not required to wait for any specific written confirmation from Revenue after the 35 days have lapsed. Revenue may write to the applicant within the 35-day limit to advise that a more detailed review or intervention will be carried out by it. In such cases, further information may be required from the applicant, and the applicant should not distribute the proceeds to the non-resident vendor.

It is worth pointing out that with the minimum 35 working-day timeframe involved, a PPS number for the non-resident vendor should be applied for sooner rather than later to avoid a longer time elapsing between the representative's receiving the proceeds and the point where the proceeds may be distributed to the vendor.

Capital losses incurred

Capital losses in respect of individuals

Section 31 TCA 1997 notes the order in which CGT shall be charged on the total amount of chargeable gains, after deducting any allowable losses accruing to that person in that year of assessment. Losses carried forward may then be utilised.

It is important that current-year losses are included and claimed in the current year. Where allowable losses may not be deducted from any chargeable gains in the year, they may be carried forward to the following year. Capital losses generally cannot be carried back to a prior year. It is vital that the losses forward are noted on the return to ensure that they are not missed if a chargeable gain arises in the future.

Under s1028(3) and s1031M(4) TCA 1997 married couples and civil partners who are living together can transfer their losses to each other: if one spouse/partner has a loss that they cannot use, it can be utilised against gains of the other spouse/partner. Although this can be very useful, care is needed, as it is automatic for jointly assessed couples and the use of the loss can limit the benefit for claiming relief such as entrepreneur relief depending on the timing.

Special provisions for capital losses after a death

Capital losses can only be carried forward to be utilised against future gains if/when they arise; however, losses incurred in the year of death that are not fully utilised against gains in that year can be carried back and offset against any gains of the previous three years under s573 TCA 1997.

Negligible-value claim

Section 538 TCA 1997 provides for the occasion of the complete destruction or extinction of an asset. A negligible-value claim arises when the value of an asset has become negligible, and it is treated as if it has been sold and immediately reacquired at the current specified value, i.e. reduced or possibly nil value.

Revenue in its Tax and Duty Manual Part 19-01-09 notes that, on a strict interpretation, a loss arising on a deemed disposal under s538(2) TCA 1997 is allowable only in the year of claim. However, it notes that, in practice, a claim made within 12 months of the end of the year of assessment or accounting period for which relief is sought will be admitted, provided that the asset was of negligible value in the year of assessment or accounting period concerned.

It is important to remember that for a loss resulting from a negligible-value claim to be included in an individual's CGT calculations for a year, a claim must be made in writing to the Inspector of Taxes. The inclusion in a tax return is not sufficient for a claim. If the Inspector is satisfied that the value of an asset has become negligible, the loss relief claim will be allowed.

Tax relief in respect of capital losses incurred by companies

Chargeable gains and losses arising on the disposal of assets are generally calculated for companies in the same manner as for individuals.

An Irish-resident company is liable to corporation tax on chargeable gains, rather than CGT, on any disposals of assets realised, wherever those assets are situated. The general principles regarding loss relief in terms of capital losses and gains from a corporate perspective are:

- The disposal of a chargeable asset may give rise to an allowable loss rather than a gain, and the company may wish to use this loss against chargeable gains that are subject to corporation tax. Excess losses are carried forward for offset against chargeable gains of the following periods.

- It may be possible for a company to offset trading losses against chargeable gains of the company in a particular tax period as a reduction from total profits.
- An exception to this general provision is in relation to disposals of development land. Development land gains are not regarded as profits of the company, and this can impact the particular loss relief available, payment dates, indexation calculations etc. In addition, the CGT payment dates for individuals apply to companies in respect of the tax payable on development land gains. The CGT payable does not form part of a company's corporation tax liability and is excluded from the general requirements relating to payment of preliminary corporation tax by companies.

Relief for certain disposals of land or buildings

The relief for both individuals and companies from CGT where a property was acquired between 7 December 2011 and 31 December 2014 and held for at least four years and up to seven continuous years is still available under s604A TCA 1997. It is good practice for the practitioner to consider the availability of the relief before finalising a computation to ensure that it is not overlooked.

In terms of recent updates, Revenue has confirmed in its TDM Part 19-07-03A, "Relief on Disposals of Certain Land or Buildings (S.604A)", that the relief is extended to properties acquired in the UK, notwithstanding that the UK is no longer part of the EU.

CGT reliefs that are specific to individuals and not available to companies

Revised entrepreneur relief

Under s597AA TCA 1997 revised entrepreneur relief provides a CGT rate of 10% for gains on the disposal of qualifying business assets. There are a number of conditions, including that the business assets must have been held for a continuous period of three years in a qualifying business. The taxpayer must have been a director or employee of the qualifying company, where they spent no less than 50% of their time in the service of the company in a managerial or technical capacity. There is a lifetime limit of €1m since 1 January 2016 on the gains that relief can be claimed on. Any gain above €1m is taxed at the 33% CGT rate.

Principal private residence relief

Although an individual may be exempt from CGT if they dispose of a property that they occupied as their only or main residence for the entire period of ownership and meet the various other conditions, they should include details of the consideration in the CGT section of the tax return if they are a chargeable person.

Transfer of a site from a parent to a child

The transfer of land to a child to build a house on can be exempt from CGT if the conditions are met. To apply for the relief, the deemed market value of the site must be included as consideration in the CGT section of the tax return.

Farm restructuring relief

The purpose of farm restructuring is to make farms more efficient by selling, buying or exchanging parcels of land to bring them closer together. If the conditions are met to claim the relief, a farm restructuring relief claim form must be completed and the box in the CGT section of the tax return ticked.

Retirement relief

An individual who is 55 or older may qualify for retirement relief if they dispose of their business or farming assets either to a third party or within their family after determining that they and the company meet the various conditions, including period of ownership, qualifying business and working director. Panel L of the Form 11 notes that you need to enter the consideration for both s599 and s598 TCA 1997 even though relief under s598 automatically applies.

Issues specific to chargeable gains for companies

Interest charged to capital

Unlike the position for an individual, it may be possible to deduct loan interest charges in a company's computation of corporation tax on chargeable gains. This applies for interest that was not deducted as an expense under income tax and is allowable under s553 TCA 1997 where:

- a company incurs capital expenditure on the construction of a building, structure or works where that expenditure qualifies as part of the base cost, including enhancement expenditure; and
- the company charged all or part of the interest on that borrowed money up to the date of disposal to capital.

Holding-company participation exemption

Section 626B TCA 1997 provides that, in certain circumstances, gains from the disposal of shareholdings by "parent companies" are exempt from tax. There are a number of conditions and provisions that must be satisfied by the investor company and the investee company for the exemption to apply. The specific detail relating to the conditions of the relief is outside the scope of this article; however, it is worth noting that details of the exemption being claimed are required to be reported on the Form CT1 corporation tax return. These details are not contained in the CGT section of the Form CT1 but must instead be reported in the "Companies Details" section of the form. The details to be included are:

- an indication of whether the company is claiming an exemption under s626B,
- the date of the disposal,
- the amount of the gain to which the exemption applied and
- the amount of any loss incurred on an s626B transaction.

Exit tax

Sections 627–629C TCA 1997 impose an exit tax at a general rate of 12.5% (as opposed to the normal, 33%, CGT rate) on companies that cease to be Irish tax resident or that transfer assets abroad. Consideration should be given to the existence of an anti-avoidance provision that may impose a 33% exit tax rate where an exit forms part of a transaction to dispose of an asset and the purpose of the exit is to obtain the lower, 12.5%, tax rate on the gain.

In broad terms, where the exit tax provisions apply, unrealised capital gains may be taxed where companies change residence or transfer assets offshore without an actual disposal by deeming a disposal to have occurred. There are detailed provisions on the operation of the exit tax, which should be carefully reviewed where there is a change of corporate residence or a transfer of assets to an offshore jurisdiction. However, when it comes to the compliance issues regarding exit tax, we should remember that details relating to the tax should be included in the corporation tax return that is being filed by the company. Those details are to be completed in the Company Details and Capital Gains panels in the CT1 and should include:

- chargeable gain liable to 12.5% exit tax,
- chargeable gain liable to 33% exit tax and
- election for and details in relation to deferral of payment

Key Dates for Filing and Payment Requirements

Capital gains tax for individuals

For the 2022 tax year, the income tax and CGT return filing deadline is 31 October 2023. However, Revenue has announced that the deadline has been extended to 15 November 2023 provided that the taxpayer both files the 2022 tax return and pays any balance of tax through ROS. If only one action is completed, the deadline remains 31 October 2023.

Although the payment of any 2022 CGT should have occurred before now, it is important that the 2022 capital disposals and acquisitions are included in the 2022 tax return. An area that taxpayers may overlook is their acquisitions; however, an acquisition of chargeable assets – whether by purchase, gift, inheritance etc. – should be included in the return for the relevant period.

The first instalment of 2023 CGT will be due by 15 December 2023 for the period 1 January 2023 to 30 November 2023. The second payment, representing tax due on December 2023 capital gains, will be due by 31 January 2024.

Chargeable gains for companies

Details of chargeable gains for companies are included on the Form CT1 corporation tax return. The deadline for filing the return is generally the 23rd day of the ninth month after year-end. Where the company's accounting period ends on or before the 21st of a month the Form CT1 should be filed within nine months of the end of the company's accounting period. The deadline for filing a return for a company that has entered liquidation is three months after the appointment of a liquidator.

Preliminary tax considerations

For a "small company", preliminary tax (incorporating both corporation tax and tax on chargeable gains) is generally paid no later than the 23rd day of the 11th month of an accounting period, subject to specific exceptions.

For large companies, preliminary tax is payable in two instalments. The first instalment is payable within six months of the start of the accounting period but no later than the 23rd of that month. The second instalment is normally due by the 23rd day of the 11th month of the accounting period, again subject to certain exceptions. Notwithstanding that the preliminary tax payments are due before the accounting period has concluded, it is important that practitioners communicate with clients in a timely manner in terms of requesting the appropriate information – for example, management accounts and the information required to calculate a chargeable gain when basing it on an estimate of the current year's tax. This will allow for the preparation of a more accurate calculation of the preliminary tax liability and mitigates the likelihood of clients incurring an interest charge on a late payment or underpayment of tax.

Relevant tax forms

The form that should be completed and filed with Revenue depends on the category of taxpayer making the disposal:

- Form CG1: where a taxpayer is usually not chargeable but for the disposal,
- Form CT1: a company,
- Form 1: a trust or an estate,
- Form 12: employees, pension recipients and non-proprietary directors who have less than €5,000 of non-PAYE income and
- Form 11: an individual who is a "chargeable person" for the purposes of income tax self-assessment.

Capital Acquisitions Tax

As you will be aware, a beneficiary receiving a gift/inheritance may have a tax liability if thresholds are exceeded. There are three group thresholds, and it is the relationship that the beneficiary has with the disponer that determines which group threshold applies.

A beneficiary must file a self-assessment CAT IT38 return if the taxable value of the gift or inheritance exceeds 80% of the relevant group threshold. A taxpayer must include all other taxable gifts or inheritances taken from any source within the same group threshold on or after 5 December 1991. Any taxable value over the threshold will be liable to CAT, which is currently 33%.

Two important dates to keep in mind for CAT are firstly, the date of the gift or the inheritance, as this determines the group threshold that will apply to the benefit and the rate of tax. Secondly, the valuation date, which determines the date of filing and payment of any liability and is relevant to the "farmer" test for agricultural relief and the definition of "relevant business property" for business relief.

Valuation date

Section 30 CATCA 2003 sets out the rules to determine the valuation date for both gifts and inheritances. For taxable gifts the valuation date is generally the date of the gift. For inheritances it will depend on several items, and there can be different valuation dates.

Section 30(4) CATCA 2003, which is relevant to most inheritances, determines the valuation date in the case of the administration of an estate. The valuation date in these circumstances is the earliest of the following:

- the date on which a personal representative is entitled to retain assets for the benefit of a successor,
- the date on which an asset is retained or
- the date of delivery of assets, payment etc. to the successor.

Filing and payment date

Where the valuation date arises between 1 September 2022 and 31 August 2023, the pay and file deadline would be 31 October 2023; again, this can be extended to 15 November 2023 where full obligations in relation to filing and payment are completed online. There are three other payment options available for discharging CAT, as follows.

Statutory instalments

A beneficiary can opt under s54 CATCA 2003 for statutory instalments, whereby the tax is paid by a maximum of 60 equal monthly instalments in certain circumstances. The TDM CAT - Collection and Enforcement Guidelines outlines that payments by instalment can be made by a beneficiary who takes either

- an absolute interest in:
  - immoveable property,
  - agricultural property consisting of land, buildings and farm machinery or
  - relevant business property; or
- a limited interest in any property

The first payment is due and payable on 31 October immediately following the valuation date, and it is important that interest is paid with each instalment.

It is vital to be aware that if an inheritance or a gift contains both personal and real property, the instalment arrangement can apply only to the real property.

Non-statutory instalments

This is granted on a concessionary basis in exceptional circumstances, where the tax liability cannot be paid without causing excessive hardship.

Registration of the debt as a voluntary judgment mortgage

Payment of the tax may be postponed in exceptional circumstances, on a concessional basis. This may be allowed where payment of the tax would cause excessive hardship for a beneficiary, such as requiring them to sell their home to pay the tax, and where payment of instalments would not be a practical alternative. Postponing payment is subject to an agreement by the parties concerned to the registration of the debt as a voluntary judgment mortgage on the property.

It is important to remember that interest will continue to accrue on the registered amount.

CAT returns

In the case of inheritances, the Statement of Affairs (Probate) Form SA.2 is filed online, with the details of the beneficiaries, their PPS numbers and the value of the benefits.

This allows Revenue to identify who should be filing a Form IT38. Practitioners should not assume that the prior benefit noted for each beneficiary in an SA.2 is accurate or up to date. Good practice for advisers who are not completing the SA.2 but have been requested to complete all IT38s for an estate is to have the beneficiaries directly confirm their prior-benefit status.

An individual who has been informed that they are required to file an IT38 return but does not actually have a requirement to file a return in respect of the relevant 12-month period must notify Revenue that a return is not due in writing or via MyEnquiries and note the reason. Failure to deliver a return on time will result in a surcharge being automatically imposed on the computation through ROS before the return is submitted.This could result in a 5% or 10% penalty depending on how late the return is.

A paper tax return (IT38S) is allowed only in the following circumstances:

- where no relief/exemption/credit is claimed, apart from the small gift exemption;
- where the benefit taken is an absolute interest without conditions or restrictions;
- where the property included in the return was taken from only one disponer and is not part of a larger benefit or series of benefits taken by the beneficiary on the same day.

If a taxpayer has to file either a Form 11 or a Form 12, they need to tick the box that they have received a gift or an inheritance in the year. This information does not satisfy a requirement to file a Form IT38.

Similar to CGT, there are certain reliefs that require a CAT return to be filed for the relief to be claimed; the main two are outlined below.

Agricultural property relief

If a gift or inheritance consists of agricultural property situated in an EU Member State or in the UK, the market value of the gift or inheritance can be reduced by 90% for CAT purposes if certain conditions are met. This is a valuable relief that in certain circumstances can facilitate the transfer of farmland and farming property between generations. Agricultural relief could also apply to a gift or inheritance of cash where the cash is used to purchase agricultural land within two years of the date of the gift or inheritance.

Business property relief

If a gift or inheritance consists of certain business assets (including certain shares in family companies), the market value of the business assets can be reduced by 90% if certain conditions are met. This relief can facilitate the transfer of a family business to the next generation. It can also be used in conjunction with retirement relief if the conditions are met.

CAT/CGT Offset

Where the disponer is liable to CGT on the transfer of an asset by way of a gift and the beneficiary is subject to CAT on the same event, a credit for the CGT paid can be claimed against the CAT liability. A clawback of this credit may arise if the property is sold by the beneficiary within two years.

Penalties and Interest for Late Filing/Incorrect Returns for Individuals and Companies

It is important that the details to be included in the relevant tax return are not overlooked just because a CGT liability or a tax liability on chargeable gains has been discharged already, as to do so could result in late filing surcharges. Failure to submit a correct return (i.e. CAT, CGT, CT) on time may result in the following surcharges:

- 5% of the amount of tax (subject to a maximum of €12,695) where the return is submitted before the expiry of two months after the specified date and
- 10% of the amount of tax (subject to a maximum of €63,485) where the return is

not submitted within two months after the specified date.

A surcharge may be imposed for CGT and chargeable gains purposes for non-compliance with local property tax (LPT) requirements. This surcharge can result in unexpected time costs to resolve, as most agents are not automatically noted as agents for LPT.

Where tax in respect of CGT, CAT and chargeable gains is not paid by the requisite dates, interest on late payment of the tax may be imposed at a rate of 0.0219% per day – which works out at approximately 8% per annum.

Consideration should also be given to the fact that there is a four-year time limit on applying to Revenue for tax refunds if an amendment is required in respect of a previous filing.

Conclusion

The above points highlight some of the compliance issues relating to capital taxes that practitioners and taxpayers should be mindful of. With various tax deadlines and compliance requirements for the filing and payment of taxes, practitioners need to be attentive to the different dates and reporting requirements. It is essential that we have processes in place to constantly monitor the reporting, payment and filing deadlines in respect of capital taxes to ensure that we do not miss a fundamental date. Penalties and interest charges can arise for non-compliance. Please also note that the points referred to in the article are not exhaustive. As tax compliance can be quite broad in nature in terms of subject matters, other issues can arise that may be outside the scope of this article.

Summary of Key Deadlines

	Period	Due date
2022 tax return	1 January 2022 to 31 December 2022	31 October/15 November 2023
2023 CGT payment	1 January 2023 to 30 November 2023	15 December 2023
2023 CGT payment	1 December 2023 to 31 December 2023	31 January 2024
CT1 corporation tax return	Accounting year-end Example accounting y/e 31 December 2022	23rd day of the ninth month after year-end 23 September 2023
Small companies CT/chargeable gains payment*	Preliminary tax Balance of tax payable	23rd day of the 11th month in the accounting year 23rd day of the 9th month after year-end
Large companies CT/chargeable gains payment*	Preliminary tax – initial payment Preliminary tax – top-up payment Balance of tax payable	23rd day of the 6th month in the accounting year 23rd day of the 11th month in the accounting year 23rd day of the 9th month after year-end
CAT tax return and payment	1 September 2022 to 31 August 2023	31 October/15 November 2023

*General rules for CT

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The Domicile Levy: Relevance to Tax Returns 2022

Introduction

Under s150 Finance Act 2010 a new part (Part 18C, s531AA to s531AK) was introduced to the Taxes Consolidation Act 1997 (TCA 1997) to provide for the domicile levy, which applies for 2010 and subsequent years. Individuals meeting certain criteria are subject to an annual levy of €200,000. Taxpayers and practitioners need to be mindful of this levy when filing income tax returns as the circumstances in which it can apply are much broader than one might initially expect.

When the levy was introduced, in the depths of the financial crisis in 2010, it appeared from the Budget speech of the Minister for Finance at the time, Brian Lenihan, that the levy was aimed at non-Irish-resident Irish-domiciled individuals. Mr Lenihan stated on 9 December 2009: "our treatment of non-resident individuals is broadly in line with that of most OECD countries but we must ensure that every wealthy Irish domiciliary who pays little or no income tax makes a contribution to the State". It seemed reasonable, therefore, to assume that the domicile levy legislation was never intended to apply to Irish-tax-resident individuals but, rather, to a small number of wealthy Irish-domiciled individuals who were resident abroad but still retained significant ties with the Irish State, e.g. with regard to ownership of Irish property assets.

To come within the ambit of the domicile levy, an individual must fulfil all of the following conditions:

- be domiciled in the State in the tax year,
- have "worldwide income" for the tax year of more than €1m,
- have a liability to income tax in the State for the tax year of less than €200,000 and
- have Irish property with a market value in excess of €5m.

There was initially also a requirement for the person to be an Irish citizen, but this was removed from 2012.

It is notable that there is no mention of tax residence being relevant to whether the levy applies. The approach taken by Revenue in applying the domicile levy to date has, however, been to apply the levy to both resident and non-resident individuals.

I will discuss each condition separately below.

Domicile

The concept of domicile is well established and originates from general law. Your domicile is essentially the country where you intend to live permanently, and it may be different from your country of residence or nationality.

Domicile of origin is determined when an individual is born and is usually determined by the domicile of the individual's father. This will remain the person's domicile until there is sufficient evidence to suggest that he or she has moved to another country with the intention of living there permanently. This will be a question of fact. To demonstrate that a domicile of origin has been abandoned, there must be evidence of abandoning the intention of ever returning to the country of domicile of origin. When a new domicile is acquired, this is known as domicile of choice.

It can be quite difficult to prove that a person has abandoned his or her domicile of origin. The burden of proof regarding domicile changes rests with the individual claiming that a change has taken place. Some factors to consider when looking at whether a change in domicile has taken place are:

- length of residency in the country;
- quality of residence, i.e. purchase a house or occupy rented accommodation;
- presence of spouse and children;
- business interests;
- political involvement;
- education of children;
- membership of clubs;
- number of return visits to the country of domicile of origin;
- holding of passports;
- letters of wishes – i.e. outlining an individual's wishes to be buried in the new country, purchase of a grave plot in the new country, etc.; and
- disposal of all property in the country where the domicile of origin arises.

With regard to the last point, relating to the disposal of property, given that the domicile levy applies only to persons with property in Ireland valued at €5m or over, it is likely to be difficult to argue that a domicile of origin has been abandoned if property assets in excess of €5m have been retained in the State.

If an individual is to acquire a domicile of choice, he or she must also:

- establish a physical presence in the new country,
- have an intention to reside there permanently and
- actually reside there.

It has been held on occasion that even where individuals have spent many years in another country, they have retained their domicile of origin. Individuals do not cease to be domiciled in a country merely because they leave it temporarily.

Worldwide Income

"Worldwide income", in relation to an individual, means the individual's gross income without regard to any reliefs, exemptions or deductions.

However, a deduction will be allowed for payments made on foot of legally enforceable arrangements made in the State, or in any other jurisdiction, under which payments are made by an individual to another individual by virtue of the annulment or dissolution of a marriage, or a separation that is likely to be permanent, or where a civil partnership has been dissolved or a relationship between cohabitants ends. A deduction will not be allowed for payments made under maintenance arrangements where permanently separated and, in certain circumstances, divorced couples, or couples whose civil partnership has been dissolved, or where a relationship between cohabitants ends, where the parties elect to be assessed jointly for income tax purposes.

The interpretation of "worldwide income" has proved the most contentious aspect of the domicile levy legislation, with Revenue taking the view from the introduction of the levy in 2010 that "worldwide income" is income before the deduction of losses or capital allowances (either current-year or carried forward). This issue has been the subject of a number of appeals to the Tax Appeals Commission, some of which are currently ongoing. An analysis of the concepts discussed in the appeal cases is outside the scope of this article, these have been discussed in the article by JMcGovern and SJO'Brien "Recent Issues in Residence, Domicile and Double Taxation Relief" in this issue. As a response to the debate that arose on the definition of "worldwide income", s79 Finance Act 2017 introduced an amendment to the domicile levy legislation specifically to deny a deduction for capital allowances and losses forward, which suggests to this author that before this amendment it was arguable that these items were deductible in calculating worldwide income. At a minimum, the position was unclear, and this is the reason for the tax appeal cases that have been taken in relation to periods before the legislative amendment contained in s79 FA2017. Section 79 FA 2017 is effective for tax years from 2018.

Revenue eBrief No. 112/18, issued on 25 May 2018, advised of an update to Part 18C-00-01 of the Tax and Duty Manual to include a "clarification" that capital allowances or losses forward are not allowed as a deduction in computing an individual's worldwide income for the purposes of the domicile levy. The fact that the legislative amendment mentioned above was required would suggest that this was not the legislative position before that. In an update to the Revenue Technical Service Manual in July 2019 it is specifically stated in paragraph 7 (TDM Part 37-00-00a) that "taxpayers are not bound by an opinion given by Revenue or by Revenue Guidance if they can show that the approach that they adopt is in line with the legislation". It is the author's view, therefore, that there is a strong argument that losses and capital allowances were deductible before 2018, but this position has not been upheld in the tax appeal cases that have been decided to date.

The current position after Finance Act 2017 is that "worldwide income" includes all income (even income exempt from Irish tax) before deductions for capital allowances or losses. Expenses that are deductible within the meaning of s81 TCA 1997 are allowed as a deduction for the purposes of the domicile levy. Taxpayers who may have believed that they had no tax liability due to the availability of capital allowances and losses can be unpleasantly surprised to find that they may in fact subject to a domicile levy of up to €200,000.

Liability to Income Tax Less than €200,000

Irish income tax paid by an individual in a tax year can be used as a tax credit against the €200,000 levy when calculating the amount of domicile levy payable. Neither PRSI nor USC is allowable as a credit against the levy, as the view is that these taxes are not considered to be income tax.

Irish Property in Excess of €5m

Irish property refers to all property located within the State to which an individual is beneficially entitled in possession, excluding:

- shares in a company that exists for the purposes of carrying out a trade or trades and
- shares in a holding company that derives its value from subsidiaries that carry out a trade or trades.

No deduction for debts is allowed from the market value of property held personally; therefore a situation such as the property's being in negative equity would not remove the requirement to pay the domicile levy. An important point to note, however, is that if a property is held in a trading company, the relevant asset will be the shares, as opposed to the property itself, and in that instance any debt in the company will operate to reduce the overall value of the asset, i.e. the shares.

It should be noted that if property is located in the State and shares are deriving their value from that property, the shares are treated as Irish property.

The legislation contains anti-avoidance provisions that treat property that was transferred by an individual on or after 18 February 2010 for less than market value to that individual's spouse, civil partner, minor children, the minor children of the civil partner, a discretionary trust or a foundation as the transferor's property on each relevant valuation date. It is therefore not possible for taxpayers to reduce their assets below the €5m limit by transferring them to the connected parties listed above. However, the limit applies on a per individual basis, so it is possible for a husband and wife to have €5m each in assets, as long as the transfers mentioned above were not effected to achieve this.

It would be advisable to keep independent property valuations on file at the valuation date, particularly where a view is taken that the domicile levy does not apply due to the asset limit not being exceeded.

Compliance Requirements

The domicile levy must be paid via self-assessment on or before 31 October in the year after the valuation date (subject to extension to match the pay and file deadline for income tax when the tax is paid and filed through ROS). The valuation date is a point-in time-test and is set at 31 December each year.

If taxpayers cannot access ROS, they can download the return, Form DL1, and:

- post the completed form to the Collector-General and
- pay through myAccount if they are a PAYE worker or by electronic funds transfer (EFT) if they are non-resident.

Failure to pay the levy, or failure to pay it on time, can result in enforced collection through the sheriff, court proceedings or attachment. Interest will be charged on outstanding domicile levy at the rate of 0.0219% per day or part of a day. Penalties may also apply.

Conclusion

The number of taxpayers who have been subject to the domicile levy has been relatively low. However, the domicile levy is broader in application than one might expect. It is not applicable solely to the wealthy non-resident Irish-domiciled individual but may also apply to the more unsuspecting Irish-tax-resident individual. Taxpayers, in particular those who have losses and capital allowances available to shelter their taxable income, should be cognisant of the domicile levy as they may find themselves unexpectedly falling within the parameters for the levy to apply. If the domicile levy applies, the taxpayer may be dismayed to discover that whereas they had assumed that their income tax liability would be sheltered by their losses or capital allowances, these items will be ignored for the purposes of the domicile levy, resulting in an unexpected tax liability of up to €200,000.

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Tax-Compliant Capital Allowance Claims for Property Investors

Introduction

In the context of repeated calls from property investors for the introduction of new tax incentives, this article looks at capital allowances for plant and machinery fixtures attached to investment property. This existing incentive could provide landlords with considerable tax relief, yet these claims are often not made at all, leaving many investors unnecessarily overpaying tax. This article investigates what is involved in making these claims for investment property and the reasons why such claims are often not made at all.

Overview

Different types of property tax incentives can be available to landlords, depending on their situation; however, we are focusing on wear-and-tear allowances, as this relief applies to almost all taxpaying property investors and many landlords are currently not claiming anything near their full entitlement.

Wear-and-tear allowances are available only for expenditure on plant and machinery. Qualifying items can be not only qualifying chattels (i.e. moveable assets) but also certain fixtures that are attached to buildings and that have been found to qualify under case law precedent. Below we look into the different ways in which this relief can be claimed by property investors.

Capital Allowances Claims for Chattels/Moveable Assets

Claims for moveable property (chattels) are commonplace even though they represent only a small fraction of the value of claims for plant and machinery fixtures attached to investment property. Preparing a claim for chattels can be relatively straightforward, and the process typically involves the following steps:

- Investigate whether the claimant satisfies the entitlement conditions as set out in legislation.[1]
- Consider case law precedent to determine whether assets will qualify.
- Analyse accounting records and associated back-up information to determine the qualifying expenditure.

Chattels claims are made routinely, sometimes leading to an assumption that this constitutes a property investor's full entitlement. However, these claims are only the tip of the iceberg of the true entitlement for property investors who have purchased investment property or have carried out construction works. We explore these claims below in detail.

Why Do Landlords Underclaim Capital Allowances on Property Fixtures?

Claims for plant and machinery fixtures can be made for a proportion of the purchase price paid for an investment property or for a proportion of construction expenditure where property developments, extensions or renovations are carried out (subject to entitlement and substantiation of such claims).

One reason why claims are often not made is a lack of awareness that they can be made. It is not widely understood that the purchase price paid for an existing property could include expenditure relating to qualifying plant and machinery fixtures or that, hidden within a building contract for construction works, a large proportion of the expenditure could potentially qualify. Other reasons include the complexity of the legislation and case law, the potential level of tax relief arising out of such claims, the volume of work involved in identifying qualifying expenditure, and the specialist skillset required to prepare robust and tax-compliant claims.

Where entitlement conditions can be satisfied in accordance with legislation, a detailed knowledge of the relevant case law[2] is required to determine whether certain items will qualify in specific circumstances. This requires an in-depth knowledge of 150 years of relevant case law precedent, which presents many

1 The basic conditions of s284 TCA 1997 apply to all claims, and the conditions of s298 TCA 1997 also apply where Case V rental income is received. The main conditions, which provide a starting point for establishing entitlement, are outlined below. Depending on the case, other conditions will also apply (and other sections of legislation).

Section 284 requires that all claims satisfy the following basic conditions:

- The claimant incurs capital expenditure on plant and machinery (P&M).
- The P&M belongs to the claimant.
- The P&M is used wholly and exclusively for a trade or profession.
- The P&M is in use at the end of the basis period.

Section 298 of TCA 1997 imposes a 24-month time limit in which to make a claim and also requires that the burden of wear and tear of the P&M falls on the lessor/property investor and not the lessee/tenant. The facts of each situation should be considered on a case-by-case basis, together with relevant case law, to make this determination. See *Lupton v Cadogan Gardens* [1971] 47 TC 1 and *MacSaga Investment Co Ltd v Lupton* [1967] 44 TC 659 for further guidance on the burden of wear and tear.

2 Where specific case law precedent addresses the eligibility of certain items of plant, such cases should be referred to and applied where relevant. Where items/installations have not been considered under case law precedent, there are a number of tests that can provide guidance on the qualifying nature of certain items. These tests arise out of case law and should be considered in the context of each situation and the legal case to which they relate:

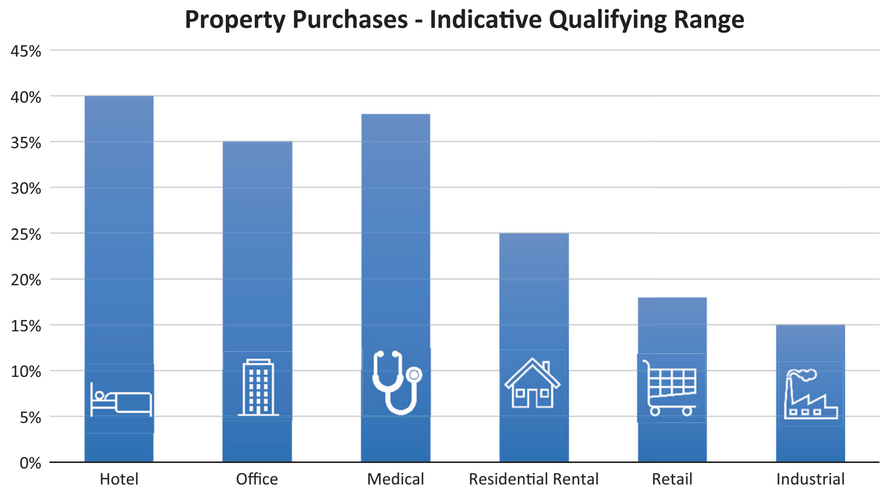
- The premises test – *Wimpy v Warland* [1988] 61 TC 51.
- The function test – *Jarrold v John Good & Sons Ltd* [1962] 40 TC 681.
- The business use test – *Wimpy v Warland* [1988] 61 TC 51 and *J Lyons & Co. Ltd v AG* [1944] Ch. 281.
- The completeness test – *Cole Brothers Ltd v Phillips* [1982] 55 TC 188.
- The setting test – *J Lyons & Co. Ltd v AG* [1944] Ch. 281.

contradictions and no fixed pattern that can be followed to identify qualifying installations. The nature of each item in question must be considered in the context of the building type, the trade carried on, how it is used and its function, as well as other factors identified under case law.

Typical Claim Values

Claim values unfortunately do not follow a set pattern and can vary wildly depending on the circumstances. Consideration of entitlement issues is the most important factor, while the level of expenditure incurred, the property type and specification, the trade carried on, and even the property location also affect the outcome.

The graph below provides an indication of the likely ranges that could apply for different types of property purchases where entitlement exists, and a detailed analysis is undertaken. Depending on a taxpayer's particular circumstances, claim values can range from nil up to or above the percentages mentioned below.



Claims for construction works tend to be higher than the figures shown above, with fit-out and refurbishment projects typically leading to the highest proportion of relief with up to 90% of the project expenditure qualifying in certain cases.

For hotel and industrial projects, the above ranges do not include industrial building allowances, which may also be available, subject to entitlement.

The figures mentioned are indicative only and it is recommended that any claim made for property fixtures should thoroughly investigate entitlement thoroughly and should have comprehensive substantiation to justify it.

Capital Allowances Claims for Construction Works

Where a building contract is in place to carry out construction works such as a commercial property renovation or a development, a review of the available accounting information associated with the project will show only the payments made to the contractor for the works carried out, detailing no obvious qualifying expenditure. Such costs are therefore often treated as non-qualifying. With knowledge of the construction procurement process, however, and through the analysis of relevant construction documentation, trapped expenditure relating to qualifying plant and machinery fixtures can be revealed, and these qualifying costs typically amount to a large proportion of the total project cost.

Some tax advisers may find the capital allowances analysis of construction works to be outside their normal scope of work. This is because the construction documentation that needs to be analysed tends to use construction-industry-specific terminology, costings and methodology; therefore, without expertise from construction professionals, the accurate identification and allocation of qualifying expenditure can prove challenging.

It is important to ensure that detailed information is collated and analysed in detail to justify any capital allowances claim for fixtures and that entitlement is satisfied in line with relevant legislation and case law precedent.

The process involved in the analysis of a construction project depends on applicable tax incentives that could be relevant and the timing of the involvement of the adviser. Such claims can be prepared retrospectively, however early involvement can improve the outcome and help to make claims more robust. Below are some high-level steps that could be followed to prepare a successful claim:

1. Pre-contract stage advice – recommendations can be provided on the ideal format of construction documentation to ensure substantiation. Also, advice can be provided on the specification of qualifying over non-qualifying installations.
2. Due diligence - undertaken to establish relevant entitlement parameters under the appliable legislation.
3. Collation of detailed construction and accounting information.
4. Property surveys undertaken at relevant stages of the works for claim justification purposes.
5. Detailed analysis undertaken of construction, accounting, and other relevant information.
6. Entitlement restrictions/parameters considered and incorporated into the claim. Plant and machinery legislation and case law knowledge applied to accurately identify expenditure qualifying for capital allowances.
7. Claim substantiation could be compiled in a report format addressing the steps listed above.
8. The taxpayer makes the capital allowances claim in their tax return once the claim is finalised.

Capital Allowances Claims for Property Purchases

What is involved?

Where an existing property is purchased and qualifying items of plant and machinery are already attached to the building, it may be possible to make a capital allowances claim for a considerable proportion of the property purchase price.

Section 311 TCA 1997 enables relevant taxpayers to make a post-purchase "just apportionment" of the property purchase price to quantify the expenditure qualifying for capital allowances. This process involves isolating the proportion of the property's purchase price attributable to plant and machinery fixtures. Such claims, however, are not readily made by property investors despite the opportunity that they present for compliant and valuable tax relief for reasons explained earlier.

In Part 9 of its "Notes for Guidance – Taxes Consolidation Act 1997" it states that to claim capital allowances on a proportion of a property purchase, "there must be a just apportionment of the sale price" to identify the expenditure on qualifying fixtures attached to the building. It is worth noting, however, that neither legislation nor guidance provides any indication of a recommended methodology for calculating a just apportionment claim. It is therefore up to the taxpayer to ensure that a just apportionment can be supported, for example this could be having a professional valuation and or other supporting documentation of calculations

The process for preparing a *just apportionment* claim could involve the following suggested steps:

1. Legal, property and accounting documentation collated, relating to the property and the acquisition.
2. Entitlement investigated – due diligence undertaken to establish entitlement to claim under Irish tax legislation. Relevant entitlement parameters should be identified and applied to the claim.
3. Detailed property survey undertaken - to document relevant details required to prepare a robust claim.
4. A *just apportionment* calculation is carried out in accordance with legislation. Depending on the circumstances, this could involve the following:
    a. Reconstruction cost estimate for the building undertaken (including plant and machinery fixtures) by a chartered taxation surveyor. Alternatively, where original construction cost documentation is available this should be relied upon and analysed.
    b. Bare site land valuation undertaken by a chartered taxation surveyor.
    c. A suitable apportionment methodology adopted to establish a *just apportionment* claim.
5. The *just apportionment* claim documentation and analysis should be retained for substantiation and the claim should be submitted in the claimant's tax return.

Purchase claims can be made for investment property purchases of almost any scale. While the benefits for multi-million euro transactions are obvious, property investments of €250,000 or more are often considerable enough to warrant investigation. It should be noted however that regardless of the purchase consideration, a similar level of substantiation is required to justify a claim.

Tax compliance for purchase claims

To ensure that the claim is tax compliant, it is important to make sure that any valuation constitutes a reasonable and robust allocation of the purchase price to plant and machinery fixtures. A valuation of plant and machinery fixtures in isolation would not provide a reasonable basis to make a robust claim because in certain economic situations where property prices are distressed or inflated, a valuation of plant and machinery in isolation could lead to an unrealistic proportion of the purchase price being attributed to such fixtures. This approach would also not apportion sufficient consideration to the relative value of other elements relating to the property purchase, namely, the land and the building structure that were also acquired as part of the purchase.

A more reasonable approach would be to allocate a proportion of the purchase price to each of these three elements. This process could involve obtaining robust valuations for each of the three elements and apportioning them to the purchase price paid. Taking this approach could provide a reliable allocation of the purchase price to these three elements, with only the proportion relating to plant and machinery fixtures qualifying for capital allowances.

This approach could be viewed as reasonable in many situations; however, depending on the facts of each particular case, other methodologies may be more appropriate. The methodology adopted should always be considered carefully in light of the facts of each different scenario.

Tax advisers who recognise an opportunity to claim capital allowances for a property purchase may have a challenge when it comes to valuing land, building structures, and the plant and machinery fixtures attached to buildings. This is where the expertise of a Chartered Surveyor could be useful.

Chartered Surveyors with the special designation of *Chartered Taxation Surveyor* are qualified to prepare these elements of a capital allowances valuation and are experienced in preparing just apportionment claims for property purchases, helping to ensure that such claims are prepared in a tax-compliant manner.

Conclusion

If property investors avail of this existing tax relief, they may find that the incentives they desperately seek are already in place. Highlighting this long-standing relief could also help with the property crisis in Ireland by incentivising property investors to develop new rental properties and refurbish currently vacant buildings.

Although there is potentially valuable tax relief available to property investors where claims for plant and machinery fixtures are possible, ensuring that such claims are prepared with sufficient substantiation and in a tax-compliant manner is key. The relevant legislation and case law, Revenue guidance and the professional expertise required to prepare tax-compliant claims should be carefully considered before making any claim.

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Irish Transfer Pricing Requirements Refresher

Recent Changes to Irish Transfer Pricing Legislation

Transfer pricing (TP) legislation in Ireland has been on the statute books for over a decade; however, a significant overhaul was needed to apply the arm's-length principle. The main changes were initially brought in by s27 of Finance Act 2019, which substantially expanded and updated the TP legislation by introducing a new Part 35A to the Taxes Consolidation Act 1997 (TCA 1997). The most significant change that this introduced was to create a requirement for businesses with a presence in Ireland (subject to certain conditions) to prepare TP documentation. This obligation applies to chargeable periods commencing on or after 1 January 2020.

Subsequently, Finance Act 2021 further updated the TP rules by introducing a new s835E TCA 1997, which provides for the application of a domestic exclusion from TP rules, again provided certain conditions are satisfied. In addition, Finance Act 2022 amended the definition of "transfer pricing guidelines" in s835D TCA 1997 to refer to the updated Transfer Pricing Guidelines published by the OECD in January 2022,[1] building on the previous version issued in 2017. This latest definition applies to chargeable periods commencing on or after 1 January 2023.

In line with the above legislative changes, Revenue released guidance in Tax and Duty Manual (TDM) Part 35A-01-01, which provides greater detail on Revenue's view of the application of the updated TP legislation. This guidance was also updated, in December 2022, to reflect the amendments to the TP rules introduced by Finance Acts 2021 and 2022. The TDM provides greater clarity on the operation of the revised domestic exemption, including examples to demonstrate how the exemption might apply in common arrangements, e.g. interest-free loans, holding company structures and rental transactions. Furthermore, the TDM was amended to update references to the 2022 version of the OECD Transfer Pricing Guidelines, as well as to reflect the Code of Practice for Revenue Compliance Interventions, which came into effect on 1 May 2022.

Expanded Scope

In addition to creating documentation requirements, the new rules have considerably broadened the scope of Irish TP legislation to bring in non-trading transactions, capital transactions (exceeding a market value of €25m) and previously grandfathered transactions. Financial transactions are also covered by the new rules. Under these new financial transaction rules, taxpayers are required to test the arm's-length nature not just of the rate of interest charged on debt – which should be subject to full TP analysis – but also of the quantum of debt between associated persons (i.e. debt capacity and serviceability), for debts that are in place from 1 January 2020.

This is a major technical and practical change that adds to the complexity of tax compliance for groups, particularly given the rise of Dublin as a financial centre over the past few decades and the rate of foreign direct investment into Ireland generally.

Documentation

As mentioned above, arguably, the key feature of the revised TP regime is the enhanced TP documentation requirements. An Irish corporate taxpayer is required to demonstrate compliance with the revised TP legislation, in line with the best-practice recommendations in the OECD BEPS Action 13. If taxpayers' annual global consolidated turnover exceeds certain thresholds, they must prepare a master file and/or a local file in accordance with Annex I and Annex II to Chapter V of the 2022 OECD Guidelines.

To ensure that the TP documentation requirements are proportionate in Ireland, the documentation obligations apply only where a group's global annual turnover exceeds one or both of two thresholds, namely, €250m per annum in the case of the master file and €50m in the case of the local file. It should be noted that each threshold test should be applied on a global consolidated group basis, regardless of the level of turnover of the Irish entity or entities. The legislation requires that, if required, documentation should be in place no later than the date on which a return for the chargeable period in question is due to be filed.

The documentation must be sufficiently robust and detailed to demonstrate compliance with the TP rules, and the level of detail required will depend on the facts and circumstances of the arrangement. The OECD Guidelines provide detailed guidance on what elements need to be included in the master and local files.

The master file essentially provides a high-level overview of the business operations and policies at the group level. Although it identifies the more significant intragroup transactions, it does so from a centralised group perspective, rather than including any detailed analysis of the transactions themselves or the TP policies that might apply to them. The information

1 OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022* (Paris: OECD Publishing, 2022), https://doi.org/10.1787/0e655865-en.

that should be contained in the master file includes the nature of the group's global operations, including the allocation of income and the location and nature of any significant economic activities.

By contrast, the local file provides far more detailed information at the level of the individual entity. For Irish taxpayers, this file is specific to the Irish operations, setting out details of all transactions – trading and non-trading – with other entities in the group, whether in Ireland or in other territories; the amounts (quantum and prices) involved in those transactions; and the company's analysis of the TP methodology that it has used to identify an arm's-length range for pricing those transactions.

Importantly, the local file must contain sufficient detail showing how the TP policy was actually applied in each period, including a reconciliation with the financial results recorded on the company's income statement, and explaining how the actual consideration payable or receivable on each arrangement complies with the arm's-length standard.

Although these elements are universal requirements, the level of detail that needs to be included in each local file will depend on the facts and circumstances of each entity, to ensure that the obligation is not disproportionately onerous.

As an alternative to preparing an individual local file for each Irish entity in a particular group, groups may opt to prepare a single, consolidated "country file" for all of the group's Irish entities. This overarching document needs to contain the same content required for a single country file. It is very important that entity-level qualitative and financial information is easily identifiable within the country file. If the financial information is left in a consolidated format in the country file, the companies covered by the document will not be treated as having complied with their TP documentation obligations.

Frequency

Revenue guidance provides that TP documentation must be up to date and contemporaneous and must be reviewed regularly to determine whether the pricing remains arm's-length and to ensure that the TP documentation adequately demonstrates this.

Information showing how the TP policy was actually applied in each period should be updated annually, including a reconciliation back to the accounts. To the extent that other facts and circumstances have not changed significantly, the content of the TP documentation can be carried forward from one year to the next and updated at less frequent intervals.

In addition, Revenue guidance makes it clear that if benchmarking analysis has been included in TP documentation, it also needs to be reasonably contemporaneous, but if there are no material changes to the economic circumstances surrounding the specific transaction and the analysis continues to be relevant to the particular facts and circumstances of the arrangement, then a taxpayer can rely on it for multiple periods.

In general, Revenue will normally expect a full benchmarking study to be carried out every three years and the financials of the accepted comparables to be updated or refreshed on an annual basis. The benchmarking does not necessarily have to be based on Irish comparables alone – pan-European comparables may be acceptable, depending on the facts and circumstances. However, if there are specific local factors that clearly differentiate the tested party's geographic market, they should be factored into the benchmarking analysis, where possible.

Penalties

To promote compliance, Revenue has also introduced a penalty regime for TP documentation. As set out above, TP documentation should be prepared no later than the filing date of the relevant tax return. In addition, it must be made available to Revenue within 30 days of a written request to do so. Where a taxpayer fails to comply with the written request within 30 days, a fixed penalty of €4,000 will apply. Where the taxpayer is required to prepare a local file, the fixed penalty is increased from €4,000 to €25,000 plus €100 for each day on which the failure continues. This increased fixed penalty applies where the relevant person has failed to provide any required TP documentation; it is not limited to a failure to provide the local file.

Protection from tax-geared penalties, for behaviour categorised as "careless", will apply where a taxpayer has prepared appropriate TP documentation on time and then provides it to Revenue within the 30-day period when requested and the documentation demonstrates that reasonable efforts have been made to comply with Part 35A TCA 1997.

Branches

Taxpayers with Irish branches should be aware that Finance Act 2021 extended the scope of Irish TP rules to branches through the introduction of the "authorised OECD approach" (AOA). This brings Irish branches within the TP requirements in the same way that it applies to registered corporate subsidiaries.

However, taxpayers with Irish branches should take note that there are enhanced mandatory documentation requirements for Irish branches and significant penalties for non-compliance. These differ from the requirements for companies, and care should be taken to ensure that appropriate documentation is prepared and retained annually.

The documentation required to be prepared for branches are referred to as "relevant branch records". These include:

- A description of the non-resident company of which the branch forms a part, and of its business, structure, strategy and competitors.
- A description of the branch itself, and of its business, structure, strategy and competitors.
- A functional and factual analysis which enables the relevant transactions and entities to be characterised and to determine the appropriate attribution of assets, risks and free capital to the branch.
- Calculations supporting the attribution of free capital to the branch.
- Accounting records and contemporaneous documentation which evidence the dealings between the branch and the rest of the company.
- Information on the TP method used by the company for transactions with other parts of the company; and why the method was selected.
- Details of the tested party, where applicable, and why that party was chosen.
- Details of any comparable uncontrolled transactions (internal or external) or other financial data for independent enterprises used to attribute profits to the branch – including any benchmarking searches used.
- For each transaction between the branch and other parts of the company, information and allocation schedules showing how the TP method has been used to attribute income to the branch.

SMEs

Small and medium enterprises (SMEs) are currently excluded from the scope of Irish TP rules. Provision has been made in Finance Act 2019 to allow SMEs to be brought within the scope on the making of a Commencement Order by the Minister for Finance. Depending on their size, SMEs either will be fully exempt from or will have significantly reduced TP documentation requirements. Good practice, however, is to consider pricing of cross-border transactions for SMEs and to ensure that it is in line with the arm's-length principle, even if there are no current documentation requirements.

New Corporation Tax Return Form (CT1)

Data on the TP documentation requirements are collated by Revenue through the Form CT1, which includes a TP section. The new mandatory questions added since 2020 are:

- Does the company qualify for the SME exemption under section 835EA, tick the box: Yes / No.
- Is the company required to prepare a Local File, tick the box: Yes / No.
- Is the company required to prepare a Master File, tick the box: Yes / No.

A further new question was added to the 2022 return to facilitate work related to the global minimum effective tax, to allow the identification and monitoring of the relevant case base, and for reporting purposes. The new question was:

- Is the company part of a multinational group which is required, whether in Ireland or elsewhere, to file a country-by-country report, tick the box: Yes/No.

The information collected from the above questions will assist Revenue in determining penalties for non-compliance and in risk-assessing groups and identifying those to be selected for TP audit.

Audit Interventions

The TP guidance TDM expands on Revenue's approach to monitoring compliance with the revised TP regime. In particular, the guidance outlines a two-pronged approach to compliance: first, through a Transfer Pricing Compliance Review (TPCR) programme and, second, through a transfer pricing audit programme.

A TPCR is a self-review carried out by the company or group of its compliance with the TP rules and its application of the arm's-length principle in relation to intragroup transactions. A TPCR gives the relevant company or group the opportunity to review its own TP compliance and to provide Revenue with an assessment of that compliance. A TPCR also results in Revenue's receiving important additional information – such as data on a particular group's business structure, intragroup transactions and the TP methodologies used – which will assist Revenue with its risk-assessment programme and, also, improve its understanding of the approaches taken by businesses in applying the TP regulations.

To be clear, TPCRs are not Revenue audits, nor are they Revenue investigations – the opportunity to make an "unprompted qualifying disclosure" will still be available to the company or group if the self-assessment reveals any shortfalls in the profits declared for tax.

In respect of the TP audit programme, for chargeable periods commencing on or after 1 January 2020, compliance enquiries into TP may be initiated and carried out by a Revenue Officer, as opposed to an "authorised officer", which was a requirement in respect of chargeable periods commencing before 1 January 2020. The clarification suggests that local districts may now have the ability to raise queries on and compliance interventions into TP matters, as opposed to such actions' being limited to "authorised officers", i.e. the Revenue Transfer Pricing Audit Branch.

Taxpayers should expect to receive an increasing number of TP queries in the near future in light of the above change. The ability to respond to queries in a timely and correct manner will, therefore, continue to be of crucial importance as companies and individuals navigate the revised TP regime in Ireland.

Key Takeaways

This article highlights the expansion of the scope and intragroup transactions to which the Irish TP regulations apply; non-trading transactions and financial transactions, as well as trading transactions, are now within scope. Taxpayers and advisers need to ensure that an appropriate TP approach has been taken to any such transactions and be able to demonstrate that the approach leads to the transactions' being priced within an arm's-length range.

Arguably, the most notable change is that the Irish TP documentation requirements have been significantly enhanced and expanded. The fact that they are also backed up by penalties for non-compliance demonstrates Revenue's seriousness in applying the arm's-length principle in Ireland. As a result, it is important that taxpayers are aware of and act in accordance with the new obligations.

As with any new tax development, early engagement is critical. Irish TP will continue to be a key focus area for Revenue. It is imperative that taxpayers continuously assess the potential implications of these new rules for their business – particularly, after changes to that business such as mergers, demergers and acquisitions – to ensure compliance with the new TP regime. In particular, taxpayers should consider undertaking TP "health checks" to identify potential issues and appropriate solutions to minimise any future disruption, which would be caused by a full TP audit.


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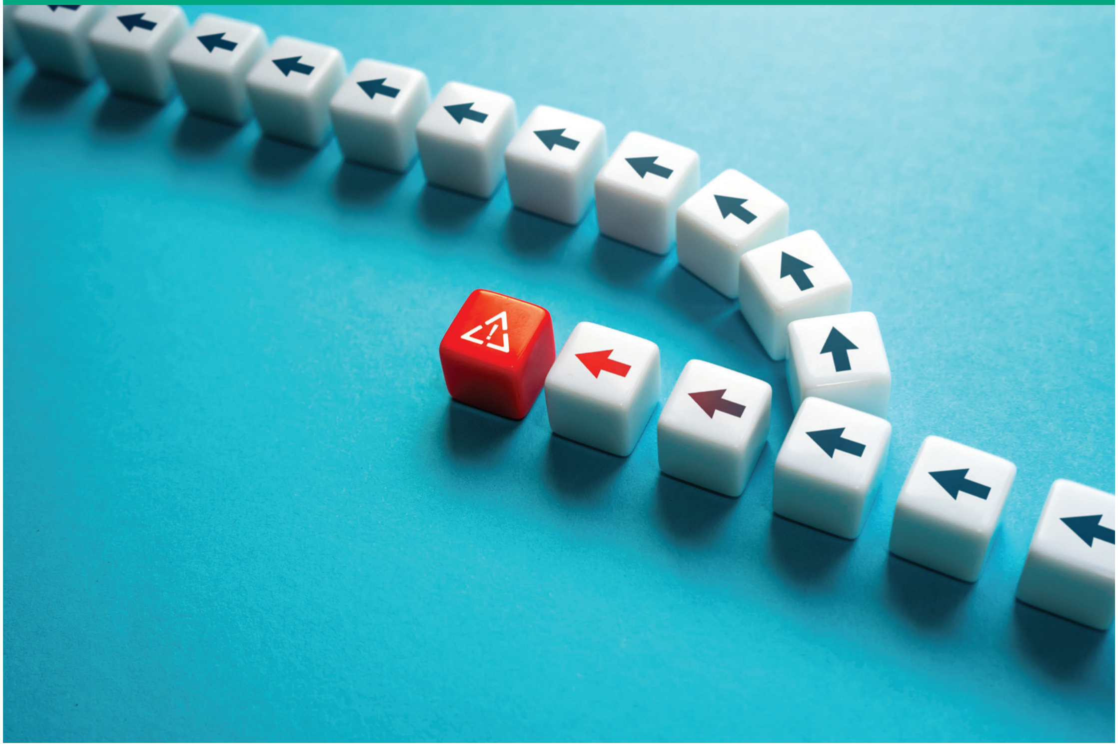
Section 135(3A) TCA 1997: Common Traps and Pitfalls To Be Aware of



Introduction

The purpose of this short article is to attempt to bring the complex provisions contained in s135(3A) of the Taxes Consolidation Act 1997 (TCA 1997) to life from a practical perspective. This relatively concise piece of law, introduced as part of Finance Act 2017, has very far-reaching implications for taxpayers and tax practitioners.

There are various provisions in tax law that aim to convert what is, on the face of it, an income transaction to a capital event and what is, on the face of it, a capital transaction to an income event. Two of the main provisions in the armoury of the Exchequer are s817 and s591A TCA 1997. Section 817 TCA, 1997 is a provision applying to members of close companies that converts capital disposals within its remit to income distributions.

This law was introduced by Finance Act 1989 Essentially, this law (applying to close companies) treats the proceeds of a capital disposal by a shareholder in a close company as an income distribution under Schedule F where the shareholding of that shareholder (and the concept of shareholder is broadened to include certain connected persons) is not significantly reduced after the transaction.

In more recent times s591A TCA 1997 (“affectionately” known as the “abnormal dividend” rules) was introduced, as part of Finance Act 2008. In brief, this law looks to do the exact opposite of s817. It treats certain dividends (which are regarded as “abnormal”) as capital events and within the charge to Irish capital gains tax (CGT).

Section 817 applies to close companies only; s591A applies whether close or not.

An important point is that both of these pieces of tax law have a legislative “bona fide commercial reasons” exclusion provision to protect genuine commercial transactions. As both pieces of law have such far-reaching tenticles, there is a legislative carve-out in s591A(3) where the transaction “is not, nor does it form part of, any scheme, arrangement or understanding of which the main purpose or one of the main purposes is avoidance of liability to tax”, with similar relief afforded by s817(7).

This leads us to s135(3A) TCA 1997, which was introduced by Finance Act 2017 and works to treat capital transactions as income distributions. There is, however, no “bona fide” legislative protection; but more on that later.

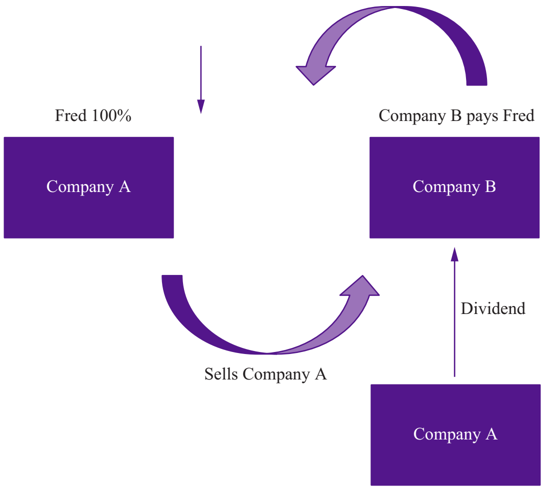
Section 135(3A) TCA 1997

The law provides that:

> *“Where a member of a company (being a close company within the meaning of section 430 and in this subsection referred to as the ‘first mentioned company’), or a person connected with that member, enters into **arrangements** directly or indirectly with another company (being a close company within the meaning of section 430 and in this subsection referred to as the ‘second-mentioned company’), whereby a member (in this subsection referred to as the ‘disposing member’) of the first-mentioned company disposes of an interest in shares or securities of the first-mentioned company and the consideration for the acquisition of those shares or securities is paid or to be paid directly or indirectly **out of the assets** of the first-mentioned company, any amount received directly or indirectly by the disposing member from the second-mentioned company in respect of the disposal shall be treated for the purposes of this Chapter as a distribution made by the first-mentioned company to that member at the time of the payment by the second-mentioned company, and this subsection shall apply however many companies participate in the arrangements* [emphasis added].”

A bit of a tongue-twister, one might conclude – with references to first-mentioned and second-mentioned companies. However, at a simple level what this law provides is that:

- You have a member (say, Fred) of a close company (Company A).
- Fred sells shares in Company A to another close company (Company B).
- Company B partially funds the purchase price payable to Fred “out of assets” of Company A.
- There is an arrangement in place in that Fred is aware of the funding process.
- The payment made is treated as an income distribution, and income tax treatment therefore applies.
- Fred is liable to income tax on the prima facie capital receipt.



For the law to apply, there has to be an "arrangement". The *Oxford English Dictionary* defines "arrangement" as "a plan or preparation that you make so that something can happen".

Committee Stage Dáil Comments

It is worth reflecting on the Oireachtas exchanges when this law was introduced to seek to determine what anti-avoidance was being targeted. The Committee Stage comments by then Minister for Finance noted:

> "These amendments form a package of anti-avoidance measures being introduced to deal with a number of specific tax avoidance schemes which have been uncovered by the Revenue Commissioners. Essentially, these schemes involve converting what should be taxable income payments into capital payments to avail of the lower capital gains tax rates. The potential charge to capital gains tax is then often avoided by the use of CGT reliefs such as retirement relief and entrepreneurial relief, resulting in funds being extracted by shareholders entirely tax free or at a significantly reduced tax liability.
> It is unfair that some individuals are engaging in these tax avoidance structures solely to take advantage of lower tax rates. This leads to unfair outcomes and puts other taxpayers who do not engage in such avoidance arrangements at a competitive disadvantage. I am, therefore, taking steps to counter these avoidance schemes.
> I am amending the distribution rules in section 135 of the Taxes Consolidation Act 1997 for determining whether an amount is to be treated as a distribution of income for tax purposes…The second amendment to section 135 deals with another scheme identified by Revenue, which seeks to avoid a liability to income tax where a company indirectly buys back shares from a shareholder. The provisions are being amended to ensure that distribution treatment correctly applies…".

It is noteworthy from these comments that the law was being introduced to combat "tax avoidance structures" and "avoidance schemes". However, there is no "bona fide" exclusion in this tax law. Although there is some helpful commentary from Revenue in its Tax and Duty Manual on how the law is to be enforced and where Revenue might not currently see it applying, this has no legislative basis. If, for instance, Revenue's views or practice changes, then the taxpayer and the tax adviser must be aware that this law has no "bona fide commercial reasons" exclusion.

This is worrying; the majority of tax-avoidance legislation seeks to put on a legislative footing protection for bona fide commercial transactions where seeking an avoidance of a tax liability is not the main purpose or one of the main purposes of the transaction.

Common Scenarios Where This Law Can Apply

Shareholder death

You are presented with a scenario where there are five shareholders in a company. All shareholders are married. One of the shareholders dies and, as is common practice to protect the company commercially, a shareholders' agreement provides that the shares of the deceased are bought back from the surviving spouse for market-value consideration.

A share buyback is not possible (as there are detailed and complex criteria that must be met to be within these rules, and reserves are required) in many circumstances, and therefore the surviving spouse must sell their shares.

Before Finance Act 2017, the common solution would be for a new company to buy the shares from the widow/widower so that the company remains owned and managed by the shareholders who understand the business and the widow/widower receives the cash market value of their inheritance.

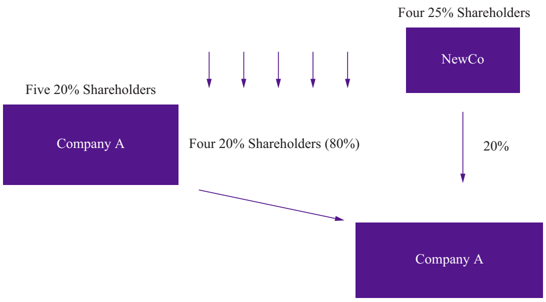
Tax law provides full relief to married couples from CGT and inheritance tax on death – s573 TCA 1997 applies to rebase asset values to market value at the time of death.

The surviving spouse has full CGT base cost and is not in any way seeking to avoid or reduce tax, as they are afforded full CGT base cost by Irish tax law. However, on death, there is no rebasing for income tax purposes.

If the new company (to buy out the spouse) receives funding out of assets of the target company, then s135(3A) TCA 1997 applies and the only defence is arguing that the widow/widower is not part of any "arrangement" in disposing of their shares. If the surviving spouse is involved in negotiating the price/terms of sale, then the water can sometimes get murky on this point.

Therefore you can be presented with a scenario where on a death (and where CGT base cost is reset) an individual could have exposure to income tax treatment on the disposal of shares. Care is required here.

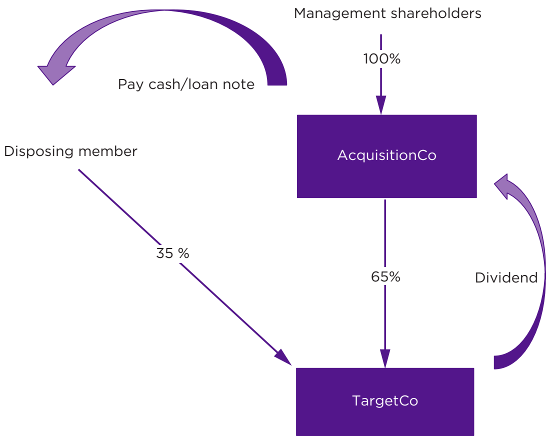
The shareholder now has no shares in the business but is exposed to income tax treatment. There is no "significantly reduced" relief as provided for by s817 TCA 1997.



Management buy-out

Take a scenario where you have a majority shareholder in a company and the best commercial decision to protect the business into the future is for the management to acquire the business – perhaps over time. The target company (TargetCo) has cash available (after-tax trading profits) that might be of assistance in funding the purchase. A standard management buy-out structure is employed, as follows:

- The management team sets up a new acquisition company (AcquisitionCo), which they own.
- The owner sells (say) 65% of the business to AcquisitionCo for cash and a loan note and retains a 35% stake.
- Due to being key to a successful commercial handover, the owner needs to remain as a director for business continuity.
- The remaining 35% stake is disposed of in three years.
- The intention is that TargetCo's resources assist in funding the buy-out by way of dividend to AcquisitionCo.



Again, one is squarely within the remit of s135(3A) TCA 1997. Generally, in these type of scenarios the concern around an "arrangement" is greater, as the owner is remaining as a director and as a shareholder. Although this is for commercial reasons, it introduces risk regarding s135(3A).

Earn-out

You have a client who sells their shares in a close company to another close company in a trade sale. As is common, it is agreed that there is an "earn-out" element where the vendor will receive cash proceeds over several years (post-sale) depending on the success of business continuity and/or profit growth in TargetCo.

If the earn-out is funded out of the profits of TargetCo by way of dividend to AcquisitionCo, which then pays the member, then s135(3A) TCA 1997 could, again, apply to charge an owner who has disposed of their business entirely to income distribution treatment.

For an individual owner, this creates income tax exposure, and for a corporate vendor (who cannot control AcquisitionCo), it can create close company surcharge exposure (depending on the sales structure of the transaction).

Business Expansion Scheme/Employment Investment Incentive

Historically, investors in BES/EII schemes were bought out after a period of time. Often, the company that has raised the funding may not have distributable reserves as it is in the early stages of life, and therefore a buy-back of shares cannot occur. For the investors to exit, an acquisition company is used, and the target assists in guaranteeing the buy-back or helps in providing funding. For the reasons outlined above, s135(3A) TCA 1997 1997 is, again, in play. The investors in the EII scheme have exposure to income distribution treatment.

Tax and Duty Manual

It is noted above that there is no "bona fide commercial" exclusion in this law; therefore there is no statutory protection for such events/transactions.

Revenue has issued detailed guidance on the application of s135(3A) TCA 1997 with helpful examples. The Revenue commentary (Tax and Duty Manual Part 06-02-05) notes that the aim of the law is to:

> "counter collusive arrangements made between companies...the provisions represent anti-avoidance measures designed to counter avoidance schemes whereby individuals sought to extract value from a company as capital, as opposed to income, in order to avail of the lower rates of capital gains tax. In some instances, CGT was completely avoided by a claim to retirement relief."

The commentary also notes that "[t]he provision therefore does not apply in relation to bona fide financing arrangements entered into by a purchaser in relation to the acquisition of shares". It states that "arrangement" is to be given its ordinary meaning "and includes agreement, understanding, scheme, transaction or series of transactions".

It is stated that "Revenue will generally apply a 'main purpose, or one of the main purposes' test in determining whether a member has entered into an arrangement to secure the payment of consideration from the assets of the company". Therefore, the commentary notes that it is likely that Revenue will apply the same kind of analysis as would apply where the s817/s591A "bona fide commercial" exclusions are relied on. Examples are given on management buy-outs and where Revenue views s135(3A) as having application and as not having application.

The Tax and Duty Manual is helpful – it gives examples and context; however, commercial transactions, by their very nature, are never the same, and there are a multitude of scenarios where one could, for instance, have a management buy-out and have concerns about an arrangement's being in place.

The Tax and Duty Manual notes that a refinance (using the TargetCo as collateral and using its assets) after a management buy-out is outside the scope of s135(3A). It is also noted that the member's simply being aware that there is a refinancing will not bring them within the scope of these rules.

However, what if the member remains a director of TargetCo after the deal as it is vital to protect business continuity? What if there is a board meeting and the member has to vote on a refinance and some of the funds may be used to pay a loan owing to the member (even where they are only one of many directors)?

There might be no concrete plans envisaged to refinance the member's loan note at the time of the transaction, but if favourable terms are available and the member remains a director, can this cause concern that s135(3A) applies where TargetCo assists in raising finance and the member has funds paid to them?

What if the member has to sign a summary approval procedure under company law financial-assistance rules as part of a transaction?

Conclusion

Section 135(3A) TCA 1997 is a concise but far-reaching piece of tax law that has been in existence for only five years. The law does not have a statutory "bona fide commercial" exclusion (unlike the other main income-to-capital and capital-to-income pieces of tax legislation).

There is detailed commentary published by Revenue in Tax and Duty Manual Part 06-02-05, which has some helpful examples and comments. However, care should be exercised by taxpayers and advisers. It is generally always a subjective view regarding what is and what is not an "arrangement".

This law can apply in scenarios outside of the standard management buy-outs in that it can apply where shares pass on death under a will, to EII-type schemes and in other situations that might not be expected. The law has the ability to apply to earn-outs that might be paid long after a sale has concluded, where the member has not been a shareholder in the company for many years.

There are also many instances where this law should not apply – the main one being where there is no "arrangement". It also does not apply where one of the companies is not a close company.

It is always, therefore, very important to consider the terms of a transaction to determine whether these rules could potentially apply.

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The Taxation of Certain Compensatory Payments to Employees

Introduction

There have been a number of interesting Tax Appeals Commission (TAC) determinations in recent years dealing with the interaction between s123 of the Taxes Consolidation Act 1997 (TCA 1997) and other relieving sections in TCA 1997, including ss192A TCA 1997 and 613 TCA 1997. In this article we examine the relevant legislation, Revenue (and HMRC) guidance and two of these TAC determinations. Some of the practical issues arising for tax practitioners in this area are considered.

Background

Section 123 TCA 1997 is a very broad charging provision that applies to:

> *"any payment (not otherwise chargeable to income tax) which is made...either directly or indirectly in consideration or in consequence of, or otherwise in connection with, the termination of the holding of an office or employment or any change in its functions...".*

Where an *ex gratia* payment is taxable under s123 TCA 1997, a number of reliefs are provided for by s201 and Schedule 3 TCA 1997 that can apply to relieve some or all of the payment from income tax. Depending on the circumstances, this may be a partial relief only, and the relief is subject to a lifetime limit of €200,000.

There are certain other provisions of TCA 1997 that can fully relieve "compensatory payments" made by an employer to an employee. For example, provided that certain conditions are met:

- s192A TCA 1997 provides full income tax relief for payments made as compensation for claims under a "relevant Act" (ie, employment legislation); and
- s613 TCA 1997 provides full relief for capital payments that are made by way of compensation for "any wrong or injury suffered by an individual in his or her person or in his or her profession".

However, s192A(5) TCA 1997 provides that where a payment falls within s123 TCA 1997, relief under s192A TCA 1997 cannot apply. Given the broad nature of the s123 TCA 1997 charging provision, a similar principle applies in the context of availing of relief under s613 TCA 1997 (albeit, unlike s192A TCA 1997, s613 TCA 1997 does not have a specific sub-section in this regard). It can, therefore, be difficult for practitioners to advise on the application of either s192A TCA 1997 or s613 TCA 1997 where, for example, an alleged breach of employment law arises during an employment but ultimately the employment is terminated and the claim relating to the alleged breach of employment law is settled around the time that the employment is terminated.

In such circumstances the question arises regarding whether the mere fact of the payment being made pursuant to a compromise agreement entered into contemporaneously with the termination of the employment (albeit stemming from an alleged breach of employment law that arose before the termination of employment) could mean that relief under s192A TCA 1997 does not apply. This is discussed in more detail below.

Also relevant in the context of the recent TAC determinations is the application of s192A(4) TCA 1997, which provides that the exemption therein will, subject to satisfying various conditions, also apply to payments under an "out of court" settlement that has been agreed between an employee and his or her employer in place of a formal hearing of a "relevant authority". Some of the conditions to be met in this regard are set out below (s192A(4) TCA 1997):

- The agreement must be "evidenced in writing" and must not be between "connected persons".
- There is a requirement that the claim would have been a bona fide claim under a "relevant Act" had it been made to a "relevant authority". Revenue guidance on s192A TCA 1997 (Tax and Duty Manual Part 07-01-27, "Exemption from Income Tax in Respect of Certain Payments Made under Employment Law", hereafter "the Guidance") expands on this to provide examples of what factors could be used in considering whether a claim is bona fide, including that "there are sufficient grounds for the claim; the claim is within the scope of a 'relevant Act'; the claim is made within specified time limits, etc" (para. 4).
- The settlement must be in respect of a claim that is "evidenced in writing".
- The claim is likely to have been the subject of a recommendation, decision or determination by a relevant authority that a payment be made to the person making the claim.
- The payment must not exceed the maximum amount that could have been awarded under relevant legislation by the "relevant authority".

Revenue Guidance

Before looking at the TAC determinations, it is important to consider the Guidance.

Interaction between ss123 and 192A TCA 1997

The Guidance provides some very limited commentary on this point, but the examples therein make it clear that the exemption under s192A TCA 1997 does not apply to a payment (however described) in respect of the termination of an office or employment (chargeable to tax under s123 TCA 1997), for example, a payment in respect of a claim made under the Unfair Dismissals Acts 1977–2015.

The Guidance was updated in March 2023, and it is interesting that a particular example (that clearly highlighted a set of facts where s123 TCA 1997 and s192A TCA 1997 applied in parallel to different payments) has been deleted from the Guidance. The now deleted example in the prior version of the Guidance involved an employer that was found to have both (1) unfairly dismissed an employee and (2) breached its obligations under the Terms of Employment (Information) Act 1994. In this example the employee was awarded €1,290 in respect of the employer's breach of the Terms of Employment (Information) Act 1994. This amount was stated to qualify for the exemption under s192A TCA 1997, notwithstanding the fact the employee was also unfairly dismissed. A payment of one week's gross wages in lieu of notice was also made to the employee in respect of his or her unfair dismissal, and this amount was found to be taxable under s123 TCA 1997.

This example in the earlier version of the Guidance was helpful in that it highlighted that, although payments under the employment legislation that are in respect of a termination of an employment are taxable under s123 TCA 1997, a part of an employee's claim may relate to other breaches of the employment legislation, which are not related to that termination, and that portion of a claim can be exempt under s192A TCA 1997.

The above example was removed from the Guidance, and although some new examples have been included, it is interesting that none of these address a situation where s192A TCA 1997 relief is sought on a portion of a payment made on the termination of an employment. Notwithstanding this, the Guidance still includes commentary on the apportionment of a settlement payment in the context of determining whether s192A TCA 1997 relief may be available (as discussed in further detail below).

The settlement agreement/claim

The Guidance acknowledges that many disputes concerning the infringement of employees' rights and entitlements, or of employer's obligations to employees, are settled by agreement. In addition, the Guidance helpfully confirms that the employee does not need to engage an external adviser to prepare written documentation on his or her behalf and that there is no requirement for the statement of claim to have been formally submitted to a relevant authority, provided that all other conditions set out above are met.

However, the Guidance is somewhat unclear in that it states that:

> "[t]he format of the employee's original statement of claim, which must be evidenced in writing, and the details required to be included in same, will vary depending on the facts and circumstances of each individual case. However, such written documentation may reasonably be expected to include information such as the nature of the claim, the nature of the relationship between the parties involved, a high-level summary of the allegations and the impact of same." (para. 4)

In addition, the Guidance paraphrases one of the conditions to avail of s192A TCA 1997 relief in an out-of-court settlement situation as follows: "the original statement of claim by the employee is evidenced in writing" (para. 4).

The reference in the Guidance to an "original statement of claim" seems to imply a higher degree of formality than the relevant legislative provision, which requires that the "claim" must simply be "evidenced in writing". In the authors' view, the legislative requirement is merely that there is written evidence of the claim (e.g. through written correspondence regarding the issues) and not that there is a prescribed formal statement of claim or a prescribed form of submission of a claim. Clearly, in most cases, a taxpayer would be required to engage an external adviser in order to formally document a claim or, indeed, lodge a claim. In this regard, in the authors' view, the Guidance creates some confusion as to the precise requirements in this regard.

Apportionment of the claim

The Guidance states:

> "In considering if the exemption provided for in section 192A TCA 1997 applies in respect of an out-of-court settlement, due regard must be had to all terms and clauses included within any written agreement between the parties involved. This includes any terms which attribute or apportion the settlement payment between different elements of the claim…". (para. 5)

However, importantly, the Guidance further states:

> "Where the agreement does not clearly attribute the payment to any specific element of the claim, the classification and consequential tax treatment of the payment must be determined having due regard to the full facts and circumstances of the case and the terms of the agreement reached between the parties." (para. 5)

Thus, it appears that Revenue's view is that although apportionment is preferable, lack of apportionment should not, in and of itself, be fatal. That said, the authors' view is that clear apportionment is invariably preferable, albeit that apportionment in and of itself will not ensure exemption under s192A TCA 1997, and any amount attributed to claims for breaches of employment law arising during the employment (which are unconnected with termination of the employment) must be supported by the overall facts and circumstances.

HMRC Guidance

The equivalent guidance from the UK's HMRC deals with compensation received by an employee for distress caused by an employer's actions and states that:

> "if this element of the payment can reasonably be attributed solely to discrimination occurring before the termination of employment, it should be accepted as not connected with the termination".

In addition, it states that:

> "where an employee enters into a settlement agreement with their employer, best practice is for the agreement itself to set out what each element of the termination payment relates to. If there is no such attribution – such as where a single, non-divisible compensation payment is made by an employer 'in settlement of all claims' – the facts need to be examined and a reasonable apportionment agreed as to the amount of compensation paid for different elements. If the agreement relates in part to termination of the employment, the onus will be on the taxpayer to show that the payment is not connected to the termination."[1]

Accordingly, it appears that in the UK:

- a payment for distress can fall outside the scope of the UK equivalent of s123 TCA 1997 where the payment can be attributed

1 See https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim12965.

to distress due to discrimination occurring before a termination; and

- even where a compromise agreement does not clearly state what portion of a payment relates to each element, it is possible to apportion the payment based on the facts.

This analysis is supported by recent UK Court of Appeal case law (*Moorthy v HMRC* [2018] EWCA Civ. 847), which found that the tax treatment of compensation for discrimination depends on whether the discrimination is connected with the termination. In this case the alleged discrimination arose in the context of the termination of the employment itself, and the compensation was therefore held to be taxable. The court held that this was due to the wide scope of s401 of the Income Tax (Earnings and Pensions) Act 2003, which is the UK's equivalent to s123 TCA 1997. Whilst UK case law is not binding in Ireland, the UK courts' decisions have persuasive authority in Ireland.

Recent TAC Determinations

Recent determinations of the TAC have caused some confusion on the application of ss192A and 613 TCA 1997 to payments made under a compromise agreement entered into contemporaneously with the termination of an employment.

153TACD2020

In this case the taxpayer alleged that €80,000–€150,000 of an €180,000 settlement should be subject to relief under s192A/s613 TCA 1997 on the basis that it should be regarded as representing damages for defamation, victimisation and injury to professional reputation, which was not subject to income tax. The taxpayer noted that the defamation claim pre-dated any claim in relation to the termination of his employment and stated that he had intended to institute proceedings against his employer for defamation but that this was obviated by the execution of the compromise agreement. The employer denied the claims.

As part of a compromise agreement, the employee agreed to resign from his employment with the employer, and the employer agreed to pay the employee €180,000 "in full and final settlement of all claims or entitlements (including the Employee's claims that he has been defamed and victimised)".[2] In addition, it was agreed that the payment of €180,000 would be made "without admission of liability on the part of the Employer".[3]

Revenue argued that the full amount was subject to tax under s123 TCA 1997 (subject to any relief due under s201 TCA 1997) and that the payment did not meet the statutory requirements of s192A TCA 1997. In addition, Revenue argued that it was clear from the terms of the compromise agreement that the payment did not represent damages for defamation or injuries suffered (the consequence of that being that s613 TCA 1997 would not be applicable).

The TAC ruled against the taxpayer in this case and made the following points in relation to the taxpayer's claim.

The payment was made "without the admission of liability"

The compromise agreement said that the payment was made "without the admission of liability on the part of the Employer". The Appeal Commissioner noted that the taxpayer was legally represented at the time of entering into the compromise agreement and therefore placed significant emphasis on the "without admission of liability wording", stating:

> "[w]here the Appellant agreed to withdraw his allegations and to accept the payment without admission of liability on the part of his employer, I am satisfied that the correct legal characterisation of the payment is that the payment was made directly or indirectly in connection with the termination of the Appellant's employment". (para. 22)

2 Paragraph 6 of 153TACD2020 (quoting clause 3.1 of the relevant compromise agreement).
3 Paragraph 6 of 153TACD2020 (quoting clause 3.7 of the relevant compromise agreement).

In the authors' view this statement is certainly unhelpful, and the legislative basis for it is unclear – perhaps the Appeal Commissioner's view was that the "without admission of liability" wording went to the bona fides of the claim. However, in the authors' experience, it is standard practice for a compromise agreement to be drafted on the basis that there is no admission of liability. In the authors' view this (of itself) should not have an impact on the application of relief (under s192A TCA 1997) where it can be evidenced that a portion of the payment was in settlement of an alleged breach of employment law that was unconnected with the termination of the employment (assuming that all other requirements for relief are met).

The compromise agreement did not split out the payment

The compromise agreement did not split out the payment between what was alleged to be in compensation for the "defamation or victimisation" and what was for the termination of the employment but simply said that the €180,000 was in full and final settlement of all or any claims or entitlements against the employer.

The Commissioner stated:

> "Based on the terms of the Compromise Agreement, it is not possible to conclude that the payment or part thereof comprised damages for defamation or injury to reputation as alleged by the Appellant. It follows that it is not possible nor is it necessary to identify a basis for apportionment of the monies as contended by the Appellant." (para. 19)

Thus, the Commissioner in this case clearly placed some emphasis on the fact that the claims were not apportioned in the compromise agreement. As noted above, although the Guidance is clear that it is preferable to include an apportionment of claims in a compromise agreement, it also accepts that lack of apportionment should not be fatal. Notwithstanding this, and the fact that other Commissioners did not place the same emphasis on this point (see below), tax practitioners should look to ensure that where s192A TCA 1997 is being relied on, claims are appropriately apportioned in the compromise agreement. However, it should be noted that, practically, employers may be unwilling to apportion an element of a payment to a breach of employment law in a written agreement in circumstances where they are not admitting any liability for such claims.

No statement of claim had issued

The TAC found that s192A TCA 1997 could not apply as no statement of claim had issued (para. 15). The Commissioner referred to s192A(4)(a)(iii), TCA 1997 noting that the section refers to the retention of a statement of claim.

Section 192A(4)(a)(i) TCA 1997 clearly provides that the exemption under s192A TCA 1997 can apply in respect of a payment made under a written agreement in circumstances where, had the claim not been settled by agreement, it is likely to have been the subject of a recommendation, decision or determination by the relevant authority. In our view, and as noted above, although it is important that there is evidence that a claim exists, this should not need to be in any official or prescribed format nor submitted to any "authority".

However, this TAC determination could be viewed as suggesting that a written "statement of claim" must involve a formal issuance of proceedings in all cases in order for relief under s192A TCA 1997 to be available. This is unhelpful and, in our view, if this was the intent of the TAC, is a misinterpretation of the relevant legislation, by seeking to introduce new criteria for the application of s192A TCA 1997 in settlement situations. That said, it would still be necessary that there be some correspondence in writing from the party asserting the claim that sets out the nature of the claim.

It is appropriate to mention that this determination has been requested for case stated to the High Court, and if it proceeds to the High Court, we look forward to seeing the High Court judgment in due course.

115TACD2021

This determination also related to the tax treatment of a settlement payment of €180,000. The taxpayer's main submission in the case was that he was entitled to relief under s613 TCA 1997. He argued that a portion of a payment made to him in a settlement agreement was compensation for defamation (damage to reputation). He also argued that he was subject to victimisation and discrimination by his former employer.

The employee had a contractual entitlement to €55,000 and argued that relief applied to some portion of the balance of €125,000 (with senior counsel noting that €80,000 would be a conservative figure for the taxpayer's defamation claim). Revenue argued that the entire payment was taxable under s123 TCA 1997.

The Commissioner found that €55,000 of the payment was in respect of the termination of his employment (albeit contractual) and the balance was in respect of the other "claims" referred to in the compromise agreement, noting that none of the €125,000 fell within s123 TCA 1997. This in itself was an interesting finding, as the Commissioner allocated no portion of the payment to an ex gratia termination payment – the €55,000 was entirely contractual.

The Commissioner found that s613 TCA 1997 could not apply as he felt that there was no (or insufficient) evidence that the taxpayer's good name was undermined and therefore the payment was not "compensation or damages for any wrong or injury suffered by an individual in his or her person or in his or her profession" but instead found that s535(2)(a)(iii) TCA 1997 applied to the non-contractual portion of the payment.

Section 535(2)(a)(iii) TCA 1997 extends the concept of a disposal and provides that there will be a disposal, for capital gains tax purposes, where a capital sum is received "in return for forfeiture or surrender of rights, or for refraining from exercising rights…". The Appeal Commissioner noted that the taxpayer had a right or chose in action to sue his former employer and that right fell within the definition in s535 TCA 1997 – i.e. the employee, in compromising the claim, disposed of his right to sue.

This was, in the authors' view, an unusual finding, particularly in circumstances where (at least from what can be seen in the determination) it is not clear that the taxpayer had an opportunity to make submissions on s535 TCA 1997 before the TAC. More worryingly, it also seems to set an inappropriately high bar for the application of the s613 TCA 1997 exemption.

The result was that the €125,000 amount was not subject to income tax but was subject to capital gains tax.

For completeness, we note that this determination has not been requested for case stated to the High Court.

Key Takeaways

Given the recent TAC determinations, including those discussed above, on ss192A and 613 TCA 1997, there are a number of issues that, in our view, require clarification to assist tax practitioners in advising on these matters. As regards 153TACD2020, clarity from Revenue would be welcome on certain issues arising from this case, including, in particular:

- Where a compromise agreement includes standard "without admission of liability" language, this does not mean that relief under ss192A and 613 TCA 1997 will be automatically unavailable.
- Even where a compromise agreement does not explicitly apportion a payment to various elements of a claim, relief pursuant to ss192A and/or 613 TCA 1997 can still apply to a portion of a payment where it can be evidenced that a portion relates to a breach of employment law that occurred before (and separate from) the termination of the employment. Clearly, in many situations

there is (or can be) payment(s) made both in relation to an alleged breach of employment law during the employment and in the context of a termination of the employment. This would be in line with the position adopted in the UK.

It is helpful that certain of the TAC cases, including 115TACD2021, clearly demonstrate that not all payments made under a compromise agreement are within s123 TCA 1997. It would also be helpful if Revenue could re-insert an example in the Guidance addressing a situation where s192A TCA 1997 relief is available on a portion of a payment made on the termination of an employment.

- To satisfy the legislative requirement that the claim "is evidenced in writing", it would be sufficient (notwithstanding the observations of the Commissioner) for the employee making the claim to prepare a letter to his or her employer summarising the claims. The authors would welcome this clarification, given that there appears to be no legislative requirement for the claim to be submitted to a relevant authority in the context of s192A TCA 1997 relief being applied to an out-of-court settlement – and the updated Guidance acknowledges this point.

As regards 115TACD2021, it is helpful that this determination identified that a portion of a payment under a settlement agreement may not be subject to income tax where it can be shown that there was a potential claim arising during the employment and a portion of the payment is attributable to that claim. It should be noted that there was no apportionment of the alleged claims in this case, but this did not impact the Commissioner's finding that he could attribute a portion of the payment to an alleged claim. It should be noted that TAC determinations are based on the individual facts in each case.

However, it is unhelpful that:

- As a practical matter, the case was decided on the basis of the application of s535 TCA 1997, when this section does not appear (based on a review of the determination) to have been argued by either side.
- The determination denies s613 TCA 1997 relief on the basis that the taxpayer did not have sufficient evidence to prove this claim. In our view, and based on a review of the determination, this sets a very high bar for the application of s613 TCA 1997 relief – particularly in circumstances where there was a senior counsel's opinion to support the claim in question.

Given the author's comments above on the position adopted by the Appeal Commissioners in these cases, and in particular that some of the statements made in or by the TAC do not have a legislative/legal basis (and contradict the Guidance), it will remain difficult for practitioners to advise on the application of ss192A and 613 TCA 1997 where an employment has also been terminated until such time as clarification from Revenue is issued.

In the authors' view it would be prudent for practitioners to adopt the following approach, where possible, when advising on the application of ss192A and 613 TCA 1997 to payments made pursuant to a termination/compromise/settlement agreement:

- Ensure that payments prescribed in the agreement are appropriately apportioned between the different elements of a claim and that there is sufficient contemporaneous evidence to support such apportionment.
- Consider whether the standard "without admission of liability" wording is required in the particular case and, where possible, remove this wording from the agreement. Although, in the authors' view, the inclusion of this wording should not impact the

availability of relief, given the above, the better course of action may be to exclude the wording where possible, pending further guidance from Revenue.

- Ensure that there is sufficient evidence that a bona fide claim existed. In the authors' view it should be sufficient, for example, for the employee making the claim to prepare a letter to his or her employer summarising the claims (for the purposes of s192A TCA 1997).
- It is important to note that determinations are solely based on the facts of each case. It is unclear in the authors view if these determinations would withstand scrutiny if considered by the High Court.


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Residence, Domicile and Double Taxation Relief – Recent Case Law Issues

Introduction

Over recent years the landscape of where and how we work has changed considerably. With increasing mobility among individuals and workers, this article focuses on some of the potential taxation issues for such workers and/or those individuals with additional income from outside Ireland.

We look at residency rules, the statutory framework and some recent cases of note. We then outline the relevant statutory provisions on domicile, including the domicile levy, and some useful guidance from the courts on the application of the levy. Finally, we broadly outline double taxation relief in certain double taxation treaties and give some examples in practice.

Although the legislation may seem relatively straightforward on these issues, in more complex cases there can be many factors for advisers to consider on behalf of a client.

Residence and Ordinary Residence

Residence and ordinary residence: Overview

The Irish residency rules are set out in Part 34 of the Taxes Consolidation Act 1997 (TCA 1997). Section 819 TCA 1997 provides that an individual will be resident in the State for a year of assessment if they are present[1] in the State at one time or several times in the year of assessment for a period in the whole amounting to 183 days or more, or at any one time or several times in the year of assessment and the preceding year for a period in the aggregate amounting to 280 days or more. An individual can also elect to be resident (s819(3) TCA 1997).

Section 820 TCA 1997 sets out the rules on becoming and ceasing to be Irish ordinarily resident. An individual acquires ordinary residence in a year of assessment once they have been resident in the Ireland for each of the preceding three years of assessment, and they lose ordinary residence only once they have been non-Irish resident for three consecutive years.

Revenue's Tax and Duty Manual Part 34-00-01, "Provisions Relating to Residence of Individuals", provides useful examples of the application of these provisions, including elaboration on individuals in transit, force majeure, unforeseen circumstances and Covid-19. For example, a day is not counted where an individual remains "airside", i.e. in a part of an airport or port that is not accessible to members of the public. Where an individual is prevented from leaving Ireland on an intended day due to extraordinary natural occurrences or exceptional third-party action or failure, none of which could reasonably have been foreseen and avoided, the individual will not be regarded as being present in the State for tax purposes on the following day.

Revenue has also set out its treatment of delays in departure due to Covid-19 circumstances, setting out the conditions (e.g. where an individual was self-isolating on the advice of a health professional) and the maximum length of time in respect of the 2020 tax year that can be disregarded for residence purposes due to Covid-19.

However, it is important to note that extra-statutory concessionary treatment such as that outlined in a Revenue manual generally cannot be the subject of a successful appeal, as the Tax Appeals Commission (TAC) cannot go beyond the wording of the legislation, demonstrated in the determination below on split-year treatment.

Split-year treatment

As outlined above, once an individual is in Ireland for 183 days or more in one year, or 30 days if the total number of days spent in Ireland over two years is 280 or more, then they are liable to Irish tax on their worldwide income. Therefore, when an individual leaves or enters Ireland during year of assessment, their residency status continues to impact their liability to Irish taxation, even on income earned abroad.

Split-year treatment, provided for under s822 TCA 1997, can provide relief in such circumstances. If an individual can satisfy an authorised officer that they are leaving or entering Ireland "other than for a temporary purpose...with the intention, and...in such circumstances...", then they can be regarded as non-resident (in the case of leaving Ireland) or resident (in the case of entering Ireland) from the date of their move. This can provide relief from taxation on income earned abroad. Taxpayers who are aggrieved by a decision of an authorised officer can make an appeal under s824 TCA 1997.

An interesting example of this is seen in TAC determination 25TACD2019. The appellant left Ireland with his wife in August 2013 with the intention of being non-resident in 2014

1 For tax years up to and including 2008, a "midnight test" was applied, where the individual had to be in Ireland at the end of the day. The amendment was made by Finance (No. 2) Act 2008.

and subsequent years. However, in November 2014 the appellant's wife was promoted, and they both returned to Ireland. The appellant did not meet the statutory requirements for split-year residence in the year of departure; however, he was granted split-year treatment on his exit from Ireland for the tax year 2013 on concessionary grounds, as his inability to qualify for the relief was due to unforeseen circumstances in 2014 (Revenue applied the concession outlined in *Tax Briefing*, Issue 17, January 1995). He was, however, deemed to be ineligible for split-year residence in the year of his return, 2014. This meant that his US employment income in 2014 was included in an amended assessment to Irish taxation. The taxpayer appealed, arguing that the treatment was inconsistent and inequitable and that the same unforeseen circumstances that allowed him to qualify in 2013 should also allow him to qualify in 2014. Revenue submitted that it had applied the non-statutory concession available for unforeseen circumstances to 2013 because the appellant was resident in Ireland during 2013 (based on the 183-day rule), he departed Ireland to live abroad in August 2013 for what the statute refers to as "other than…a temporary purpose" and it was clear that he did not intend to be resident in the State in the following year. Revenue submitted that the taxpayer did not meet one of the conditions necessary for eligibility in 2014, namely, that he be non-resident in the year preceding arrival. The Appeal Commissioner agreed, finding that as the taxpayer was Irish resident in 2013, he could not qualify for split-year treatment on his year of return to Ireland, 2014. For our purposes, the Commissioner was clear that the grant or refusal of any extra-statutory concession is not a matter over which the TAC has jurisdiction, and therefore he could not intervene. He also noted similar limitations to the TAC's jurisdiction with regard to legitimate expectations (*Kenny Lee v Revenue Commissioners* [2018] IEHC 46) and alleged unfair treatment (*Coleman v Revenue Commissioners* [2014] IEHC 662).

Domicile

Domicile Overview

The common law concept of domicile concerns a permanent home and is best described as a much 'stickier' concept than residence. Domicile can have significant tax implications for individuals.

Every individual is born with a domicile of origin, and in general the domicile of origin is determined at birth (usually the domicile of the father). Domicile of origin can be supplanted by a domicile of choice in circumstances where an individual is resident in a new country and intends to reside there permanently or for an unlimited time. If a domicile of choice is abandoned, the domicile of origin revives, thereby protecting the principle that no-one shall be without a domicile. In the latter circumstances the laws of the country of the domicile of origin will continue to govern one's legal position. No person can, at the same time, have more than one domicile[2].

A domicile of choice can be abandoned, and a new domicile acquired by choice if one can demonstrate a combination of residence and intention of permanent or indefinite residence, but it is not an easy process to change one's domicile. The factors to be taken into consideration in determining domicile are generally factual, although motive can be considered in coming to a conclusion on domicile.

A high burden of proof must be discharged before establishing that a new domicile of choice has been acquired, as set out in the High Court by Henchy J in *T v T* [1983] IR 29, where he stated that there is a rebuttable presumption in favour of the continuance of the domicile of origin. To displace a domicile of choice, one must show that one acquired a domicile of choice by residing in the new jurisdiction with the intention of:

- making that jurisdiction one's sole or chief home and
- continuing to reside there indefinitely.

2 See *Dicey, Morris & Collins: The Conflict of Laws* (London: Sweet & Maxwell, 16th edn, 2022).

In *Rowan v Rowan*[3] Costello J stated:

> "The approach which the court should adopt has been succinctly stated by Budd J (*In re Sillar* [1956] IR 344) as follows:
>
> 'From a consideration of the case law it is clear that it is a question of fact to be determined from a consideration of all the known circumstances in each case whether the proper inference is that the person in question has shown unmistakably by his conduct, viewed against the background of the surrounding circumstances, that he had formed at some time the settled purpose of residing indefinitely in the alleged domicile of choice. Put in more homely language, that he had determined to make his permanent home in such place.'"

The importance of being aware of the above "stickiness" in relation to domicile is heightened when we consider the domicile levy, especially in light of the strict application of the levy in recently determined case law.

Domicile levy: Overview

The domicile levy was introduced by Finance Act 2010 and imposes a fixed amount of €200,000 on relevant individuals who meet the conditions set out in Part 18C TCA 1997. The application of the domicile levy captures both resident and non-resident individuals who are Irish domiciled and effectively requires such individuals to pay the levy of €200,000 if not already paying income tax to that level. Irish income tax paid in the year of assessment is allowed as a credit in calculating the amount of the domicile levy chargeable for the year.

Sections 531AA–531AK TCA 1997 set out the parameters of the application of the domicile levy. It is useful to include below some of the provisions in full for the purposes of our later discussion of the highlighted cases. A "relevant individual" is defined in s531AA(1) TCA 1997 by reference to the following criteria:

> *"'relevant individual', in relation to a tax year, means an individual –*
>
> *(a) who is domiciled in the State in the tax year,*
>
> *(b) whose world-wide income for the tax year is more than €1,000,000,*
>
> *(c) whose liability to income tax in the State for the tax year is less than €200,000, and*
>
> *(d) the market value of whose Irish property on the valuation date in the tax year is in excess of €5,000,000."*

The imposition of the domicile levy is on "world-wide income", a term defined in s531AA(1) TCA 1997 as follows:

> *"'world-wide income', in relation to an individual, means 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 as if any provision of those Acts providing for any income, profits or gains to be exempt from income tax or to be disregarded or not reckoned for the purposes of income tax or of those Acts were never enacted, and –*
>
> *(a) without regard to any deduction –*
>
> *(i) in respect of double rent allowance under section 324(2), 333(2), 345(3) or 354(3),*
>
> *(ii) under section 372AP, in computing the amount of a surplus or deficiency in respect of rent from any premises,*
>
> *(iii) under section 372AU, in computing the amount of a surplus or deficiency in respect of rent from any premises,*
>
> *(iv) under section 847A, in respect of a relevant donation (within the meaning of that section),*

3 *In the Goods of Bernard Louis Rowan, Deceased and Joseph Rowan v Vera Agnes Rowan & Ors* [1986] 3 ITR 572.

(v) under section 848A, in respect of a relevant donation (within the meaning of that section),

and

(b) having regard to a deduction for –

(i) any payment to which section 1025 applies made by an individual pursuant to a maintenance arrangement (within the meaning of that section) relating to the marriage for the benefit of the other party to the marriage, unless section 1026 applies in respect of such payment,

(ii) a payment of a similar nature to a payment referred to in subparagraph (i) pursuant to a maintenance arrangement (within the meaning of section 1025) relating to the marriage for the benefit of the other party to the marriage which attracts substantially the same tax treatment as such a payment,

(iii) any payment to which section 1031J applies made by an individual pursuant to a maintenance arrangement (within the meaning of that section) relating to the civil partnership for the benefit of the other party to the civil partnership, unless section 1031K applies in respect of such payment,

(iv) a payment of a similar nature to a payment referred to in subparagraph (iii), pursuant to an order of a court under the law of another territory that, had it been made by a court in the State, would be a maintenance arrangement (within the meaning of section 1031J), relating to the civil partnership for the benefit of the other party to the civil partnership which attracts substantially the same tax treatment as such a payment, or

(v) any payment to which section 1031Q applies made by an individual pursuant to a maintenance arrangement (within the meaning of that section) where a relationship between cohabitants ends

determined on the basis that the individual, if not otherwise resident in the State for the year, was resident in the State for the tax year".

Domicile levy: Recent case law

Three recent cases address the issue of what deductions, expenses, etc. are to be taken into consideration when determining "world-wide income" for the purposes of Part 18C TCA 1997, and the approach of the Court of Appeal, the High Court and the TAC in interpreting the legislation appears to be consistent.

Fitzgerald v Revenue Commissioners

Fitzgerald v Revenue Commissioners [2022] IECA 255 addressed the definition of "world-wide income" and whether the payment of USC constitutes the payment of income tax. The taxpayer, a hotelier, is Irish tax resident and Irish domiciled. He incurred capital expenditure of over €25m on the construction of a hotel (which he subsequently operated) and expenses on plant and machinery of over €14m. The hotel, once constructed, was loss making in 2010 and 2011. In addition to the operation of the hotel, the taxpayer was in receipt of income from other sources, including salaries from numerous companies, dividend income, rental income and interest income. He availed of Case I losses on the hotel and applied for an income tax refund of €361,346 for 2010 and €919,557 for 2011. The refunds were processed, but €200,000 was retained in respect of both 2010 and 2011 and the taxpayer was assessed as liable to the domicile levy in respect of those years of assessment. The taxpayer appealed these assessments, first to the TAC and then by way of case stated to the High Court. In

November 2022 the Court of Appeal delivered judgment on the taxpayer's appeal from the High Court.

The taxpayer asserted, first, that he should not have been liable to the domicile levy as his "world-wide income" within the meaning of s531AA TCA 1997 was nil and therefore he was not a "relevant individual" for the purposes of the levy. He argued that his losses, as augmented by capital allowances incurred in his hotel trade, reduced the level of income under each of his other sources of income. He contended that the losses, as augmented by capital allowances, were not an "amount deductible from or deductible in computing total income" within the definition of "world-wide income". Therefore, they were permitted deductions and were not to be disregarded in calculating worldwide income for the purposes of the domicile levy.

Costello J in the Court of Appeal, upholding the decision of Twomey J in the High Court (*Fitzgerald v Revenue Commissioners* [2021] IEHC 487) and dismissing the taxpayer's appeal, found that the estimate of the appellant's worldwide income could not take into account losses in respect of which he claimed a refund of tax. Costello J identified the essence of the dispute between the parties on this issue as follows (para. 57):

> "The definition of the worldwide income in relation to an individual means 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. The dispute between the parties' concerns whether or not the appellant's losses (as augmented by his capital allowances) are sums which were deductible from or deductible in computing his total income. In essence the dispute between the parties is the stage at which the losses are deducted in computing income chargeable to tax as it is accepted that they are legitimate deductions to be made and he was entitled to a tax repayment. The appellant says this happens at the first stage in the process as a deduction in estimating income from all sources and the respondent says that this happens at the second stage as a deduction in computing total income. The respondent submits that, as it is a deduction in computing total income, it is to be disregarded in assessing the appellant's worldwide income."

Costello J disagreed with the arguments put forward on behalf of the taxpayer and determined that worldwide income for a relevant individual is the individual's income from all sources as estimated in accordance with the Tax Acts without regard to any amount deductible from or deductible in computing total income and subject to certain express exclusions and allowances.

In that regard a loss claimed under s381 TCA 1997 is an amount deductible in computing total income within the definition of worldwide income and must be disregarded in calculating worldwide income for the purposes of s531AA TCA 1997. Loss relief under s381 TCA 1997 must be actively claimed by a taxpayer, and if no such claim is made, then the losses do not come into the computation of income. Taxpayers are required to assess their income each year in accordance with TCA 1997 and to make a declaration of income under each Schedule each year. Losses can be claimed both in the year of assessment and not later than 2 years after then end of the period of assessment. Therefore, a declaration of income may not take into consideration losses claimed under s381 TCA 1997 initially but could do so for up to two years after the year of assessment. In the circumstances Costello J did not accept that the losses claimed were "deductible from or in the computation of total income", as that income figure must be determined first and then an application for loss relief can be made on that income figure. The determination of losses is concerned with calculating the amount of tax to be repaid and not with calculating the individual's total income.

The second issue raised by the taxpayer concerned the computation of USC. In 2011 he paid in excess of €200,000 in USC and he claimed that the payment of USC in effect represented a liability *"to income tax in the State"* in the amount €200,000 and as such, no domicile levy was chargeable for that tax year. USC was introduced by s531M TCA 1997, which provides:

> "With effect from 1 January 2011, there shall be charged, levied and paid, in accordance with the provisions of this Part, a tax to be known as 'universal social charge' in respect of the income specified in paragraphs (a) and (b) of the Table to this subsection."

The appellant asserted that because USC is a tax charged "in respect of income", his payment of USC in 2011 meant that he was not subject to the domicile levy as he had paid "income tax" of €200,000 or more.

On this issue Costello J found that income tax as charged by the Tax Acts (meaning the Income Tax Acts and the Corporation Tax Acts) does not include USC, as it is not a tax **charged** by the Tax Acts and therefore is not payable under the Tax Acts. Put another way, USC is charged and payable on foot of TCA 1997 but it is not chargeable on income under the Income Tax Acts. She noted that USC is charged on 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, other than certain specified matters not relevant to the case. She went on to note that the part of TCA 1997 that establishes the USC is consistent in treating it as different from income tax and that USC is also charged on sources of income some of which are exempt from income tax. Therefore, for the sake of the domicile levy, a relevant individual is an individual whose "liability to income tax in the State" is less than €200,000, not whose liability to tax on income in the State is less than €200,000.

Corcoran v The Revenue Commissioners

In *Corcoran v The Revenue Commissioners* [2022] IEHC 199, a case that was heard after *Fitzgerald* in the High Court but before the Court of Appeal judgment, Egan J addressed the issue of capital allowances in the calculation of worldwide income for the purposes of the domicile levy and provided a comprehensive and complex analysis of the legislation on this point. The judgment was approved by Costello J in the Court of Appeal in *Fitzgerald*.

Revenue had appealed a determination of the TAC by way of case stated arising from the taxpayers' appeal that they were not liable to the domicile levy for the taxable years. The primary considerations for the court were what constituted "world-wide income" and whether capital allowances under s284 TCA 1997 in relation to the respondents' hotel trade were deductible in computing "world-wide income". The court further considered how expenses incurred wholly and exclusively for the purposes of the trade under s81 TCA 1997 were to be considered.

In *Corcoran* Egan J differentiated between the concept of "gross receipts" and "gross income" in ascertaining what the starting point is in determining, first, what constitutes "total income" and second, what constitutes "world-wide income". The parties agreed that total income is not the same as gross income and that trading expenses under s81 TCA 1997 must be deducted from "world-wide income" for the purposes of the levy,

With that in mind, Egan J stated that to determine "world-wide income" under s531 AA TCA 1997 one has to determine whether the respondents' "income...from all sources as estimated in accordance with the Tax Acts" exceeds €1m. Egan J stated (paras 26-28):

> "Slightly unpacking this definition, one sees that 'world-wide income' is defined as (A) "income...from all sources as estimated in accordance with the Tax

> Acts", and (B) 'without regard to any amount deductible from or deductible in computing total income'. Where convenient, I will distinguish between parts (A) and (B) of the definition of 'world-wide income'.
>
> The part of the definition at (A) is, effectively, the definition of 'total income' as per s. 3 TCA. This defines 'total income' as 'income from all sources as estimated in accordance with the Income Tax Acts'.
>
> As the part of the definition at (B) makes clear, in arriving at this estimation of total income for the purposes of the 'world-wide income' definition, regard is not to be had 'to any amount deductible from or deductible in computing total income.'

The question therefore was whether wear- and tear-allowances form part of (A) or of (B) in the calculation of total income, which it was agreed includes expenses wholly and exclusively incurred for the purpose of the trade (s81 TCA 1997). The taxpayer contended that the calculation of total income must include income from all sources and the phrase must include the portion of an individual's income as is chargeable to tax. This, it was contended, must include wear-and-tear allowances which are deducted after Schedule D, Case I, income is estimated but before tax is paid. Effectively, capital allowances/wear-and-tear allowances should be treated as equivalent to trading expenses pursuant to s81 TCA 1997, and therefore they fall within (A) as identified by Egan J. Revenue, however, contended that they should not, arguing that it is only after Schedule D, Case I, trading profits have been calculated that wear-and-tear allowances can be deducted, and therefore they fall within (B) above.

Egan J, having accepted that the two parties agreed that trading expenses are deductible under s81 TCA 1997, concluded that, for the purpose of the definition of worldwide income, total income cannot mean gross receipts because the definition suggests that a process of estimation must be carried out in coming to an income figure. She stated (para. 52):

> "I accept that the estimation of total income at (A) is an exercise which incorporates at least the deduction of trading expenses and of other amounts properly deductible pursuant to s. 81."

However, Egan J did not accept that capital allowances should also be included in this calculation. First, s81 itself specifically excludes (among other exclusions) capital expenditure from the amounts that are deductible in computing the amount of profits or gains to be charged to tax. This suggests that such allowances are intended to be treated differently. Second, the taxpayers' submission was incompatible with the scheme governing capital allowances, which suggests that capital allowances are not part of "total income" for the purposes of (A) but are assessed at a later stage in determining income chargeable to tax. Egan J concluded that, for the purposes of the definition of "world-wide income", capital allowances are not part of the total income estimation but are a deduction in computing total income for income tax purposes, i.e. a deduction made after Schedule D, Case I, trading profits are estimated. This reasoning was consistent with that of Twomey J in *Fitzgerald* in the High Court (affirmed by the Court of Appeal). Egan J stated (paras 72–74):

> "Overall, it seems to me that the plain meaning of the part (B) of the definition, 'deductible...in computing total income', requires that when 'world-wide income' is estimated regard is not had to capital allowances/wear and tear allowances, to losses (as in *Fitzgerald*), or for example, to other potentially deductible amounts such as pension contributions. As a matter of revenue practice, what these items have in common is that they are usually deductible after profit or gain from all sources is estimated and before the Part 15 deductions are made from the individual's total income. It is further notable that the respondents

were unable to offer any explanation as to what the phrase 'deductible…in computing total income' might mean, on their interpretation, or what deductions might be disallowed thereby. Rather, the respondents' interpretation would effectively rob this phrase of all meaning.

Bearing in mind that the purpose of the domicile levy is to ensure that wealthy individuals pay a minimum of €200,000 tax, the definition of 'world-wide income' is more akin to a person's gross income (after deduction of expenses) and less akin to a person's income after making various deductions for the purposes of calculating his or her tax bill. To interpret it otherwise would be to defeat the purpose of the domicile levy because a person with a gross income of say €5 million could potentially reduce their tax bill below €200,000 by the use of capital allowances, losses, pension contributions etc. This is what the section is designed to prevent.

In my view, the domicile levy is, and is intended to be, different to income tax. If one were permitted to deduct from one's 'world-wide income' amounts such as losses and capital allowances that one is permitted to deduct from income tax then, in many cases, there may be little difference between one's income for the purposes of income tax and one's 'world-wide income' for the purposes of the domicile levy. This would tend to undermine the purpose of the domicile levy."

TAC determination 14TACD2023

In 14TACD2023, which was heard in September 2022, with a determination delivered in November 2022, the issue for the Appeal Commissioner was also the question of what constitutes "world-wide income" for the purposes of s531AA TCA 1997 and whether certain expenses and outgoings incurred in calculating Case V rental income were deductible in arriving at the appellant's total income.

The decision of Egan J in *Corcoran* was followed in 14TACD2023, where the Appeal Commissioner considered the issue of Case V rental income in the calculation of worldwide income. Revenue submitted that this case was distinguishable from *Corcoran*, which dealt with capital allowances; however, the Appeal Commissioner did not agree. The Commissioner found that an individual is charged to tax on profits or gains as estimated under Schedule D, Case V, and this feeds into the calculation of "total income" for the purpose of assessing "world-wide income". The combined effect of ss75 and 97 TCA 1997 means that it is not gross revenue that is charged to tax but, rather, profits or gains that are charged to tax. This is consistent with Egan J in *Corcoran*. That being so, for the purpose of assessing worldwide income, it is not gross income that is charged to tax but, rather, income that has been calculated with deductions allowed by ss75 and 97 TCA 1997, which are not capital in nature.

In summary, the Court of Appeal, the High Court and the Tax Appeals Commission have provided significant clarity on the application of the domicile levy and what can and cannot be included when calculating "world-wide income" to establish whether an individual is a "relevant person" for the purpose of Part 18C TCA 1997. Capital allowances are not to be included, but general trading expenses are.

Irish Taxation of Irish and Foreign Income and Double Taxation Relief

Irish statutory regime

An individual who is resident and domiciled in Ireland is liable to Irish income tax on their worldwide income (TCA 1997 s18(1)(a)(i–ii), s19 and s2).

An individual who is resident but not domiciled in Ireland is liable to Irish tax on foreign income on the remittance basis of taxation (TCA 1997 s71(2)). Therefore Irish income, foreign employment income to the extent that it relates to Irish duties and foreign income that is remitted to Ireland are liable to Irish tax.

A non-resident but ordinarily resident and domiciled individual, under s821 TCA 1997, is liable to Irish tax on their worldwide income with the exception of income from a trade or profession that is not carried on in Ireland, income from an office or employment where all of the duties are carried on outside of Ireland and other foreign income that does not exceed €3,810 per year.

An individual who is non-resident and non-domiciled but is ordinarily resident is taxed on the remittance basis subject to certain exceptions.

An individual who is non-resident and non-ordinarily resident is taxed per s18 TCA 1997 and is subject to Irish tax on Irish-source income and income from trades, professions and employment exercised in Ireland. Domicile is not a factor in this charge.

Double taxation relief

Of course, where an individual is resident in another country, he or she may qualify for relief from Irish tax under a double taxation treaty (DTT). Tax treaties are bilateral treaties that are, first and foremost, addressed to the two contracting states (the source and residence state) rather than the taxpayer themselves. The treaty allocates the taxing right between the states. There are many treaties between Ireland and other jurisdictions, with many variations between those treaties, but there are certain clauses common to most treaties, which follow the OECD Model Tax Convention ("the Model Treaty"). In general, the taxes covered for Ireland are income tax, capital gains tax and corporation tax. There are variations for certain jurisdictions, and generally inheritance/gift tax and VAT are not included.

In the context of this discussion, articles of the Model Treaty to note when considering "additional income" include those on business profits and permanent establishment (Articles 5 and 7), income from immoveable property (Article 6), dividends (Article 10), interest (Article 11), royalties (Article 12), capital gains (Article 13) and directors' fees (Article 16).

The employment income article (Article 15), for example, affirms the general rule that income is taxed where that employment is exercised. However, an individual is exempt from personal taxes where the individual spends no more than 183 days in any 12-month period, in Ireland and the employer paying their wages is not a resident of the state where the employment is exercised and the payment is not borne by a permanent establishment of the country where the employment is exercised.

Article 1 provides that the Model Treaty applies to persons who are residents of one or both of the contracting states, and Article 4(2) provides that residency is determined by reference to the law of the state in question. Where an individual is tax resident under the domestic tax law of the two countries, a tie-breaker is applied to determine their "fiscal domicile" for the purposes of the Model Treaty. This allows the above-mentioned treaty articles concerning what income is taxed in the country of residence to apply and permits a credit to be given in the country of residence for income taxable in both countries.

Ireland applies a credit for relief from double taxation and therefore follows Article 23B of the Model Treaty. Schedule 24 TCA 1997 sets out the computational rules in this regard, providing that the credit against Irish income tax for foreign tax shall not exceed the Irish tax charged on income.

In the event of ambiguity in the application of a specific treaty provision between two territories, practitioners should first refer to the interpretation articles of the Model Treaty. Article 3(2) of the Model Treaty provides that any undefined term shall have the meaning that it has at that time under the law of the state wherein it applies.

The issue of treaty relief has been considered by both the High Court and the TAC. In *Kinsella v Revenue Commissioners* [2011] 2 IR 417, a case before the High Court that concerned residence (discussed above), the taxpayer was successful in claiming that the DTT between

Ireland and Italy applied to capital gains tax but also that, for the purposes of determining residence under the treaty, the Irish domestic provision in TCA 1997 applied (i.e. that an individual must be present in the State at the end of the day, "the midnight test", as it applied at the time). In *Kinsella* Kelly J also adopted a purposive approach when interpreting the DTT between Ireland and Italy. He found that where there is ambiguity, reliance can be had on the Commentary on the Model Treaty.

In *O'Brien v Quigley* [2013] IR 790 Laffoy J concluded, *inter alia*, that DTTs ought to be interpreted in good faith in accordance with the ordinary meaning to be given to their terms, in their context and in light of their object and purpose. They are to be given a "meaning in international law"[4] without recourse to the approach to the interpretation of domestic taxing statutes. If such an interpretation leaves the meaning ambiguous or with an unreasonable result, recourse could be had to supplementary means of interpretation, including the OECD Model Treaty and Commentaries thereon.

In determination 17TACD2019 the Appeal Commissioner considered the *Kinsella* decision, finding that the principles of interpretation in the context of DTTs permit "a wider ability to interpret as there is a requirement to give a purposive approach to an international treaty" and that a strict approach is incorrect.[5]

Domicile levy and double taxation treaties

An interesting topic is the interaction between the imposition of the domicile levy and access to DTT benefits because of it. In 2017 a US Federal Claims Court issued an opinion in *John P. McManus v United States* [2017] 130 Fed. Cl. 613, where Mr McManus had appealed withholding tax of $5.22m being applied to gambling winnings. The taxpayer, although not resident in Ireland, sought the benefit of the Ireland–USA DTT because he had paid the domicile levy, arguing that this meant that he was a resident of Ireland for the purposes of the treaty, even if he was not a tax resident of Ireland under Irish domestic tax law. The US court found that "liable to tax" under Article 4 of the DTT meant comprehensive taxation and that the domicile levy, being limited to €200,000, was not such taxation and therefore Mr McManus was not a resident of Ireland for the purposes of the DTT and could not benefit from it. This opinion was previously discussed in this publication (Charles Garvan, "Access for Exiles: The *McManus* Case, the Domicile Levy and the Double Taxation Treaty Network", *Irish Tax Review*, 30/2 (2017)) which questioned the reasoning of the decision. Mr McManus appears not to have pursued a further appeal.

Non-discrimination in double taxation treaties

Article 24 of the Model Treaty provides for non-discrimination in tax matters, placing requirements on the host state not to discriminate against, for example, nationals of the other contracting state. National law that violates the non-discrimination article is overridden to the extent that such national law violates it, and the more advantageous domestic provisions that apply for a state's own nationals will apply. Although Article 24 is limited in many regards (addressing itself to a series of specific prohibitions), it is correct to say that it puts the onus on host states to "prevent unfair taxation" in this context.[6] An example of this can be found in the Australian High Court case of *Addy v Commissioner of Taxation*.[7] The case concerned the "backpacker tax", levied on persons in Australia on short-term "working holiday" visas. The first AUD37,000 of income earned by a backpacker was taxed at 15%, whereas an Australian national or resident could claim a tax-free threshold for the first AUD$18,200 of income and then became liable to an income tax rate of 19% on up to AUD37,000.

The difference for Ms Addy, who was a resident of Australia but a UK national, was that she

4 Para. 15, referring to the judgment of Barrington J in *McGimpsey v Ireland* [1988] IR 567.
5 17TACD2019, page 42. This appeal concerned group relief.
6 Jonathan Schwarz, *Schwarz on Tax Treaties* (Alphen aan den Rijn: Wolters Kluwer, 6th edn, 2021).
7 [2021] HCA 34; 24 ITL Rep. 193 (HC (Aus)).

would have to pay AUD3,986 in tax on her earnings in the 2018 tax year, whereas if she were an Australian national she would have been liable to AUD1,591 in tax. Her case came before the Australian courts on the basis of Article 25(1) of the Australia–UK DTT.

The High Court unanimously found that the "backpacker tax" amounted to discrimination that was prohibited under the DTT. The Australian tax authority submitted that the provision requires a comparison with a "notional national" who is "identical in all matters relevant to the imposition of taxation except nationality" and because Australian nationals could not hold the backpacker visa, the DTT was not engaged.

The court rejected this and found that the "text, context, objective and purpose" of Article 25(1) supported the proposition that "the relevant comparator is the hypothetical taxpayer in the same circumstances apart from the criterion on which the claim of discriminatory taxation is based" (para. 28) and is in "substantially similar circumstances" (para. 31). It compared Ms Addy to an Australian resident who was "doing the same work, earning the same income, under the same ordinary taxation laws" (para. 34) and found that she was subjected to higher taxation, was discriminated against and was therefore entitled to relief under the DTT.

Conclusion

Residence, ordinary residence and domicile are cornerstones of personal taxation. However, they should not be underestimated as trite in their application. Policy changes such as the domicile levy and the fallout from Covid-19 and Brexit will continue to add layers of complications for advisers. Increased mobility of workers will remain a feature permeating all of this, along with the influence of international tax law on the application of domestic law. The above has given a legislative overview of these provisions, highlighting some relevant cases.

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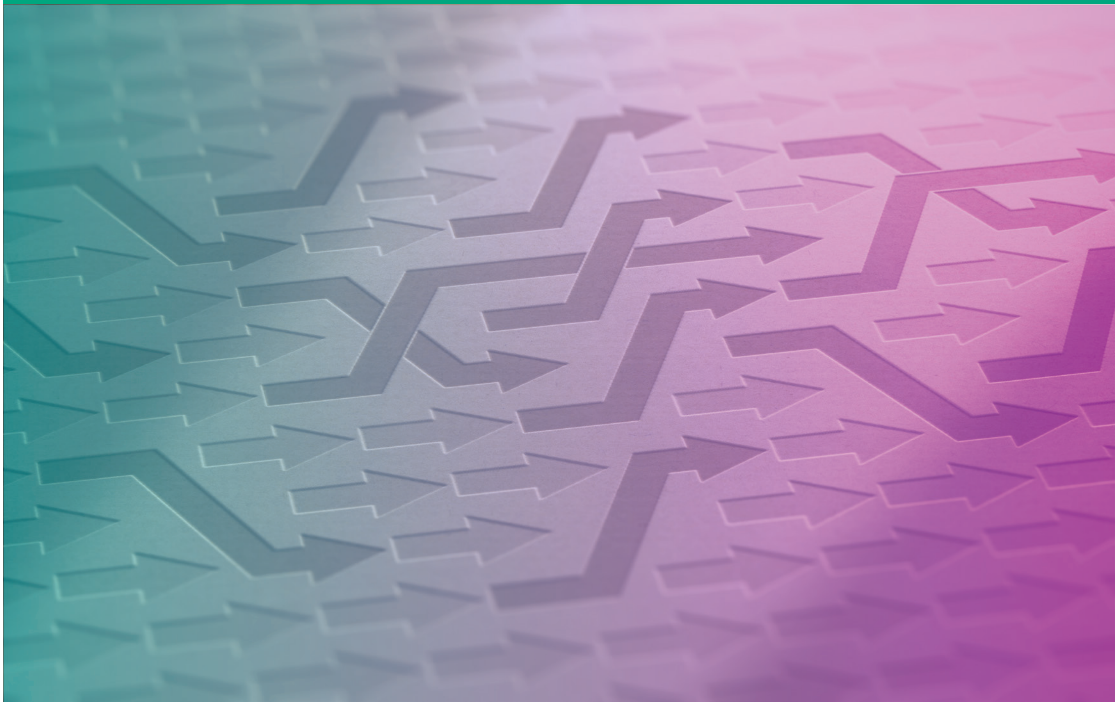
Group Rationalisation Post-Acquisition: Part 2



Introduction

The first part of this article, "Group Rationalisation Post-Acquisition: Part 1", published in Issue 3 of *Irish Tax Review,* 2022, considered some of the tax implications of the post-acquisition realignment of a recently acquired entity in the purchaser's group. As outlined therein, the preferred rationalisation structure may be achieved through an intragroup transfer of shares/assets, merger and liquidation. To give effect to reorganisations of this nature in a tax-efficient manner, reliefs from capital gains tax (CGT) and stamp duty are typically claimed. A summary of the relief conditions is given in "Group Rationalisation Post-Acquisition: Part 1", and we do not propose to deal with these again here. However, for a number of these reliefs to apply to any group rationalisation project, there are also specific anti-avoidance provisions that require the transaction to be implemented for bona fide commercial reasons and not form part of a wider arrangement of which the main purpose, or one of the main purposes, is avoidance of tax.

Specific Anti-Avoidance

Irish tax legislation provides for both general and specific anti-avoidance measures. We address the specific anti-avoidance clauses here, but a tax practitioner should also bear in mind the general anti-avoidance measures, as outlined under s811C TCA 1997, especially when engaging in complex group reorganisations.[1]

Anti-avoidance provisions applicable to group reorganisations

Relevant to the case study set out in "Group Rationalisation Post-Acquisition Part 1", the specific anti-avoidance provisions applicable to typical group reorganisations are as follows.

	Anti-avoidance provision	Anti-avoidance provision text [emphasis added]
Share-for-share exchange	Section 586(3)(b) TCA 1997	"This section shall not apply to the issue by a company of shares in the company by means of an exchange referred to in subsection (1) unless it is shown that the exchange is effected for **bona fide commercial reasons** and does not form part of any arrangement or scheme of which the **main purpose** or one of the main purposes is avoidance of liability to tax."
Group reorganisation (e.g. share-for-undertaking three-party swap)	Section 587(4)(b) TCA 1997	"This section shall not apply to the issue by a company of shares in the company under a scheme of reconstruction or amalgamation referred to in subsection (2) unless it is shown that the reconstruction or amalgamation is effected for **bona fide commercial reasons** and does not form part of any arrangement or scheme of which the **main purpose** or one of the main purposes is avoidance of liability to tax."
	Section 615(4A)(b) TCA 1997	"This section shall not apply to a scheme of reconstruction or amalgamation involving the transfer of the whole or part of a company's business to another company unless it is shown that the reconstruction or amalgamation is effected for **bona fide commercial reasons** and does not form part of an arrangement the **main purpose**, or one of the main purposes, of which is the avoidance of liability to tax."
	Section 623(1)(d) TCA 1997	"references to a company ceasing to be a member of a group of companies shall not apply to cases where a company ceases to be a member of a group by being wound up or dissolved or in consequence of another member of the group being wound up or dissolved where the winding up or dissolution of the member or the other member, as the case may be, is for **bona fide commercial reasons** and is not part of a scheme or arrangement the **main purpose** or one of the main purposes of which is the avoidance of tax."

1 For further analysis of the general anti-avoidance provisions, see Tom Maguire, "Finance Act 2015 and Anti-Avoidance: the Process Continues...", *Irish Tax Review*, Issue 1 of 2016.

	Anti-avoidance provision	Anti-avoidance provision text [emphasis added]
	Section 624(1) TCA 1997	"Section 623 shall not apply in a case where – (a) as part of a merger a company (in this section referred to as "company A") ceases to be a member of a group of companies (in this section referred to as "the A group"), and (b) it is shown that the merger was carried out for **bona fide commercial reasons** and that the avoidance of liability to tax was not the main or one of the **main purposes** of the merger."
	Section 635 TCA 1997	"Notwithstanding any other provision of the Tax Acts or the Capital Gains Tax Acts, sections 631, 632, 633, 633A, 633C and 634 shall not apply as respects a transfer, disposal or the formation of an SE or an SCE by merger unless it is shown that the transfer, disposal or merger, as the case may be, is effected for **bona fide commercial reasons** and does not form part of any arrangement or scheme of which the **main purpose** or one of the main purposes is avoidance of liability to income tax, corporation tax or capital gains tax."
Stamp duty	Section 79(7B) SDCA 1999	"This section shall not apply unless the conveyance or transfer of a beneficial interest in property, or the liquidation referred to in subsection (7A)(a), is effected for **bona fide commercial reasons** and does not form part of a scheme or arrangement of which the **main purpose**, or one of the main purposes, is the avoidance of liability to any tax or duty."
	Section 80(12) SDCA 1999	"This section shall not apply unless the scheme of reconstruction or amalgamation or the merger is effected for **bona fide commercial reasons** and does not form part of a scheme or arrangement of which the **main purpose**, or one of the main purposes, is avoidance of liability to any tax or duty."

The components of the above provisions can be split out as follows:

- for bona fide commercial reasons and
- does not form part of a scheme or arrangement the main purpose, or one of the main purposes, is avoidance of liability to any tax.

In considering the main purpose of a transaction, Revenue has set out the following "simple test" (Tax and Duty Manual Part 33-01-01):

> "In simple terms, tax avoidance will be one of the main purposes or benefits of a transaction, where:

i. there are a number of reasons for entering into, or potential benefits from, a transaction and

ii. one of those reasons/benefits is to gain a tax advantage and

iii. the person would not have entered into the transaction had the possibility of the tax advantage not been there."

The requirement for a transaction to be for bona commercial reasons and not part of a scheme or arrangement of which the main purpose is avoidance of liability to tax is considered to be a subjective test, which has been subject to much commentary and case law.

It should be noted that Irish Revenue manuals are not legislation but rather Revenue's view at a moment in time and therefore subject to change. Accordingly, the views expressed in Revenue manuals should not be relied upon in any litigation.

How to determine commercial reasoning

Case law provides various examples of when a transaction is considered to have been implemented for bona fide commercial reasons or not. In *Trevor G Lloyd v HMRC* [2008] UKSPC SPC00672, 11 of the transactions were held not to be commercial themselves. Nevertheless, it was concluded that the **reasons** for carrying them out was, and that was what was important for the purposes of the bona fide commerciality test. For example, in a share-for-share transaction, the question to be answered is why the shares were sold, not why the transaction was structured in that manner. However, the **"why"** is relevant in determining whether the transaction forms part of any arrangement or scheme the main purpose, or one of the main purposes, of which is avoidance of a liability to tax. We have seen recently in the Tax Appeals Commission (TAC) case 127TACD2022, discussed below, that Revenue denied retirement relief on a reorganisation due to its failing the "main purpose" test. It is therefore important that motive is considered in respect of the manner in which a transaction is structured and the ultimate claim for relief.

As with all things that are subjective in nature, it can be difficult to attain complete certainty regarding the applicability of reliefs to certain transactions before implementation. For this reason, there may be more comfort provided to taxpayers (and agents) by receiving approval from Revenue before implementation, similar to the position in the UK.

Section 139 of the UK's Taxation of Chargeable Gains Act 1992 (TCGA 1992) provides relief from CGT on company reconstructions and amalgamations. This relief is, however, subject to certain anti-avoidance provisions. Section 139(5) TCGA 1992 provides that relief will not apply unless the scheme of reconstruction or amalgamation:

- is effected for bona fide commercial reasons and
- does not form part of a scheme or arrangement of which the main purpose, or one of the main purposes, is avoidance of liability to corporation tax, capital gains tax or income tax.[2]

The anti-avoidance provisions of s139 TCGA 1992 are subject to an advance clearance procedure. The procedure exists so that commercial decisions are not hindered by uncertainty about the possible application of the anti-avoidance provisions.[3]

To ensure that all applications for clearance are complete, HMRC has shared the following checklist:

- Provide details of the commercial reasons for the transactions. Simply stating that the transactions are for "commercial reasons" is insufficient.

2 HMRC internal manual "CG52810 – Company Reconstructions: Company: TCGA92 S139: Anti-avoidance Provisions and Clearance Procedure".
3 HMRC internal manual "CG52631 – Share Exchange: Anti-avoidance: Clearance Procedure".

- When stating a commercial reason ensure it is a reason for the transaction and not a statement of what the transactions will achieve (e.g. “to create a group” is what is achieved but does not provide information as to why the transaction is being carried out).
- Where the reason for the transaction is a disagreement between the shareholders provide details of the impact of the disagreement and how the transactions proposed will resolve those difficulties.
- If a sale of the business or any part of the business is planned provide details of how the sale will be effected (e.g. if by sale of shares, provide details of the shares which will be disposed of).
- For applications under s138, state if the transactions are to fall within s135 (a share exchange) or s136 (a reconstruction where shares in the target will be cancelled and new shares issued).[4]

The legislation provides that a clearance notification is void if the information in the application and any further particulars that have been requested about the transaction or transactions do not fully and accurately disclose all material facts and considerations relevant to making the decision (s138(5) TCGA 1992). Clearance is given on the understanding that the person has come to HMRC with “all cards face up on the table”. HMRC shall notify its decision to the applicant within 30 days of receiving the application/the request for further particulars being complied with; this timeframe may therefore impact the implementation timeframe for the transaction.

It is however important to note that UK tax legislation and caselaw may not be relied on in Irish litigation as there are deviations in the underlying UK provisions. It is therefore important to consider the application of such provisions and principles as guidance only.

How to evidence intention

Similar to the position set out above, it is also important from an Irish tax perspective to demonstrate motive clearly. The guidance provided by HMRC is helpful with regard to the nature of the evidence required. The key point from the above appears to be a requirement for clarity in respect of motive, i.e. what are the motivating factors, first, for implementing the transaction and, second, for implementing it in a particular manner or order. The influence of motive is considered in more detail in the analysis of the 2022 TAC case below.

As set out above, it is important to consider the commercial rationale before moving to implement a transaction to ensure that the transaction has commercial substance from the business’s perspective but also to ensure that anti-avoidance provisions are not unintentionally triggered. From a practical perspective, it is important to ensure that intention is always documented through minutes of board meetings or internal correspondence. As noted from the TAC case referred to below, it is not only actions but also perceptions as part of interactions with Revenue or other parties that may ultimately influence Revenue’s/the TAC’s interpretations of the commercial rationale for a transaction.

2022 TAC determination

In 2011, the appellant in 127TACD2022 carried out the following transaction (“the transaction”):

- On 1 November 2011, the appellant’s son incorporated a company 100% owned by him for the purpose of acquiring the share capital in the target, owned by the appellant and his wife.
- On 29 November 2011, the appellant sold six of his shares in the target to the newly incorporated company for €700,000 (although payment of the €700,000 was not made until 2013 – it would seem that the funds were retained in TradeCo until that

4 See https://www.tax.org.uk/what-to-include-in-statutory-clearance-applications-hmrc-checklist.

time and then distributed to HoldCo to fund the payment).[5]

- Also on 29 November 2011 the appellant sold his remaining five shares in the target, the consideration being five additional shares in his son's company for a value of €583,335, and his wife sold her one share in the target, consideration being one additional share in her son's company for a value of €111,667.

The appellant and his wife remained the only directors of the target until 2018.

The appellant failed to disclose these transactions in his income tax return for 2011. In his income tax return for 2013, he claimed retirement relief pursuant to s598 TCA 1997 on his sale of six shares in the target to his son's company for €700,000. Additionally, he claimed relief pursuant to s586 TCA 1997 (CGT relief on a share-for-share restructuring) in the amount of €583,355 on the exchange of his five shares in the target with his son's company.

The appellant contended that the transaction in 2011 was made for bona fide commercial reasons as he wanted to retire from the company and that the transaction allowed him to do this while preserving the company as a going concern, as well as maintaining an interest for his three children who were not involved in the company. Revenue denied that the transaction was made for bona fide commercial reasons as it contended that the appellant continued to have an active role in the running and operation of the company and did not demonstrate that he was passing the business on to his son.

Revenue's case on the matter considered many of the broader circumstances of the steps undertaken, as set out as part of the respondent's[6] evidence:

> Paragraph 60 "When asked why he did not believe that the bona fide commercial test had been met in this instance, he stated:
>
> Primarily the individual stayed on as an employee post the alleged retirement or sale of shares. He never appointed another Director in the company. His wife stayed on as an employee until the present day or up to that point in 2018 at the time of making the assessment. There was no real explanation as to a change of ownership. I couldn't see anything material looking at the ERTC records, which we've furnished today and updated, there was no establishing of that. The individual signed cheques. He represented himself at [an] Audit, which is, in my experience, unusual for somebody, who has stepped back from the business. There is admission of signing tenders. And there was quotes said to me in a meeting on the day about 'nothing has changed', 'a bit of a pension for himself'. So from looking at all that it appeared to me that this was not a bona fide commercial reason....
>
> Paragraph 63 When asked why the Respondent was so concerned that the appellant had not retired, he stated that it formed part of the 'basket of evidence' to establish that the transaction was not for bona fide commercial reasons. He also accepted that the legislation did not require someone to retire as a director."

In finding in favour of Revenue, the Tax Appeals Commissioner had regard to the following:

- The appellant had power to authorise the 2013 payment by the company.
- The appellant had power to authorise the transfer of funds between company bank accounts in October 2018 and the subsequent closure of those bank accounts.
- The appellant and his wife continued to receive salaries between 2011 and 2013. The Commissioner found that there was insufficient evidence to conclude on whether the payments were made to the appellant as

5 Mark Ludlow, "Direct Tax Cases: Decisions from the Irish High Court and Tax Appeals Commission Determinations", *Irish Tax Review*, Issue 4 of 2022.
6 Principal Officer of the National Anti-Avoidance, Branch One, Large Cases – High Wealth Individuals Division.

a director or an employee but found that "if they did constitute directors' remuneration, they suggest that the appellant was significantly more than simply a 'paper director'."

- The appellant represented the company at the Revenue audit in 2018–2020. The appellant's son was not involved in the engagement with Revenue. The Commissioner found this point to be "significant".
- The appellant failed to relinquish control of the company (he and his wife collectively retained a 50% shareholding).
- The company office remained located at the appellant's house. The Commissioner also found this point to be "significant" and said that "it further demonstrates that the appellant had not fully stepped back from the business".
- The appellant had the incorrect belief that he and his wife retained a 51% shareholding in the target:

> "The Commissioner considers that the appellant's expressed belief at the hearing that he retained 51% of the shareholding in [the target] rather than the 50% stake held with his wife, was also factually incorrect, but also indicative of the appellant's understanding of who had control of the company."

Based on the above, the Appeal Commissioner appears to have looked beyond the steps of the transaction and considering more broadly the motives behind each step. As part of his recent summary of this case, Mark Ludlow[7] raises the following questions:

- What is the point in time when the motivation of the taxpayer should be considered?
- Did the TAC effectively introduce concepts similar to the "trade benefit test" in s176 TCA 1997 (buy-back relief) to a retirement relief claim?
- Did the TAC effectively introduce a "control" and/or s817-style "significant reduction" and/or s176-style "substantial reduction" test to the interpretation of retirement relief?

The position taken by the Commissioner may therefore suggest a broader application in considering bona fide best interests. This case should be borne in mind when engaging in any group rationalisations.

When Is Tax Avoidance a Main Purpose?

Determining whether the main purpose or one of the main purposes of a transaction is avoidance of a liability to tax is subjective in nature. This issue has been the subject of numerous cases and has caused judges difficulties in analysing the taxpayer's state of mind, some of which are discussed below.

Revenue has highlighted the following general principles from case law:

- There is a difference between something being the sole or main purpose of a transaction and being one of the main purposes of that transaction. That a transaction has a genuine commercial motive as the main purpose does not mean it does not have obtaining a tax advantage as one of the main purposes.[8]
- Where a tax advantage is simply "the icing on the cake" then it is not a primary purpose or main benefit of the transaction.[9]
- It is often obvious whether or not a primary purpose or main benefit of a transaction was to give rise to a tax advantage.[10]

7 Mark Ludlow, "Direct Tax Cases: Decisions from the Irish High Court and Tax Appeals Commission Determinations", *Irish Tax Review*, Issue 4 of 2022.
8 Revenue Tax and Duty Manual Part 33-01-01, referring *to Lloyds TSB Equipment Leasing (No 1) Ltd v Revenue and Customs* [2014] EWCA Civ. 1062.
9 Revenue Tax and Duty Manual Part 33-01-01, referring to *Commissioners of Inland Revenue v Sema Group Pension Scheme Trustees* [2002] 74 TC 593.
10 Revenue Tax and Duty Manual Part 33-01-01, referring to *Snell v HMRC* [2006] 78 TC 294.

Again, determining whether a transaction was implemented for bona fide commercial purposes and was not part of a scheme or arrangement the main purpose, or one of the main purposes, of which, was the avoidance of tax is a subjective test. A test of this nature considers what the taxpayer had in mind at the time of implementation. By contrast, an objective test considers what "a reasonable man on the street would think" in the same circumstances.[11]

The UK's First-tier Tribunal[12] considered whether the purpose should be inferred from the consequences and found that:

> "it is legitimate to consider the consequences of the taxpayer's actions in order to determine his purpose. Consequences are the result of purposes which have been acted on. Consequences can, and will usually, be related to purpose, though we take on board the fact that purposes can be frustrated and consequences can be unexpected."

It further considered that in determining the purpose of a taxpayer one should:

> "Tak[e] account of both the alleged purposes by reference to the available evidence and actual consequences of the appellant's actions; this is the approach taken in [*Prudential plc v T&C Comrs* [2008] STC (SCD) 239, *Commissioners of Inland Revenue v Sema Group Pension Scheme Trustees* [2002] 74 TC 593 and *IRC v Brebner* [2006] 78 TC 294]."

In the *Sema* case the Special Commissioners held on the facts that the taxpayer would not have sold certain shares but for the tax credit that arose on their sale and held, accordingly, that tax avoidance was one of the main objects of the transaction. This decision was not contested by the Court of Appeal; however, Lightman J indicated that if a tax advantage is "mere icing on the cake", it will not be deemed to be the main object of a transaction.

In the UK High Court decision in *Snell v HMRC* [2006] 78 TC 294, which involved the disposal of shares in consideration for loan stock and a claim for relief under UK provisions similar to s586 TCA 1997, the judge broke the issue into two separate questions:

- Was the exchange part of a scheme or arrangements and, if so, what were they?
- Did the purposes of such scheme or arrangements include the purpose of avoiding a liability to capital gains tax and, if so, was it a main purpose?

HMRC argued, and the judge agreed, that the scheme or arrangements included the issue of each of the loan stocks with the intention of becoming non-resident and redeeming them while non-resident. The judge continued that:

> "If that was the scheme or arrangements then it is obvious that a main purpose was, subject to a point of construction on which Mr Snell relies, the avoidance of a liability to capital gains tax for there could have been no other."

Mr Snell had sought to argue that the purposes of the scheme or arrangements was to mitigate rather than to avoid tax. However, the judge noted that:

> "No such distinction is drawn in s137 [TCGA 1992, not unlike the Irish s586(3)(b) TCA 1997]. Section 137 is concerned with the terms on which a liability to capital gains tax may be deferred. It provides for a right of deferral to be lost if it is to be used for the purpose not of deferral but of avoidance altogether. If that is a main purpose of the scheme or arrangement, it matters not whether the scheme etc. was formed for purposes of tax mitigation, avoidance or indeed evasion. The plain fact is, as the

11 Revenue Tax and Duty Manual Part 33-01-01.
12 Revenue Tax and Duty Manual Part 33-01-01, referring to *A.H. Field (Holdings) Ltd v Revenue & Customs* [2012] UKFTT 104 (TC).

> Special Commissioners recognised in the concluding sentence in para 6 of their decision, that the main purpose of the scheme is the avoidance of a liability to capital gains tax."

In the *Snell* case, as the principal purpose of the transaction was to sell the company, it was a bona fide commercial transaction. However, when the Special Commissioners went on to review whether the transaction was an arrangement to avoid tax, they took the view that, as the function of the legislation was merely to defer CGT, the actions of Mr Snell (i.e. his actions taken to become non-resident) were part of an arrangement to avoid tax.

Anti-avoidance specific to ss586 and 587 TCA 1997

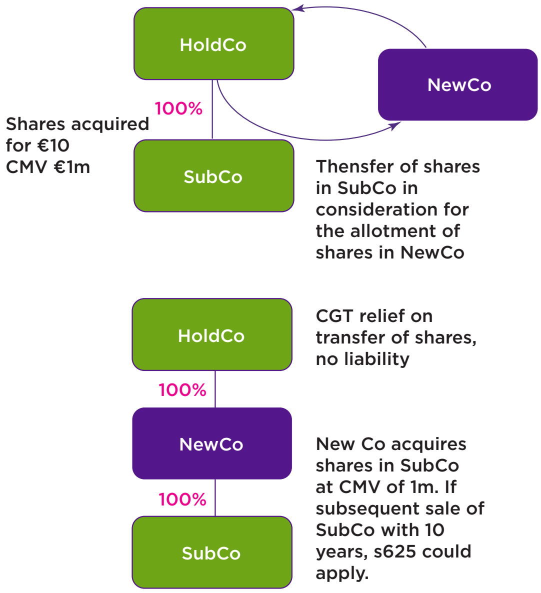
Section 625 TCA 1997 is intended to protect against possible tax avoidance within a group of companies through the disposal of shares in a subsidiary to another group member to avoid a tax charge on such a disposal by virtue of s617 TCA 1997. This is a specific anti-avoidance measure to target the misuse of s586 and s587 TCA 1997 to transfer a company out of a group without the increase in its value being caught for capital gains.

The effect of the section is to reimpose the charge deferred by s586 or s587 TCA 1997. There is a deemed disposal and reacquisition of the shares at market value by the chargeable company immediately before it disposes of the shares to another member of the group (Tax and Duty Manual Part 20-01-12).

Section 625(1)(a) provides:

> "This section shall apply if a company (in this section referred to as 'the subsidiary') ceases to be a member of a group of companies, and on an earlier occasion shares in the subsidiary were disposed of by another company (in this section referred to as 'the chargeable company') which was then a member of that group in the course of an amalgamation or reconstruction in the group, but only if that earlier occasion fell within the period of 10 years ending on the date on which the subsidiary ceases to be a member of the group."

The above could therefore give rise to the following:



If the chargeable company has been liquidated or dissolved before the subsidiary company ceases to be a member of the group, any corporation tax that would have been charged on the chargeable company under this section may be assessed and charged (in the name of the chargeable company) on the company that is the principal company of the group at the time when the subsidiary company leaves the group (Tax and Duty Manual Part 20-01-12). Revenue have confirmed as part of Tax and Duty Manual Part 20-01-12 that a *"[t]he reference to a "company ceasing to be a member of a group" does not apply where a company ceases to be a member because -*

i. it is wound up or dissolved; or
ii. another member of a group (e.g. an immediate parent) is wound up or dissolved."

It is important that the provisions of s625 are considered on any sale following a s586/587 reorganisation. It may be the case that a sale is not immediate and the provisions of s625 may apply inadvertently.

Anti-avoidance specific to s617 TCA

Sub-sections (2), (3) and (4) of s617 TCA 1997 provide exceptions to the CGT relief provided for as part of the legislative provision. In Tax and Duty Manual Part 20-01-04 Revenue states that "these exceptions are made in order to prevent tax avoidance".

Any chargeable gain or allowable loss accruing in any of these circumstances to a member of a group is to be charged or allowed:

- Section 617(2)(a): The disposal of a debt (or part of a debt) due from and satisfied by another member of the group. If, however, a chargeable asset passes from the debtor to the creditor member in satisfaction of the debt, the disposal and acquisition of the asset falls within s617(1).
- Section 617(2) (b): A disposal that occurs on the redemption by one member of a group of its shares held by another member of the group.
- Section 617(2): A deemed disposal of shares by one member of a group on the occasion of a capital distribution (as defined in s583 TCA 1997). If it takes the form of a distribution of assets in kind by another member of the group, however, the general rule applies to the disposal of the assets distributed in kind (so that if the company that acquires the assets subsequently disposes of them, the base cost to be taken will be the cost to the distributing company).
- Section 617(3): the consideration for a disposal from one member of a group to another consists of a payment for damage to the asset and that payment is provided by an insurer. The disposal is treated as having been made to the insurer.

Where a member of a group of companies disposes of a specified intangible asset (within the meaning of s291A TCA 1997) to another member of the group, s617(1) will not apply to the disposal of that asset where the companies jointly so elect, by giving notice to the Collector-General in such manner as Revenue may require, not later than 12 months from the end of the accounting period in which the other member of the group acquired the asset (Tax and Duty Manual Part 20-01-12).

Where such an election is made, the transfer would be regarded as one between connected parties deemed to occur at market value. Maguire notes in relation to this provision that:

> "the transferor company may be putting itself in harm's way of a charge to CGT. The rationale behind such an action is that TCA 1997, s 291A (9) says that capital allowances under that section cannot be claimed where the asset is acquired under a transaction to which either the relief in TCA 1997, s 617 or s 615 is claimed."[13]

Before implementing a restructuring or reorganisation, it is important to consider whether any anti-avoidance provisions apply. Depending on the nature of the transaction, certain anti-avoidance provisions may require a change to the implementation steps originally envisaged to ensure that the availability of tax reliefs is maximised.

Therefore, arguments exist that reference to a taxpayer's motivation may not be ruled out in that if a taxpayer were to give evidence, it is likely that their motivations behind the transaction could be aired.[14]

Conclusion

Many commercial transactions are just that, driven by pure group needs; however, it is also true that tax-driven transactions can be covered with a veneer of commerciality in an attempt to disguise their main purpose

13 Tom Maguire, *Irish Capital Gains Tax 2022* (London: Bloomsbury Professional, 2022), chapter 16.
14 Tom Maguire, *Irish Capital Gains Tax 2022* (London: Bloomsbury Professional, 2022), chapter 15.

(*A.H. Field (Holdings) Ltd v Revenue & Customs* [2012] UKFTT 104 (TC)). It is important that the tax practitioner is mindful of what is being proposed and ensures that the transactions proposed fit within the spirit of the law.

The purpose of specific and general anti-avoidance provisions is to target transactions that have little or no commercial reality but are intended to reduce, avoid or defer a tax or duty charge or to increase a tax deduction/refund. In considering whether a transaction could be considered a "tax avoidance transaction", Revenue's Notes for Guidance in respect of section 811C recommends that:

> "one must first consider the substance of the transaction and any related transactions, and not just the form of the transaction. This is necessary so as to get behind the facade of transactions and see their true purpose. One must also consider a transaction by reference to what it brought about and how it went about doing so and to alternative ways of achieving the outcome of the transaction."[15]

The tax landscape is constantly changing, with the addition of new specific anti-avoidance provisions and Revenue taking a much closer look at transactions. It is therefore important that the paperwork accurately reflects the intentions and the commercial reality of the situation. Tax advisers when advising clients on restructurings also need to be aware of disclosure requirements under the mandatory reporting obligations (s817D TCA 1997) and the application of DAC6.[16]

15 Part 33 – TCA Revenue Note for Guidance Section 811C – Transactions to avoid liability to tax
16 Council Directive (EU) 2018/822 (DAC6) provides for a mandatory disclosure regime for certain cross-border transactions that could potentially be used for aggressive tax planning. Further commentary is given in Revenue's Tax and Duty Manual Part 33-03-03.

News & Moves

Twelve new Partners at PwC including 4 new Tax Partners

PwC Ireland is delighted to announce the admission of 12 new Partners, 4 of whom are in Tax and are members of the Irish Tax Institute. They are Brian Lavery, Sinead Lew, Nick O'Brien and Johnny Wickham. The new Partners cover a diverse range of business areas and reflect further investment in the firm's growth and market ambition.

Brian Lavery becomes a Tax Partner in the firm's Financial Services practice. Brian has 15 years' experience assisting clients in the Asset and Wealth Management (AWM) industry to navigate cross-border tax issues arising from operating on a global basis. Brian specifically focuses on alternative AWM, including private equity, credit, and hedge fund clients. Brian has international experience, having spent over 2 years on secondment in PwC's Chicago International Tax Practice. He is an Associate of the Irish Tax Institute.

Sinead Lew becomes a Tax Partner in the firm's Domestic and International Outbound practice. Sinead has 14 years' experience in advising a diverse range of clients on domestic and international tax structuring across a variety of industries with a particular focus on real estate, capital projects and infrastructure. Sinead works with clients on all aspects of their business including mergers and acquisitions, due diligence, financing and group reorganisations. Sinead is a member of Chartered Accountants Ireland and an Associate of the Irish Tax Institute.

Nick O'Brien becomes a Tax Partner in the firm's Indirect Tax practice, leading PwC Ireland's financial services VAT offering. With more than 20 years' experience in tax, Nick works with clients across all financial services sectors, including public and multinational clients, to support their VAT outcomes. He also has extensive industry experience within the financial services sector in Ireland and internationally. Nick is a member of Revenue's Tax Administration Liaison Committee (TALC) Indirect Tax Sub-committee. Nick is a fellow of Chartered Accountants Ireland and an Associate of the Irish Tax Institute.

Johnny Wickham becomes a Tax Partner leading the firm's Tax Technology & Transformation practice, supporting clients' tax technology strategies and maximising the efficiency of tax technology solutions. Johnny has 15 years' experience working in tax, assisting clients with tax technology strategy design and execution engagements including ERP, data extraction, transformation and visualisation assignments. Johnny is a fellow of Chartered Accountants Ireland and an Associate of the Irish Tax Institute.

Pictured is Enda McDonagh, PwC Ireland's incoming Managing Partner (far left), with PwC's new Partners (l-r) Moira Cronin, Nick O'Brien, Sinead Lew, Johnny Wickham, Marie Taylor-Ghent, Brian Lavery, Fionán Moriarty, Eoin Tippins, Julie Kennedy, Shane O'Regan, Laura Gilbride and Keiran Barbalich.

Pictured with Harry Goddard, CEO, Deloitte Ireland are the 23 new Partners who were recently appointed.

Deloitte Strengthens Leadership Team with a Record 23 Partner Appointments

Thursday 1 June 2023: Deloitte Ireland has appointed 23 new partners across its business, following a year of strong growth and client demand. Four of the 23 new partners are Chartered Tax Advisers and members of the Irish Tax Institute including: David Boyle, Carmel Marnane, Anthony O'Halloran and Kelly Payne.

Commenting on the appointments, **Harry Goddard, CEO, Deloitte Ireland**, said: "Today is a significant milestone for our organisation and our people. This record number of appointments is a testament to the growth and strength of our business across the island of Ireland. Our new partners have proven ability in responding to our clients' requirements and in the growth and wellbeing of their teams. Many of these partners joined Deloitte as graduates, and I look forward to seeing the positive impact they continue to make in the work that they do. I wish them all every success in their new roles."

David Boyle is a partner in Audit & Assurance based in Galway. He works primarily with large private equity backed and multinational clients. He has extensive experience across a number of industries. He has advised corporates on corporate governance, risk assessment processes and financials control improvements including faster financial close reporting and working capital management. Internally within Deloitte, David has held a number of strategic roles across talent, clients and industries and more recently as part of the audit transformation leadership team. David is a Chartered Accountant and a Chartered Tax Adviser (CTA). He holds a Diploma in IFRS and FRS102 as issued by Chartered Accountants Ireland.

Carmel Marnane is a partner in Tax & Legal based in our Cork office. Carmel has over 15 years professional tax experience, working with a range of clients including domestic and multinational companies in implementing tax efficient structures for transfer pricing, business model optimisation and transferring wealth to the next generation. Carmel also works with companies engaged in the financial services and aircraft leasing industry. Carmel holds a Business Studies degree (BBS) from the University of Limerick and she is a Chartered Tax Adviser (CTA).

Anthony O'Halloran is a partner in our Tax & Legal department and part of the Corporate & International tax team. Anthony specialises primarily in international tax for multinational companies investing in Ireland. He previously led our Irish Tax Desk in New York with Deloitte LLP. He works primarily with inbound multinational clients from the US, UK and Europe. Anthony has extensive experience in leading multi-jurisdictional projects in the areas of IP structuring, due diligence, group re-organisations, business model optimisation and financing projects with a particular focus on companies in the technology and life sciences industries. Anthony is a Chartered Accountant (ACA) and a Chartered Tax Adviser (CTA).

Kelly Payne is a partner in Tax & Legal working in Global Employer Services. Kelly joined Deloitte in August 2013 and has worked with a range of multi-national and domestic companies across a variety of sectors. She has extensive experience advising clients on global mobility matters, employment tax, equity incentives, personal tax, payroll, and social security matters. Kelly advises clients on tax issues relating to their global mobility programmes, and compensation and benefits policies. She also provides support to clients in respect of Revenue audits and interventions, PAYE health checks and due diligences ahead of M&A transactions. Kelly is a Chartered Tax Adviser (CTA) and an Associate of Chartered Accountants Ireland (ACA).

Mason Hayes & Curran Appoints New Tax Partner

Mason Hayes & Curran has announced the appointment of **Kevin Mangan** as a Partner and Co-Head of the firm's Tax team. Kevin brings more than 16 years of experience including working with a Magic Circle law firm in London and 6 years with a major global technology company.

Kevin is known for his pragmatic advice on corporate tax, including on business expansion into Ireland and cross-border structuring. He has deep financial services expertise and brings significant hands-on experience of transfer pricing and tax controversy matters, both in Ireland and in other territories.

Kevin is a graduate of University College Dublin and a member of the Irish Tax Institute.

William Carmody, Managing Partner, Mason Hayes & Curran with Niamh Caffrey, Tax Partner and Kevin Mangan Tax Partner.

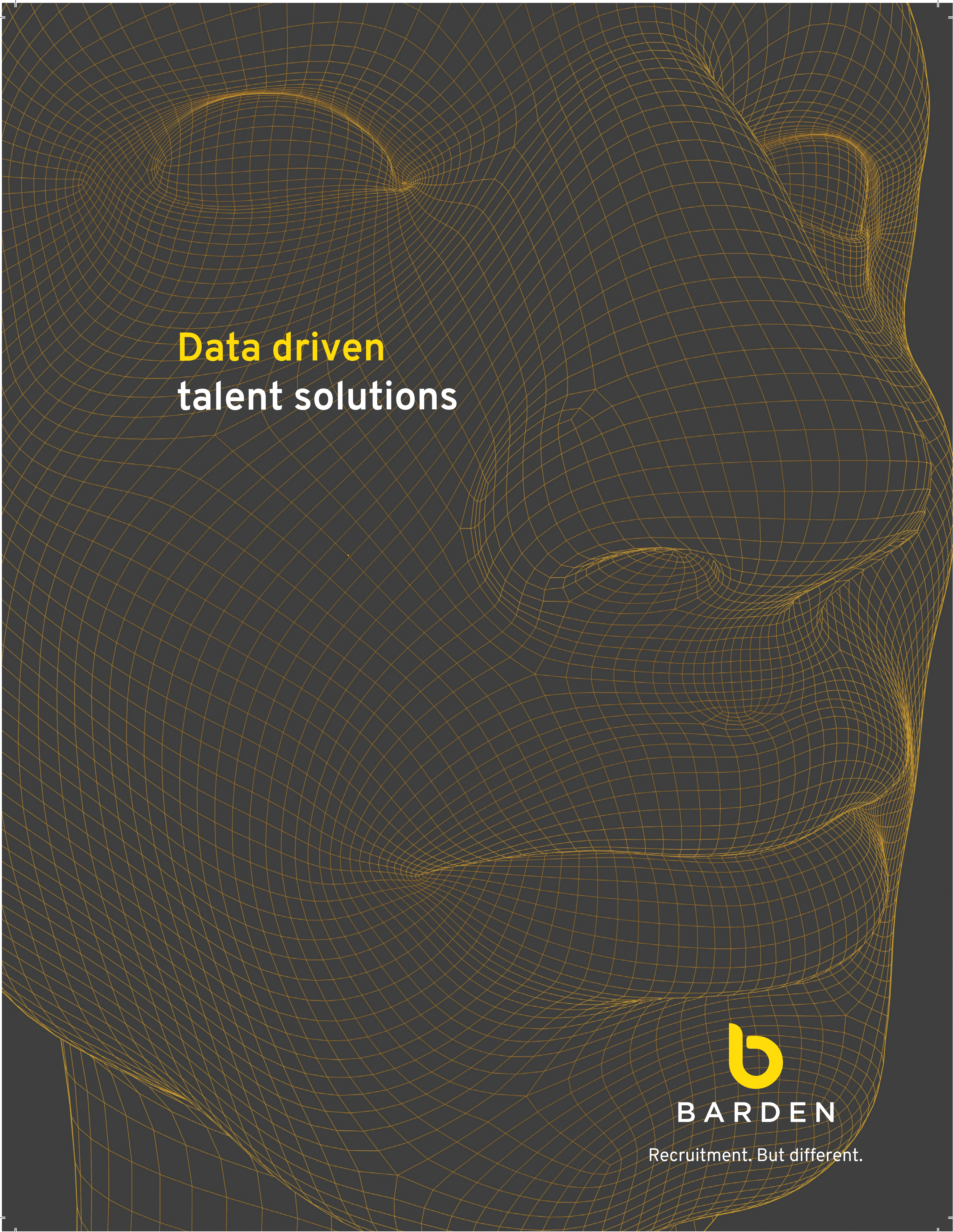
HLB Ireland Announces Latest Merger, with John McCarrick & Associates, Further Strengthening their Presence in the Irish Market

HLB Ireland, a leading provider of accounting, audit, and advisory services, is pleased to announce a merger with John McCarrick & Associates, a long-established and respected accounting firm based in Sandyford, Dublin. Post-merger, the firm will practice as HLB Ireland.

Mark Butler, Managing Partner of HLB Ireland said, "We are delighted to join forces with John McCarrick & Associates. This merger brings together two firms with complementary strengths and shared values including a focus on owner-managed business and impactful CSR initiatives such as the Kenyan Child Foundation.

John McCarrick, founder of John McCarrick & Associates, said, “We have delivered tailored accounting and advisory services to our clients for over 30 years. In order to respond to the evolution of professional services, advance the goals of the businesses we advise, and support the development of our talented people, I am very proud to be partnering with HLB Ireland”.

Mark Butler, Managing Partner, Maura Duffy, Partner and John McCarrick, Consultant.



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