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Irish Tax Institute

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- 100 Years of "The Fullest Fiscal Freedom": The Creation of the Irish Tax System in 1923
- New Transfer Pricing Documentation Requirements for Irish Branches
- Revenue Guidance on Foreign-Entity Classifications
- Considerations for Investors and Withdrawal of Investor Relief under the Employment Investment Incentive Scheme
- Remote Working and Global Mobility Tax Updates
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- Tax Appeals: Facts, Proven Facts and Expert Evidence

Interview with New Institute President, Tom Reynolds

Irish Tax Institute

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Policy & Representations Monitor

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Lorraine Sheegar lists all Revenue eBriefs issued between 1 May 2023 to 31 July 2023.

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

Mark Ludlow

- In the case of *Colm Murphy v Revenue Commissioners* [2023] IECA 160 the Court of Appeal considered the jurisdiction of the Appeal Commissioners (and a court, on appeal) to hear time-limit arguments
- In the case of *Brian Murphy v Revenue Commissioners and the Director of Public Prosecutions* [2023] IECA 110 the Court of Appeal considered whether a settlement agreement precluded prosecution
- In the case of *Michael Quigley v Revenue Commissioners* [2023] IEHC 244 the High Court considered the circumstances in which Revenue is required to disclose information to the taxpayer
- 72TACD2023 considered the meaning of the term "interest in land" for the purposes of s980 TCA 1997
- 92TACD2023 considered whether two individuals were "proprietary directors" of a company
- 94TACD2023 examined whether the loan element of a "stapled investment" was a "debt on security"

Direct Tax Cases: Decisions from the UK and European Courts

Stephen Ruane and **Patrick Lawless**

UK Cases

- In *Hargreaves Property Holdings Ltd v HMRC* [2023] UKUT 120 (TCC) the Upper Tribunal dismissed the taxpayer's appeal against the determination of the First-tier Tribunal that UK income tax should have been deducted from interest payments on debt financing provided to the group
- In *HMRC v J Conran; JC Vision Ltd v HMRC* [2023] UKUT 166 (TCC) the Upper Tribunal overturned a decision of the First-tier Tribunal in relation to whether a payment for the transfer of a licence constituted a distribution
- In *GE Financial Investments v HMRC* [2023] UKUT 146 (TCC) the Upper Tribunal reversed the decision of the First-tier Tribunal that a UK-resident company was not also US resident for the purposes of the UK–US double taxation treaty
- In *Strachan v HMRC* [2023] UKFTT 617 (TC) (5 July) the First-tier Tribunal determined that although the taxpayer had failed to acquire a domicile of choice in Massachusetts, HMRC had not met the burden of proving that the loss of tax was brought about by carelessness
- In *HMRC v Perenco UK Ltd* [2023] UKUT 169 (TCC) (19 July 2023) the Upper Tribunal upheld the decision of the First-tier Tribunal to allow expenditure

claims made by Perenco in respect of the costs of replacing a cooling plant at a gas processing terminal

European Case

- In 2017 the European Commission held that Amazon as a group received an individual selective advantage in the form of the tax ruling from the Luxembourg tax authorities that resulted in, according to the EC, a transfer pricing result and methodology that was not in line with the arm's-length principle. On 8 June 2023 concluded that the Commission did not rely on the correct reference framework for its review of a selective advantage.

International Tax Update

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

- BEPS: Recent Developments
  - OECD has published a consultation document on Pillar One – Amount B
  - OECD has issued documents covering the GloBE Information Return (GIR) and administrative guidance
  - OECD has released an Outcome Statement with 138 countries and jurisdictions agree milestone to implement global tax deal
  - The Australian Tax Office started a public consultation on Pillar Two
  - The Bahamian Ministry of Finance published a paper addressing the challenges posed by Pillar Two
  - Bermuda has launched a public consultation on the introduction of corporate income tax
  - Czech Republic's lower chamber has approved draft law on the implementation of Pillar Two
  - The Finnish government has opened a public consultation on Pillar Two
  - The German government has approved draft legislation on implementing Pillar Two
  - Guernsey, Jersey and the Isle of Man announced that they have agreed on a common approach to implement the global minimum tax under Pillar Two
  - Ireland has launched a consultation on a second Feedback Statement on the transposition of the Pillar Two Directive
  - New legislation came into force in Italy empowering the Government to implement Pillar Two
  - Luxembourg has published draft legislation on Pillar Two
  - The Netherlands expect to enter Pillar Two into force on 31 December 2023
  - New Zealand has introduced a bill detailing Pillar Two implementation
  - Norway's Ministry of Finance submitted a proposal for consultation on the introduction of the Pillar Two global minimum tax rules
  - The Republic of Korea the Ministry of Economy and Finance has announced its proposed 2023 tax revision Bill
  - Switzerland has approved a constitutional amendment to implement Pillar Two
  - Turkey and Vietnam have ratified the MLI
- US Tax Development
  - The US Internal Revenue Service and Department of the Treasury have proposed regulations setting out guidance on reporting information on digital assets
- EU Tax Developments
  - The European Parliamentary Research Service has issued a briefing document on the proposed FASTER Directive
  - Denmark has introduced a new provision allowing tax to be withheld at a rate of 15.4% on dividends from tax-free portfolio shares
  - Germany has published its law implementing the provisions of the EU Public Country-by-Country Reporting (CbCR) Directive

  - Germany has replaced its previous transfer pricing guidance
  - The Bill for the implementation of DAC7 in Greece has been submitted to Parliament
  - Public CbCR Directive was transposed into Irish domestic legislation in Ireland by the 22 June deadline
  - Luxembourg has enacted DAC7 rules
  - Luxembourg has drafted legislation on revised investment tax credit
  - Luxembourg has transposed the Public CbCR Directive into domestic legislation
  - Romania has transposed the Public CbCR Directive into domestic legislation
- UK Tax Developments
  - The UK has formally introduced requirements for transfer pricing master files and local files in line with OECD requirements
  - A new consultation has been launched on umbrella companies
- Saudi Arabia's Zakat, Tax and Customs Authority (ZATCA) has issued a circular stating that a non-resident's employees or personnel must be physically present in Saudi Arabia for the establishment of a service permanent establishment
- The OECD has published its "International Standards for Automatic Exchange of Information in Tax Matters: Crypto-Asset Reporting Framework and 2023 Update to the Common Reporting Standard"
- The Australian Treasury has deferred the introduction of public country-by-country reporting
- The Singaporean Ministry of Finance issued the draft Income Tax (Amendment) Bill 2023 for public consultation

VAT Cases & VAT News

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

VAT Cases

- *Gemeinde A v Finanzamt* C344/22 related to Gemeinde A's right to deduct input VAT and the interpretation of Articles 2 and 13 of the VAT Directive
- *Dyrektor Krajowej Informacji Skarbowej v C. sp. z o.o., in liquidation* C108/22 concerned the special scheme for travel agents as provided for under Article 306 of the VAT Directive (TOMS/TAMS) and whether it applied to a hotel services consolidator
- *Cabot Plastics Belgium SA v État Belge* C232/22 related to the interpretation of Article 44 of the VAT Directive (which sets out the general business-to-business (B2B) place-of-supply rule for services), together with Article 11 of the Implementing Regulation (EU 282/2011) which sets out the characteristics of a fixed establishment)

Tax Appeals Commission Determinations

- 82TACD2023 dealt with the submission of amended returns after revision of the VAT calculations using an updated version of the pharmacy scheme
- 101TACD2023 dealt with the exemption provided for education, training and vocational training under paragraph 4(3) of Schedule 1, VATCA 2010
- 106TACD2023 resulted from the withdrawal of the zero rate of VAT that the appellant had applied to sales of goods to the UK as it had not retained evidence to prove that the goods were removed from Ireland and transported to the UK

Accounting Developments of Interest

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

Legal Monitor

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

Tax Appeals Commission Determinations Published from 1 May to 31 July 2023

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Alan Heuston and **James Quirke** discuss the decision in *Cintra Infraestructureas Internacional SLU v The Revenue Commissioners* [2023] IEHC 72, where the High Court upheld a Tax Appeals Commission determination that the sale by a non-resident company of shares in a company that built and operated an Irish motorway was not subject to Irish capital gains tax.

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145 The "Principal Purpose Test" Tested in Court: *Burlington Loan Management*

Martin Phelan and **Fiachra Ó Raghallaigh** provide an overview of the UK First-tier Tribunal's decision in *Burlington Loan Management v HMRC*, which sets a high bar for tax authorities' proof that a transaction contravenes the principal purpose test.

148 Tax Appeals: Facts, Proven Facts and Expert Evidence

Conor Kennedy considers how practitioners should prepare for tax appeal hearings, in particular, the fundamental requirement to ensure that all evidence is made available to an Appeal Commissioner.

Interview with New Institute President, Tom Reynolds

Tom Reynolds was inaugurated as the Institute's 48th President at the AGM on 7 September. Tom has worked in senior tax roles in multinational manufacturing industries for the last 28 years, including Kerry Group, where he started his career. He is currently Vice-President of Tax, M&A and Business Structuring at Schneider Electric, a global specialist in energy management and automation. Before taking up his role as President, he spoke to Tax Talk host Samantha McCaughren about his experience of working in large global companies and the uncertainty facing businesses as Pillar Two comes into effect on 1 January 2024.

Samantha McCaughren: You're very welcome here today, Tom. Just as an introduction to the members, can you tell us a little bit about why you chose a career in tax?

Tom Reynolds: Thanks Samantha. I always had an interest in maths and accounting in secondary school, and I decided I wanted to do accountancy. I grew up in Carrick-on-Shannon and decided I would apply for the commencement course in Sligo Regional Technical College, and at the time I developed a strong interest in tax. I trained in a small firm in Sligo town, which was great, because it covers all topics from audit to tax, accounting etc. So it gave me a broad scope of what I was really interested in, and in the end I decided I wanted to do tax.

Samantha McCaughren: As you say, you see all life in a small firm. How did you go from working and training in a small firm to working for some of the biggest names out there, certainly some of the

biggest names in Ireland, for example, Kerry – one of our big success stories.

Tom Reynolds: That was my first job in industry. What happened was that when I finished my tax and accounting exams, I decided I wanted to do an MBA in the University of Ulster. And by chance I got talking to somebody from Kerry, and they were looking for somebody for tax. So I applied, and I went down two days later and I got the job. It was a great experience because it was a large organisation that was growing, doubling in size every five years. I think the opportunity and the experience I got was huge. It was very challenging at times because I was thrown into a lot of international tax, which I didn't have very much experience of. And Kerry did a huge number of M&A deals at that time, which was very exciting. I became the Head of Tax, probably two years after joining.

Samantha McCaughren: It really is a rare opportunity to grow with a company like that; it probably gave you a whole new set of skills that gave you opportunities to work in other international companies. So where was your next stop after Kerry?

Tom Reynolds: After Kerry I moved to Kellogg's. And I think the skill set I gained in Kerry stood to me because I developed a deep knowledge of tax, but also I built a very strong relationship with the business, and I understood the strategy. And tax and strategy are very linked. When I moved to Kellogg's I took on a broader role. I was responsible for tax for Europe, and I also took on pensions and treasury and then statutory reporting. Then, after about three-and-a-half years there, I moved into more of a finance role, as a finance director, and in that role I was responsible for setting up the centre of excellence that Kellogg's had here in Dublin.

Samantha McCaughren: Okay, and then the next stop was Schneider?

Tom Reynolds: Yes. I was looking for, I suppose, a larger, more global organisation, and Schneider was looking for somebody to take responsibility for transfer pricing and M&A activity. So I applied and was successful, and I've been with them now for 11 years. Over that period I have taken on more responsibility – I'm responsible for the greater India region, which really came about as a result of some M&A transactions, and it's been a great experience. I think, looking at the three organisations I've worked for, I've been exposed to very different cultures and differences in how people think. It's quite interesting, and it just broadens your scope. And I think that's what's great about industry. One of the key skills is knowing how to be a very effective business partner and being able to convert tax technical knowledge into layman's English.

Samantha McCaughren: One of the advantages of being in tax in Ireland is that we have so many big global companies with key operations here. There is an opportunity for people who are interested to get that global tax experience.

Tom Reynolds: It's a huge opportunity. I think when you're in practice, you give advice, but you never see a project from the start through to the end result. The brilliant thing about working in industry is that if you're doing a transaction, you're involved from the pre-offer to the closing to the integration. And, in my role, I'm also responsible for understanding the global transfer pricing rules and how they should be implemented across our organisation. So it's a great opportunity to understand the broader aspects of tax, and its complexity.

Samantha McCaughren: And how close are you to the big decision making, then? I mean it sounds like you're involved in several key aspects of the business.

Tom Reynolds: I think when you're working in a business, tax is an important part of the strategy. For example, if you're entering a new market, or if you're acquiring or disposing of a company, or if you're setting up a transfer pricing policy, you need to have tax aligned with the strategic intent of the business. So you get to understand the business more deeply, and you work very closely with the other functions. So, effectively, you become a very strong, trusted adviser within the industry.

Samantha McCaughren: You mentioned cultural differences earlier. The idea of working in tax in India is fascinating. I mean, is it as different as it might seem from the outside or are there similarities, or common ground or parallels, with working in tax here at home?

Tom Reynolds: Each culture has a different way of thinking and doing things, and I think that once you can adjust and understand that, you can work very well with the teams in each country. You need to understand their way of thinking sometimes, and you need to step back and say "this is what's driving this, and this is what you need to do".

Samantha McCaughren: You're obviously very closely involved with the Institute and have been for some years. How did that come about?

Tom Reynolds: I became a Council member in 2008 through Joan O'Connor, who was a Past President. She was keen to get someone who worked in industry involved in the Institute. So when I joined Council I became a member of the Corporate Sector Committee, and I went on to join other committees. The Institute does a lot of good work on tax policy, making submissions to Government departments and international bodies like the OECD and the European Commission, and I've been involved in a lot of that work on the international tax side and currently on Pillar Two and BEPS etc.

Samantha McCaughren: That brings us on to a lot of interesting topics. You're taking up the Presidency at a time of huge change in international tax. How do you think that big businesses are going to react to the global minimum rate, something that's been talked about for so many years and is now about to be introduced?

Tom Reynolds: Indeed, there's been a lot of change over the last decade. When you look back: we had BEPS, the 15-step plan; now we have Pillar Two and Pillar One. We've had Brexit. We had changes in the US tax regime that brought a lot of new rules into play, for example, BEAT.

I would say that businesses are reacting well to the change in the minimum rate. It's been out there for a long time – there's a lot of awareness about it in businesses, and they've had time to adjust to it. I think the same can be said for governments. But the implementation of Pillar Two will take some time to complete and bed down because it's extremely complex.

If you look at the reporting requirements and the touch points for the data that must be collected, you could be talking about up to a thousand touch points in a multinational company. What I would say is that Pillar Two is not just a tax issue; it also involves the accounting and HR teams modifying their systems to get the data. That's a lot of work. Various studies that have emerged show that maybe 40% to 60% of the data is readily available, and the other 40% or 60% has to be extracted from different systems, sometimes manually.

So there's a huge amount of work to be done in terms of gathering and collecting that information. Some helpful solutions are emerging from the implementation process that will help the

compliance process, but it remains very unclear how the reforms are going to play out.

Another cause of uncertainty is the countries, including large countries like China and India, that have yet to change their tax systems to accommodate Pillar Two. And in the US, we've got complexity because the OECD agreement isn't being enacted into its tax system, and we have to wait and see when it will happen there.

Samantha McCaughren: Would you have concerns about some of the pushback that we're seeing in the US? How dependent are we on the US coming on board to make this work? You know, we're coming up to election time and we could be back to a Trump Presidency, potentially. Does that add more uncertainty to the mix or are you confident it'll come right in the end?

Tom Reynolds: No, I think the current environment is very uncertain, and I think if we don't have alignment from these countries, we're going to have more revenue audits. And we've got to prepare for that because it's going to put a lot more pressure on organisations. There is a significant compliance cost for businesses in meeting the requirements of Pillar Two. So I think we're going into a period of great uncertainty, and we're probably going to have a lot more disputes.

Samantha McCaughren: What do you mean when you say disputes? Is that different countries disagreeing on things or is it more corporate-level disagreements?

Tom Reynolds: I think that disputes will arise if some countries haven't implemented Pillar Two or if countries have enacted the legislation and have slightly different interpretations of those rules. What happens in that situation. The big challenge will be how to handle situations where questions are raised on audits: are we clear on how relief is given and how countries' tax systems will interact with each other? I think the key point from an Irish perspective is that the legislation we enact should simple and easy to understand. And that's going to be a huge challenge.

Samantha McCaughren: In terms of what we can do to retain multinational businesses, are there incentives we could bring in or are we hamstrung in this new world of a more even playing field?

Tom Reynolds: I think, Samantha, businesses want certainty about tax, and we should be adopting a simplified approach. For example, moving to a territorial system and introducing the participation exemption in Ireland is key. That would free up resources in companies and remove some of the complexities. Companies would welcome that.

I also think we need to re-look at our capital gains tax position, because we have a very high rate, at 33%, and we have no indexation, which again is an extra cost on businesses. In this respect, we compare badly with competitors. And I don't think reducing the rate would have a big impact on the Exchequer.

We also need to look at innovation. We've dropped down the global rankings, and I think we need to rebuild our position. Changing the R&D tax credit system and increasing our spend would help. We also need to educate our SMEs to be more innovative. We can extend the credit and simplify it. And we could also potentially change it to allow some process improvement as a qualifying R&D activity, which would help us to decarbonise our businesses. I think that would be very helpful for small SMEs, because they need some incentivisation to meet their targets. They haven't got the supports and resources that large multinationals have.

Samantha McCaughren: So the question comes back, then, to what can we do to foster our own indigenous sectors and to make SMEs become more sustainable? Look at the likes of Kerry, which you worked for, I mean why aren't we getting those big employers like Kerry and growing them on our own shores?

Tom Reynolds: I think we've probably got to collaborate more closely with our indigenous companies and SMEs. And we've got to assist them to grow, and to grow their exports, and to ensure that they're developing a much more sustainable way of doing business. Again, it comes back to the need to encourage innovation and entrepreneurship. I think that some of the enterprise reliefs are really not fit for purpose. We need to change them so that we can encourage a lot more investment in the entrepreneurial skills and development that can happen in Ireland. Ireland is a great country with very highly educated people.

I think we've got to look at our cost base too. When people are considering locating in Ireland, it's difficult, because of housing etc. It makes it a bit more complex. We've got to look at some of these issues because we've really got to show that we are a country that's open to inward investment, which we are, but we've got to prove through

simplification and through incentives that we can actually help companies to grow and develop.

Samantha McCaughren: An interesting point you touched on there was climate change. What kind of role does tax have in helping sustainability become a key part of the agenda, because it's not something any one business or any one sector can do on its own?

Tom Reynolds: For a lot of companies, sustainability is at the top of their agenda. I think we clearly see that in the case of investors looking at companies, or employees, and potential graduates – they're very focused on how sustainable a company is. I think within that there is an area where incentives should be created to promote decarbonisation and energy efficiency. And we're an island, we've got some great resources – we can push our green agenda very strongly to help us achieve our decarbonisation targets.

Samantha McCaughren: Going back to that whole discussion about global companies and your experience there, is sustainability and how countries are dealing with it becoming more important to the multinational sector?

Tom Reynolds: I think it's become much more important. I think it's on the top of everyone's agenda as to how to decarbonise. I work for an organisation where sustainability is critical, and we're an energy management company. It's all about how you make energy more efficient and more effective and getting your clients to become carbon neutral.

Samantha McCaughren: Another topic getting pushed to the forefront of agendas is the diversity and inclusion discussion. In terms of tax, are there enough women, are there enough minority groups in the profession? And do you think that there's more that can be done on that front?

Tom Reynolds: I think it's interesting to watch. For me, where I work, we have 50:50 or probably more women than men, so it's interesting to see that. With the pandemic, what we see is more flexibility coming into organisations, so that has led to some changes as well. And I think that organisations are very focused on trying to bring equal representation of men and women, and encouraging the minority interest as well.

Samantha McCaughren: In terms of what's coming next for the profession, AI has been a huge topic,

met with, I think, a lot of fear among workers. People in several sectors are wondering "how will this affect me?". What do you think, yourself?

Tom Reynolds: It's an interesting one because, when I look back – I'm qualified 30 years this year, and when I started working we didn't have email, we didn't have mobile phones, and the tax returns were prepared manually. Since then, there's been a huge change with digitalisation. And this was very evident during the pandemic – how quickly companies could adapt and change. I think we're going to see a lot more of that. And I think when we look at AI and the use of the cloud, and the ability to collect data and analyse it, and also being able to visualise that, I think that things will change dramatically over the next three to five years. I think that the Chartered Tax Adviser role will have a limited focus on compliance, as we will see much more tax in real time. And what we'll see is the CTA becoming much more a strategic adviser to businesses and very much more a trusted business partner.

Samantha McCaughren: Do you think that's one of the biggest challenges for the profession, the implications for how you do your work, or do you envisage other changes for tax professionals down the line?

Tom Reynolds: I think there will be changes coming down the line. Tax as a career is very interesting. I think that you cover an awful lot of topics, and you're exposed to all levels of the business, and senior management, and you work very closely with other functions. That's my experience from an industry perspective. I think that when we look at all of the changes we have seen in tax and look at what is coming, there's going to be a huge level of work to be done in Pillar Two. That's going to keep a lot of us tax professionals employed for a while. I think what you'll see is a change away from a compliance focus to this more strategic approach, where you work with the business, which I think is exciting and very interesting. It's a great opportunity for anybody who's considering a career in tax at this point in time.

Samantha McCaughren: Just to round up, what's your view overall, then, are you reasonably optimistic?

Tom Reynolds: I think we have to be careful because with globalisation and digitalisation, and more people working remotely, it's very easy to move your business and change how you do business. I think we've seen that in terms of the pandemic, how things change so quickly, and how companies reacted. I think that's where we've got to really look at what we do in Ireland. And I keep coming back to it: we need to look at how we simplify our complexity and how we encourage companies, in terms of the changes we can make. But we also need to focus on what we're very good at, which is innovation, and we've got to develop that further to get our ranking back. And we've also got to look at how we encourage our SMEs to grow and develop. I think that if we lose some in A and we gain some in B, that's going to bring some change. But I think we just need to be a lot more proactive in our approach to supporting businesses, especially given what we can see other countries are doing.

You can listen to Tom's full Tax Talk podcast interview here.

Chief Executive's Pages

Martin Lambe
Irish Tax Institute Chief Executive

Introduction

The Institute's Annual General Meeting took place on 7 September, and Tom Reynolds was elected as our 48th President. Tom joined Council in 2008 and has been a valued member of numerous Committees over the last 15 years; he is also the first Institute President to come from a manufacturing industry background.

Tom began his career in Kerry Group, where he was Head of Tax, and went on to work for Kellogg's, where he was Director of Global Tax Projects. He is currently Vice-President of Tax, M&A and Business Structuring at Schneider Electric, a global specialist in energy management and automation.

The Institute has leveraged the expertise that Tom has built up over a long career of working in senior tax roles in large multinational businesses. We are fortunate indeed to have a person of his experience and rich insight at the helm as we embark on the implementation of Pillar Two in the Irish tax system.

Before he took office, Tom spoke to our Tax Talk podcast host, Samantha McCaughren, about his background in tax, his plans for his year as President, the challenges facing businesses impacted by the global minimum tax rate and the pressing need to simplify our tax code. An edited transcript of the podcast is included in this edition of *Irish Tax Review*, or you can listen to the full podcast here.

Tom Reynolds, President, discussing his plan for the year with Samantha McCaughren, Tax Talk host.

Thank you to Colm

Tom takes over from Colm Browne, who had a very busy and successful term of office. He presided over the return of the full calendar year of in-person events, some of which had not taken place since 2018. He also hosted the first Joint Conference with Revenue in six years.

Colm's broad experience in practice and his expertise in corporation tax compliance for large businesses were invaluable to the Institute in a year that saw the implementation of Revenue's new Compliance Intervention Framework and intensive engagement with the Department of Finance and Revenue on the implementation of Pillar Two. On behalf of Council and the wider membership, I want to thank Colm for his great work and generosity with his time during his Presidency.

Changes to Council

The appointment of our new President gives rise to a number of changes in Council. Aoife Lavan has moved up to the role Deputy President; Shane Wallace joins the Officer Board as our new Vice-President; and Colm Browne is our Immediate Past President. We also warmly welcome two newly elected Council members, Kelly Payne of Deloitte and Neil Phair of Phair and Co. We are also delighted that Maura Quinn, former CEO of the Institute of Directors, has accepted our invitation to join Council as an independent member. Maura was co-opted to Council at the AGM.

Kieran Twomey has decided to step down from Council after 16 years service to the Institute and its members. Kieran brought huge energy and commitment to his work on Council. His experience and wisdom have been a tremendous asset to the Institute and we wish him well for the future.

Education

Our Autumn 2023 courses are open for registration and will begin shortly. The numbers are promising across the three courses – Diploma in Tax, Tax Technician and, of course, the Chartered Tax Adviser (CTA) qualification. We look forward to supporting our new students through their tax education. The students who completed our Tax Technician and CTA courses during the summer will receive their exam results in the coming weeks. We wish them all the best of luck.

Our third-level textbook, *Irish Taxation: Law and Practice*, has been published. This book is used in third-level institutions all over the country. It is also the basis for our Tax Trainee Induction Programme. The book is edited by Dr Patrick Mulcahy and Laurence May, and our authors are Margaret Sheridan, Christopher Crampton, Tara Duggan, Paul Murphy, Raymond Holly and Martina Whyte. I want to thank them all for their contributions to this important publication.

Our work to promote the career in tax continues and, as usual at this time of year, we are attending career fairs for both second- and third-level students to highlight the many opportunities that a career in tax can offer them. Our engagement with undergraduates will continue through our Fantasy Budget 2024 competition, and shortlisted applicants for our Third-Level Scholarship were interviewed earlier this month. The winner will be announced shortly.

Professional Development

The Tax Trainee Induction Programme for those about to embark on their CTA training took place earlier this month. For those starting later in the year, the Programme is still available on demand. It is designed to give trainees the tools and knowledge to get started in their careers.

In our highly globalised economy the demand for expertise in transfer pricing has grown significantly in recent years. Responding to this need, our Professional Development team has designed a comprehensive training programme that will give participants an in-depth knowledge of transfer pricing rules and concepts and an understanding of how they apply in practice. The programme, which runs

from 27 September to 5 December, includes an impressive panel of expert speakers. You can learn more about the programme here.

The Autumn/Winter 2023 CPD Programme is well under way. This year the focus will be on key issues for CTAs and their clients, such as Budget 2024, Finance (No. 2) Bill 2023, customs and deferred tax.

Revenue Audits and Investigations – The Professional's Handbook

The third edition of *Revenue Audits and Investigations – The Professional's Handbook* was launched earlier this month. Written and edited by leading practitioners, this step-by-step guide will be of great value for anyone navigating the new Compliance Intervention Framework. You can order a printed copy or an ebook version here.

Budget 2024

The Institute sent its Pre-Budget 2024 Submission to the Minister for Finance, Michael McGrath TD, on 30 June. It sets out our recommendations for tax changes that we believe would bolster the resilience of the economy in the current, highly uncertain global trading environment. We stressed that attracting foreign direct investment would remain a key objective, but the second prong of a balanced and sustainable growth strategy must be a laser-like focus on building productivity and innovation in the indigenous sector.

Pictured at the launch (L–R); Julie Burke, BL, Editor; Aidan Lucey, Author, PwC; and Mark Barrett, Author, RDJ.

Minister McGrath told us at our Annual Dinner in February, that he wanted to take a fresh look at the existing suite of SME tax supports to see how they could be optimised. So we were delighted to get the opportunity to meet him in his office on Merrion Street on 13 July to take him through the detail of our recommendations to make measures such as the EII, the KEEP, entrepreneur relief and the R&D tax credit more accessible to small businesses and start-ups.

It was a constructive engagement, and we hope that some of our proposals will be taken on board by the Minister when he announces his Budget on 10 October.

Watch out for our usual Budget Briefing Webinar moderated by Newstalk's Shane Coleman, which begins at 7.30pm on the evening of the Budget. Joining our President, Tom Reynolds, to give their reactions to

L–R: Martin Lambe, Chief Executive, Cathy Herbert, Director of Corporate Affairs, Anne Gunnell, Director of Tax Policy and Representations, Minister for Finance, Michael McGrath TD, and our then President, Colm Browne.

the Minister's speech will be Fergal O'Brien, Executive Director of Lobbying at Ibec, and Rosanne Longmore, CEO of health tech start-up Coroflo. The next morning Mark Barrett of RDJ and Kate Newman of KPMG will go through the technical details and what Budget 2024 means for you and your clients.

Representations

It has been an exceptionally busy summer for our Policy and Representations team, with no fewer than seven tax policy submissions completed since June. The main strand of the team's work has been on the implementation of Pillar Two.

Since mid-May the Institute has been involved, along with other stakeholders, in intensive consultations with the Department of Finance and Revenue on the implementation of the EU Directive on Pillar Two, with meetings taking place fortnightly at TALC BEPS Sub-committee.

In our response to the second Feedback Statement, which we submitted in late August, the Institute urged the Department and Revenue to continue to engage with stakeholders up to the publication of the Finance Bill and during its passage through the Oireachtas to ensure that the legislation, when enacted, can be clearly understood by taxpayers and does not lead to any unintended consequences.

We also emphasised the need for Revenue to adopt a pragmatic approach in respect of penalties in the initial period following the implementation of the Directive into Irish law. And we recommended that after the transition period any penalties imposed should be in line with existing penalties that apply in Ireland for corporation tax purposes.

Outbound payments

In early July the Department of Finance published a Feedback Statement on new taxation measures to apply to outbound payments of interest, royalties and dividends. In our response we said that any new such measures must be proportionate while meeting the central objective of the commitment to prevent double non-taxation. We noted that the legislative approach proposed in the Feedback Statement will, in many instances, go beyond what is necessary and may give rise to unintended consequences.

Roadmap for the introduction of a territorial system of taxation in Ireland

On 14 September the Minister for Finance issued a statement setting out his intention regarding moving to a territorial system of taxation. Although the Institute welcomed the Minister's commitment to a firm date for the introduction of a foreign dividends exemption, we are disappointed that it has been delayed until 2025.

In the days before his statement, Minister McGrath acknowledged that it was "becoming ever more challenging" for multinational businesses to meet the increasingly complex requirements of Ireland's corporate tax code. The Institute could not agree more, and that is precisely why we had urged the Government to bring forward legislation to permit a participation exemption for foreign dividends in tandem with the implementation of Pillar Two.

As we noted in our response to the Minster's statement that allowing a foreign dividends exemption would have gone a long way towards reducing the uncertainty and the administrative burden that the new global regime will impose on multinational businesses in Ireland.

Furthermore, the Minister's statement did not provide clarity on the Government's plans to provide a foreign branch exemption, the second element of a territorial system of taxation. Legislating for this change may require further consideration, but the fact that it is not mentioned in the timeline set out in the Minister's Roadmap causes further uncertainty for businesses.

The Institute will, of course, engage with the consultation process announced by the Minister, but the questions that have been published with the Statement are not encouraging.

Enhanced Reporting Requirements

We wrote to the Minister for Finance at the end of August expressing our concern about the forthcoming Enhanced Report Requirements (ERR), which Revenue intends to bring into effect on 1 January 2024, subject to a Commencement Order.

These new rules would require employers to report details of certain non-taxable payments and benefits made/given to employees in real time. In our letter to the Minister we pointed out the considerable burden and cost that these requirements would impose on employers, as well as their cash-flow implications for employees.

We suggested changing the reporting requirement to one month after the payments are made. This would be more manageable for businesses while providing Revenue with timely data on these payments. However, Revenue is determined to proceed with the new rules, and that is why the Institute felt the need to write to the Minister.

We are aware from members that there is limited awareness among employers about the new Enhanced Reporting Requirements. In that regard, we recommend you encourage your employer clients to register to attend one of Revenue's information sessions on the ERR.

In the meantime we will continue to engage on the implementation of the ERR and will update members on developments.

Sad News

In early September we learned with great sadness that our student Ciarán Briody died when he was knocked down by a bus in Dublin city centre on 31 August. Ciaran was a tax trainee in KPMG and had successfully completed his Part Two CTA exams in June. The tragic news of the loss of a young man on the cusp of joining the profession is deeply shocking. I know that you will all join me in offering our condolences to Ciaran's family, his friends and his colleagues in KPMG.

Contributors' Stories: Getting Involved with Your Institute

Kevin Donovan CTA
Tax Manager, Roberts Nathan
Conferred in 2020

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

I am currently involved with the Institute's Education team as part of the CTA programme having updated the Part 3 Domestic Taxes student manual for Finance Act 2022. I have also presented on the Institute's CPD programme and chaired a number of webinars over the past 2–3 years.

What have you gained from your involvement with the Institute?

Being involved with the Institute has given me access to a wider network group of CTAs and it is great to get an insight into how the Institute functions from an education and CPD perspective. Most importantly, my involvement with the Institute has given me invaluable experience in public speaking that can be quite difficult to come by.

Would you encourage others to get involved and why?

I would definitely encourage anybody who is interested in getting involved with the Institute to get in contact with the team. You don't have to wait to be approached! They are always extremely helpful and encourage involvement at every level, which can be extremely valuable experience, especially for recently qualified CTAs. It is possible to get involved "behind the scenes" in writing or examining, or author and article for *Irish Tax Review* if you don't enjoy presenting.

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

Institute representations before Budget 2024/Finance Bill 2023

The Institute submitted its Pre-Finance Bill Submission to the Minister for Finance, Michael McGrath TD, on 31 May, setting out a number of legislative changes for consideration in the drafting of Finance (No. 2) Bill 2023. The Institute subsequently submitted its Pre-Budget 2024 Submission to Minister McGrath on 30 June.

The Pre-Finance Bill Submission contains recommendations relating to a number of key areas, including: 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; a review of the interest deductibility provisions to reduce the inherent complexity and simplify the Irish tax code; 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 measures to support the growth of the indigenous sector, including enhancements to the Employment Investment Incentive (EII), Key Employee Engagement Programme (KEEP), Start-Up Relief for Entrepreneurs (SURE), capital gains tax (CGT) entrepreneur relief and R&D tax credit.

In our Pre-Budget 2024 Submission we echoed the recommendations in our Pre-Finance Bill Submission and re-emphasised the urgent need to introduce a participation exemption for foreign dividends in tandem with the implementation of the Pillar Two minimum tax in the forthcoming Finance Bill. Furthermore, the submission focused on how the tax system can be used to incentivise sustainability and highlighted reforms to the personal tax system.

The Institute discussed some key elements of our Pre-Budget 2024 Submission with Minister McGrath at a meeting at the Department of Finance on 12 July. The delegation, led by Institute President Colm Browne, took the Minister and his officials through the detail of our recommendations to make business tax measures such as the EII, KEEP, CGT entrepreneur relief and R&D tax credit more accessible to small businesses and start-ups, given the Minister's stated intention to take a fresh look at these tax incentives in Budget 2024. We also stressed the importance of putting the Irish tax code on an equal footing with the tax regimes of competitor countries by introducing a participation exemption for foreign dividends.

The Institute's Pre-Finance Bill Submission and Pre-Budget 2024 Submission are available on our website, www.taxinstitute.ie.

Institute responds to consultation on implementation of new taxation measures to apply to outbound payments

On 8 August the Institute responded to the Department of Finance's Feedback Statement on new taxation measures to apply to outbound payments of interest, royalties and dividends. This consultation, which builds

on the public consultation held in November 2021, sought views from stakeholders on the possible draft legislative approaches to key elements of the new defensive measures to be introduced. The Department of Finance had received eight submissions, including a submission from the Institute, in response to the 2021 consultation.

A series of commitments were made as part of Ireland's National Recovery and Resilience Plan to tackle aggressive tax planning and to introduce legislation applying to outbound payments to prevent double non-taxation. The implementation of these proposals represents a critical part of the legal commitment made by Ireland to secure funding under the EU Recovery and Resilience Facility. As the commitment is for legislation to be completed by 31 March 2024, the Government stated its intention to fulfil this commitment by legislating for these new defensive measures in Finance (No. 2) Bill 2023.

In our response we highlighted that if Ireland is to remain an attractive location for investment, any new taxation measures applying to outbound payments must be proportionate while meeting the central objective of the commitment, which is to prevent double non-taxation. We noted that the proposed legislative approach outlined in the Feedback Statement will in many instances go beyond what is necessary to prevent double non-taxation and may give rise to unintended consequences.

To ensure that the proposed measures will apply only in cases of double non-taxation, the Institute emphasised the importance of formulating the legislative provisions to take account of tax paid on outbound payments in another jurisdiction, even if the payments are not taxed on the entity that receives the payment from Ireland. We also raised concerns that the proposed legislative approach does not consider the range of scenarios where an outbound payment will already have been subject to Irish corporation tax and, consequently, there is no possibility of double non-taxation.

Given that the robust domestic measures already in place in respect of dividends (distributions) are sufficient to address any risk of double non-taxation, the Institute stressed that the scope of the proposed measures to apply in respect of distributions is disproportionate and urged that these provisions be further reviewed.

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

Department of Finance launches Second Feedback Statement on transposition of Pillar Two Directive

Minister McGrath published the second Feedback Statement on the transposition of the EU Minimum Tax Directive (the Pillar Two Directive) on 27 July. Pillar Two of the *Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, which Ireland signed up to in October 2021, primarily consists of two interlocking rules, together referred to as the Global Anti-Base Erosion (GloBE) Rules.

These rules, as reflected in the Pillar Two 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.

This second Feedback Statement builds on the Department of Finance's previous public consultation, to which the Institute responded in July 2022, and the first Feedback Statement on the implementation of Pillar Two, to which the Institute responded in May 2023. The first Feedback Statement considered possible draft legislative approaches to key elements of the GloBE Rules and outlined potential approaches in respect of the qualified domestic top-up tax (QDTT) and administrative requirements such as registration, self-assessment, filing of returns, payments and record-keeping.

The second Feedback Statement brings forward possible draft legislative approaches

for a transitional country-by-country reporting (CbCR) safe harbour, a transitional undertaxed profits rule (UTPR) safe harbour, a QDTT, rules for the Pillar Two elections, and principles for construing rules in accordance with the OECD GloBE Model Rules, Commentary and Administrative Guidance. The Feedback Statement also seeks further feedback on the possible approach to the administration of the GloBE Rules and the GloBE Information Return, including the general approach that should be taken regarding penalties in respect of non-compliance with the GloBE Rules.

The second Feedback Statement notes that it is intended that Ireland will provide for the application of the qualified domestic minimum top-up tax (QDMTT) safe harbour in respect of constituent entities located in other jurisdictions that have obtained safe harbour status following the OECD peer-review process. The legislative approach to that aspect is currently under consideration but is not included in the second Feedback Statement as the relevant guidance has only recently issued from the OECD.

The second Feedback Statement confirms that the OECD has started the questionnaire process to establish which jurisdictions are in scope of the Pillar Two subject-to-tax rule (STTR), with a return date of 2 October 2023. The Multilateral Instrument (MLI) implementing the STTR is to be released and will be open for signature from the same date. The Inclusive Framework members in scope can elect to implement the STTR by signing the MLI or by bilaterally amending their treaties to include the STTR when requested by developing Inclusive Framework members.

Finance Act 2022 introduced amendments to legislation governing the Knowledge Development Box (KDB), subject to a Commencement Order, to bring it in line with the principles of the STTR. It was stated that the provisions would be commenced once a clear timeline for implementation of the STTR was agreed. The second Feedback Statement confirms that work is now under way to provide for the commencement of the KDB provisions before the questionnaire return date. Further information in this regard will be published on the Department of Finance's website when available.

On 21 August 2023 the Institute responded to the second Feedback Statement. We noted that, in addition to responding to first Feedback Statement, the Institute, alongside other stakeholders, has been an active participant at the TALC BEPS Sub-committee in providing feedback on technical issues relevant to the policy development of the implementation of Pillar Two into domestic legislation. We highlighted that it would be of benefit to all stakeholders to understand how the feedback provided to date and the guidance on aspects of the rules included in the July 2023 OECD Administrative Guidance on the GloBE Rules, which are not addressed in the second Feedback Statement, such as on the QDMTT safe harbour and tax credits, will be reflected in Irish law.

As work progresses on drafting the legislation that will implement Pillar Two domestically, we urged the Department of Finance and Revenue to continue to engage with stakeholders directly and via the TALC BEPS Sub-committee. Such engagement should continue up to the publication of the Finance Bill and during the passage of the Bill through the Oireachtas, to ensure that the legislation, when enacted, is clearly understood by taxpayers and does not give rise to any unintended consequences.

Safe harbours will have a key role to play in reducing the administrative burden for groups within the scope of the GloBE Rules. In this regard, we welcomed the inclusion of the draft legislative approach for the transitional CbCR safe harbour and the transitional UTPR safe harbour in the second Feedback Statement.

We also welcomed the confirmed intention that the Irish QDTT should comply with the safe harbour requirements under the EU Minimum Tax Directive and the July 2023 OECD Administrative Guidance, such that other jurisdictions would recognise a safe harbour for constituent entities subject to the

Irish QDTT. We emphasised that the primary concern in formulating the legislation adopting the QDTT must be to ensure that it meets the conditions to be recognised as "qualifying" for the purposes of the QDMTT safe harbour as set out in the July 2023 OECD Administrative Guidance.

Qualifying for the transitional simplified reporting framework outlined in the July 2023 OECD Administrative Guidance will also be critical for MNE groups, as it will significantly reduce the number of disclosures required on the GloBE Information Return in the cases where it applies. We strongly urged that, in formulating the legislation for the QDTT, careful consideration be given to ensure that it does not automatically exclude MNE groups from applying the simplified reporting framework to their Irish constituent entities where a top-up tax liability arises. At the same time, any potential impact on the credibility of the QDTT for the purpose of Ireland's double taxation agreements with its key trading partners must also be contemplated.

The OECD has confirmed that a peer-review process will be used to determine whether a jurisdiction's QDMTT meets the standards required to be granted safe harbour status. To provide certainty to taxpayers, we noted that it would be helpful to understand the expected timeframe for the completion of this peer-review process. We urged Irish policy-makers to advocate for the early completion of this peer-review process, as the safe harbour will play a crucial role in reducing the administrative burden for businesses in complying with the GloBE Rules.

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

Department of Finance launches consultation on funds sector

On 22 June the Minister for Finance, Michael McGrath TD, published a public consultation document as part of a review of Ireland's funds sector, titled *Funds Sector 2030: A Framework for Open, Resilient & Developing Markets*. This follows the publication of the terms of reference for the review of Ireland's funds sector on 6 April, as highlighted in the last issue of *Irish Tax Review*. 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 will examine international contexts, effects on employment and the economy, and the wider taxation regime for funds, life assurance policies and other, related investment products. It will take account of the relevant commitments contained in the Programme for Government, the relevant recommendations of the Commission on Taxation and Welfare and the recommendations of the IMF Financial Stability Assessment Programme.

The consultation paper has been split into a number of sections based on the terms of reference, covering topics including investment funds and asset management landscape; the regulatory and supervisory framework; assessing the impact of the funds sector; taxation of investment products; the role of the Real Estate Investment Trust (REIT) and Irish Real Estate Fund (IREF) regimes in the Irish property market; and the role of the s110 TCA 1997 regime.

The public consultation will run until **15 September 2023.** The Review Team will analyse responses to the consultation, and targeted stakeholder engagement will occur in late 2023 and into 2024. It is intended that a draft report will be submitted to the Minister for Finance by the Review Team in summer 2024. At the time of writing, the Institute is drafting its submission in response to this public consultation.

FASTER proposal for new EU system for withholding taxes

On 19 June the European Commission adopted a proposal for a Directive on Faster and Safer Relief of Excess Withholding Taxes (FASTER). The objective of the proposed new rules is to make withholding tax procedures in the EU more efficient and secure for investors, financial intermediaries (e.g. banks) and Member

State tax administrations. Following this, the Commission has launched a public consultation on the proposed Directive.

The key features of the proposed new system are:

- a common EU digital tax residence certificate intended to make withholding tax relief procedures faster and more efficient;
- two fast-track procedures complementing the existing standard refund procedure – a "relief at source" procedure and a "quick refund" system – to make the relief process faster and more harmonised across the EU; and
- a standardised reporting obligation that will provide national tax administrations with the necessary tools to check eligibility for the reduced rate and to detect potential abuse.

Once adopted by Member States, the proposal should come into force on 1 January 2027.

The Institute confirmed its support for the Commission's initiative to introduce a common, EU-wide system for withholding tax when we responded to the Commission's public consultation on a new EU system for the avoidance of double taxation and the prevention of tax abuse in the field of withholding taxes in June 2022. We emphasised that a harmonised framework for withholding tax procedures across the EU is necessary to reduce the incidence of double taxation arising as a result of the divergent and complex administrative procedures that exist in EU Member States.

The deadline to provide feedback to this consultation is **Monday, 18 September 2023**.

Non-resident landlord withholding tax system

Section 92 of Finance Act 2022 provided for a new administrative regime for rent paid to non-Irish-resident landlords. The section was subject to a Commencement Order, which the Minister for Finance signed on 20 June 2023. Finance Act 2022 (Section 92(1)) (Commencement) Order 2023 amended s1041 TCA 1997 in relation to rents payable to non-residents with effect from **1 July 2023**.

Collection agents (and tenants who withhold and remit tax) will use this system to record and remit the 20% tax withheld on rental payments and to supply certain information to Revenue, as outlined in the legislation. The system includes scope for bulk uploads, and a record and visibility for the landlord of tax withheld to be credited to the landlord and pre-populated in their tax return.

If the collection agent complies with the requirements of the regime, they will no longer be the chargeable person in respect of the rent. The landlord can file their tax returns in their personal capacity for their rental income, which has been long sought by the Institute.

Revenue released a Tax and Duty Manual on the new non-resident landlord withholding tax (NLWT) system in June, which gives detailed operational information on the NLWT with screenshots from ROS and myAccount. The Institute hosted a webinar with Revenue on 19 June on the new system before the 1 July go-live date, and Revenue provided step-by-step guidance on accessing and using the NLWT portal and participated in a Q&A informed by the numerous questions that we had received from members on a wide range of issues.

During the webinar Revenue confirmed that the non-resident landlord can choose to appoint a collection agent under the pre-1 July rules, if that collection agent is willing to remain the assessable person and be responsible for the tax in respect of the landlord's rent, and file a separate Form 11/CT1. In this case there will be no requirement for the collection agent to withhold tax on the rental payments.

A recording of the webinar is available on the Institute's dedicated webpage on the new NLWT system.

Taxation of foreign retirement lump sums

Finance Act 2022 introduced s200A to TCA 1997, which deals with the taxation of lump sum payments from foreign pension arrangements. It provides for a lifetime tax-free limit of

€200,000 on all lump sums that are paid to a resident individual from a foreign pension arrangement on or after 1 January 2023. Amounts paid in excess of this tax-free limit are chargeable to tax under Case III of Schedule D in two stages: the portion between €200,000 and €500,000 is taxed at the standard rate of tax, and any portion above this is taxed at the higher rate. The lump sum amount, if any, in excess of €500,000 is also chargeable to USC.

The treatment of foreign pension lump sum payments has been a long-standing area of focus for the Institute in its representations to Revenue. We engaged extensively with Revenue Legislation and Policy Division personnel through the TALC Direct/Capital Taxes Sub-committee since 2021 to clarify the technical basis for treating a lump sum drawn down from a foreign pension as income from a foreign possession, given that such an approach was a fundamental change in practice from the historical position, as set out in Precedent 28 (PREC/28).[1]

The Institute submitted a technical query paper to Revenue through the TALC Direct/ Capital Taxes Sub-committee in August 2021 requesting clarification regarding the domestic charging provision in Irish law that imposes income tax treatment on a lump sum drawn down from a foreign pension. Revenue prepared a position paper in response to the Institute's submission in September 2021, setting out its view that the receipt of a lump sum from a foreign pension is a taxable source of income that is liable to income tax and USC under Case III of Schedule D. This is on the basis that Revenue's view is that a lump sum is income from a foreign security and possession in accordance with s18(2) TCA 1997. Revenue's position paper is included as an addendum to the minutes of the September 2022 meeting of the TALC Direct/Capital Taxes Sub-committee.

After further discussions at TALC, the Institute submitted a second technical query paper responding to Revenue's position paper in February 2023, setting out the basis for the Institute's view that a lump sum from a foreign pension arising **before** 1 January 2023 is a capital payment and, thus, not a taxable source of income under Case III of Schedule D.

In May 2023 Revenue provided a written response to the Institute's submission, reiterating its view that the receipt of a lump sum from a foreign pension is fully taxable under Case III of Schedule D. Revenue also confirmed that although s200A TCA 1997 does not apply retrospectively, it is prepared to allow taxpayers to claim the benefit of the section with respect to lump sum payments drawn down from foreign pension arrangements before 1 January 2023. Revenue's response is attached to the Institute's technical query paper as an appendix. The Institute's submissions to Revenue are available on its website, www.taxinstitute.ie.

Further information in relation to Revenue's new "Taxation of Foreign Retirement Lump Sums" manual, published in May 2023, which sets out the rules governing the treatment of lump sum payments from foreign pension arrangements on or after 1 January 2023, is given in eBrief No. 113/23.

Policy News

Residential zoned land tax update

Residential zoned land tax (RZLT) is a component of the Government's Housing for All plan to increase new housing supply and was introduced by Finance Act 2021.

It will apply from 2024 to relevant land at a rate of 3% of market value, with the aim of activating land for residential development countrywide rather than raising revenue.

1 Occupational pensions: Are tax free lump sums in commutation of foreign pensions taxable in Ireland should the individual come to reside in this country following their retirement? No. Originally published 30 July 1987, File ref: PREC/28.

RZLT Supplemental Maps were published in the first week of May by a number of local authorities, as part of the first stage of the implementation of RZLT. The deadline for making a submission to a local authority regarding the exclusion of land on the Supplemental Map or to request a change of zoning of land was 1 June 2023. The local authority had until 1 August 2023 to inform the landowner of its decision in response to a request for exclusion of land identified on the Supplemental Map from RZLT.

Landowners dissatisfied with a local authority's decision can appeal the decision to An Bord Pleanála until 1 September 2023. Final maps of land meeting the relevant criteria for RZLT will be published by local authorities on 1 December 2023.

Homeowners will not have to pay RZLT if they own a dwelling that appears on the local authorities' RZLT Maps where the property is subject to local property tax. If a homeowner owns such a dwelling, where the land/gardens/ yards attached to it are greater than 0.4047 hectares (1 acre), they will have to register for RZLT with Revenue, but they will not be liable to pay the tax.

The liability date for RZLT is 1 February annually. The owner of a relevant site on the liability date is liable to RZLT and must pay the tax on or before the return date for the relevant year, which is 23 May in that year. Therefore, where land is within the scope of the tax on, or before, 1 January 2022, the tax will be based on the valuation of the relevant site and will be charged from 1 February 2024 onwards (i.e. the annual return and payment of RZLT for 2024 will be due by 23 May 2024). Where land comes within the scope of the tax after 1 January 2022, the first valuation date of a relevant site is the liability date (i.e. 1 February) in the year when RZLT first applies to the liable person, and tax will be charged in the third year after the year in which it comes within scope.

Revenue is currently developing a facility to enable landowners liable to the tax to register for and return RZLT. The Institute is engaging with Revenue through the TALC Direct/Capital Taxes Sub-committee to discuss enhancements to the guidance and to identify any legislative matters to be raised with the Department of Finance.

Public Country-by-Country Reporting Regulations signed into law

On 22 June the Department of Enterprise, Trade and Employment confirmed that the European Union (Disclosure of Income Tax Information by Certain Undertakings and Branches) Regulations 2023 (SI 322 of 2023) had been signed, transposing Directive 2021/2101/EU (known as the Public Country-by-Country Reporting (CbCR) Directive) into Irish law.

The Regulations require multinational enterprises with turnover exceeding €750m in each of the last two consecutive financial years to publicly disclose corporate tax information separately for each Member State and each third country on the EU list of non-cooperative jurisdictions and an aggregate figure for all other third countries.

Non-EU multinationals with subsidiaries and branches in the EU must comply with the same reporting obligations as EU multinational undertakings. Where the information is not available, the subsidiary or branch must request the information from the ultimate parent or standalone company. If the information is not provided, the subsidiary or branch must publish a report of all the income tax information available and a statement that the ultimate parent or standalone company did not provide the necessary information. The reporting obligations apply only where the net turnover of a branch exceeded €12m for the last two consecutive financial years.

The directors of an ultimate parent or standalone undertaking have collective responsibility for ensuring that the report on income tax information is drawn up, published and made accessible to the public. The relevant person(s) in a subsidiary or the authorised person(s) of a branch have collective responsibility for ensuring, to the best of their knowledge and ability, that the report on

income tax information is drawn up, published and made accessible to the public.

The reporting will take place within 12 months of the date of the balance sheet for the financial year in question. The Regulations also set out the conditions under which a company may defer the disclosure of certain commercially sensitive information for up to five years. Responding to the public consultation on the transposition of the CbCR Directive in February 2018, the Institute highlighted the importance of ensuring that the objective of the Directive of achieving corporate transparency is balanced with the need to protect against the disclosure of commercially sensitive information.

The Regulations provide that where financial statements are required to be audited, the audit report must state whether the undertaking was in scope for the preceding year and if the report was published. The application of the Regulations will begin in the first financial year on or after 22 June 2024, with 2025 the first potential year for reporting, to be published in 2026. The undertaking must publish the tax report on its own website unless it makes the report available to the public on the website of the Companies Registration Office, in which case the company must reference this on its own website and provide information on where the report can be found.

European Council reaches agreement on DAC8

The European Council reached a political agreement (general approach) on the Draft Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation (known as DAC8) at a meeting of the Economic and Financial Affairs Council (ECOFIN) on 16 May.

The new proposed tax transparency rules will apply for all service providers facilitating transactions in crypto-assets for customers resident in the EU. The updated Directive has been extended in scope to include reporting obligations of financial institutions regarding e-money and central bank digital currencies and the automatic exchange of information on advance cross-border rulings used by natural persons.

Based on a Commission proposal, the new rules complement the Markets in Crypto-assets Regulation and the Transfer of Funds Regulation and are fully consistent with the OECD initiative on the Crypto-Asset Reporting Framework (CARF).

The key objectives of this legislative proposal are:

- To extend the scope of automatic exchange of information under DAC to information that will have to be reported by crypto-asset service providers on transactions (transfer or exchange) in crypto-assets and e-money. The due diligence procedures, reporting requirements and other rules applicable to reporting crypto-asset service providers under DAC8 will reflect the CARF and a set of amendments to the Common Reporting Standard, which were prepared by the OECD under the mandate of the G20.
- To extend the scope of the current rules on exchange of tax-relevant information by including provisions on exchange of advance cross-border rulings concerning high-net-worth individuals, as well as provisions on automatic exchange of information on non-custodial dividends and similar revenues, to reduce the risks of tax evasion, tax avoidance and tax fraud, as the current provisions of DAC do not cover this type of income.
- To amend a number of other existing provisions of DAC. In particular, the proposal seeks to improve the rules on reporting and communication of the tax identification number to facilitate tax authorities in identifying the relevant taxpayers and correctly assessing the related taxes, and to amend DAC provisions on penalties applied by Member States to persons for the failure of compliance with national legislation on reporting requirements adopted pursuant to DAC.

Final adoption of the new rules will be possible when the consultative opinion of the European Parliament becomes available. After adoption of the proposed Directive, the new reporting

requirements with regard to crypto-assets, e-money and digital currencies will enter into force on 1 January 2026.

HMRC revises interest rates for late payment and repayment of tax

On 4 August the Bank of England Monetary Policy Committee announced an increase of the Bank of England base rate to 5.25%. Consequently, HMRC interest rates for late payment and repayment across the main taxes will increase to 7.75% on late payments and 4.25% on repayments. The changes came into effect on 14 August 2023 for quarterly instalment payments and 22 August 2023 for non-quarterly instalments payments. HMRC has updated its guidance to reflect the revised interest rates.

UK Government publishes draft clauses for technical consultation in relation to upcoming Finance Bill

HM Treasury confirmed in a statement on 18 July that, in line with the Tax Policy Making framework, the UK Government is publishing draft legislation ahead of its potential inclusion in the next Finance Bill. The publication of the draft legislation allows for technical consultation and is intended to provide taxpayers with predictability regarding future tax policy changes.

The key measures for which draft legislation has been published relate to:

- **Additional tax relief for R&D-intensive SMEs**: to introduce a new permanent rate of relief for the most R&D-intensive loss-making SMEs from 1 April 2023.
- **Merging the R&D expenditure credit (RDEC) and SME relief**: to combine the R&D enhanced deduction rules for SMEs and the RDEC rules for large businesses into a single, simplified, above-the-line tax credit. A final decision on whether to merge schemes will be taken at a future fiscal event.
- **Reform of the audio-visual creative tax reliefs**: to implement the modernisation and reform of the audio-visual tax reliefs into expenditure credits. The reforms include a higher rate of relief for animation and children's TV. This higher rate will also be extended to animated films. The draft legislation also includes administrative changes to improve the creative industry tax reliefs, alongside the introduction of the new expenditure credit regimes.
- **Technical clarifications to the cultural tax reliefs** announced in the Spring Budget 2023. Alongside the two-year extension to the higher rates, the UK Government has published draft legislation to clarify what is eligible for the three cultural tax reliefs: theatre, orchestra, and museums and galleries exhibition tax relief.
- **Improvements to the Enterprise Management Incentives (EMI)**: to extend the time limit for a company to notify HMRC of a grant of an EMI share scheme option.
- **Changes to the real estate investment trusts (REITs) tax rules**: to make further improvements to the operation of the rules. As well as engaging on the detail of these provisions, it is noted that the UK Government will continue to consider the case for other reform options.
- **Amendments to legislation implementing the OECD Pillar Two Model Rules**: to ensure that they function as intended and reflect the latest internationally agreed guidance. Alongside this, the UK Government is setting out the draft legislation on the structure of the undertaxed profits rule (UTPR).

The UK Government also published several new tax-related consultations and summaries of responses to consultations that have already been conducted. The four new consultations relate to: the reform of the tax treatment of employee ownership trusts and employee benefit trusts; the design of an energy security investment mechanism for the energy profits levy; the reform of the VAT Terminal Markets Order; and calculating chemically recycled content for the purposes of plastic packaging tax.

Two-Pillar Solution to Address Tax Challenges from Digitalisation

On 11 July 138 members of the OECD/G20 Inclusive Framework on BEPS agreed an Outcome Statement on the *Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*. The Outcome Statement was agreed at the fifteenth meeting of the Inclusive Framework and summarises a package of deliverables developed by the member countries to address the remaining elements of the Two-Pillar Solution. The Outcome Statement was delivered to G20 Finance Ministers and Central Bank governors at their meeting in India on 17–18 July.

The package of deliverables comprises the following four parts.

Part I: Multilateral Convention on Amount A of Pillar One

The Inclusive Framework has delivered a text of a Multilateral Convention (MLC) that allows jurisdictions to reallocate and exercise a domestic taxing right over a portion of the residual profits of a multinational enterprise. The text of the MLC will be published once it has been prepared for signature, upon resolution of a small number of specific items. The delay in publication of the MLC is due to a few jurisdictions' having expressed concerns with some specific items in the MLC.

The MLC will be opened for signature in the second half of 2023. A signing ceremony will be organised by the end of the year, with the objective of enabling the MLC to enter into force during 2025 and allowing for the domestic consultation, legislative and administrative processes applicable in each jurisdiction. The MLC will be accompanied by an Explanatory Statement that will set out the common understanding of the MLC.

Subject to at least 30 jurisdictions that account for at least 60% of the ultimate parent entities of in-scope MNEs signing the MLC before the end of 2023, members of the Inclusive Framework have agreed to refrain from imposing newly enacted digital service taxes or relevant similar measures (as defined in the MLC) on any company between 1 January 2024 and the earlier of 31 December 2024 and the entry into force of the MLC.

The Outcome Statement notes that if sufficient progress has been made by that date towards the entry into force of the MLC, Inclusive Framework members may agree to extend this commitment to the earlier of 31 December 2025 and the entry into force of the MLC.

Part II: Amount B of Pillar One

The Inclusive Framework has achieved consensus on a proposed framework for the simplified and streamlined application of the arm's-length principle to in-country baseline marketing and distribution activities (known as Amount B).

Further work on Amount B of Pillar One is due for completion by the end of the year. The OECD Secretariat launched a public consultation on Amount B of Pillar One on 17 July, with a deadline of **1 September**. At the time of writing, the Institute is drafting its submission in response to this public consultation.

The Inclusive Framework plans to approve a final report on Amount B and incorporate key content in the *OECD Transfer Pricing Guidelines* by January 2024. Due consideration will be given to the needs of low-capacity jurisdictions and the interdependence with the MLC.

The timeline for the smooth implementation of Amount B will take into account those considerations and the time necessary for some jurisdictions to adopt legislative changes to give effect to the revised guidelines, as well as to allow businesses to be prepared.

Part III: Subject-to-tax rule under Pillar Two

Inclusive Framework members that apply nominal corporate income tax rates below 9% to intra-group interest, royalties and a defined set of other payments will implement the STTR in their treaties with developing Inclusive Framework members when requested to do so.

The Inclusive Framework has completed and delivered an STTR model provision and commentary and a Multilateral Instrument (MLI), together with an Explanatory Statement, to facilitate the implementation of the STTR.

The agreed documentation relating to the STTR was published on 17 July, with the MLI implementing the STTR to be released and open for signature from 2 October 2023, as outlined in News Alert, above.

Members of the Inclusive Framework can elect to implement the STTR by signing the MLI or by bilaterally amending their treaties to include the STTR when requested by developing Inclusive Framework members.

Part IV: Implementation support

The OECD will prepare a comprehensive action plan to support the swift and coordinated implementation of the Two-Pillar Solution, with additional support and technical assistance to enhance capacity for implementation by developing countries.

In addition to the above package of deliverables, the Inclusive Framework published a package of documents as part of its ongoing work under Pillar Two on 17 July, including further administrative guidance on the GloBE Rules, which also included two new safe harbours (a permanent QDMTT safe harbour and a transitional UTPR safe harbour), the GloBE Information Return and a report on the STTR.

Recent Revenue eBriefs

Lorraine Sheegar
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Revenue eBriefs Issued from 1 May to 31 July 2023

No. 107 Alcohol Products Tax and Reliefs Manual

The "Alcohol Products Tax and Reliefs" manual has been updated to reflect s47 Finance Act 2021, which made 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 with effect from 13 February 2023.

Section 2 has been updated regarding the APT relief for small producers of cider and perry introduced by Finance Act 2022. Material duplicated from "Administration and Control of Tax Warehouses Manual Part 2 – Breweries, Microbreweries and Cider Manufacturers" has also been removed.

An update has also been included in section 3 concerning the recent *Quadrant Amroq* CJEU case (C-332/21).

No. 108 Credit in Respect of Tax Deducted from Emoluments of Certain Directors and Employees

Revenue has updated the manual "Credit in respect of tax deducted from emoluments of certain directors and employees" to reflect that debt warehousing of Schedule E liabilities for a self-assessed director or employee was available for income tax payments that fell due on 31 October 2020 and 31 October 2021 and that it was not possible to warehouse Schedule E liabilities that were due to be paid by 31 October 2022 (16 November 2022 where the ROS extension applied).

No. 109 Customs Warehousing

Revenue has updated the manuals listed below after the introduction of the Customs Automated Export System (AES):

- "Guidance Manual on Customs Warehousing" at section 5.5.
- "Instruction Manual on Inward Processing" at sections 2.6, 2.6.1 and 5.5.
- "Instruction Manual on Outward Processing" at sections 3.4, 5.1, 5.2, 6.2 and 7.4.

No. 110 Stamp Duty Tax and Duty Manual – "Section 31D: Cancellation Schemes of Arrangement" – Updated

Revenue has updated "Part 5: Section 31D – Cancellation Schemes of Arrangement" of the Stamp Duty manual to clarify Revenue's position after a Tax Appeals Commission (TAC) determination (08TACD2021) in respect of s31D SDCA 1999, where TAC found that s31D was contrary to the Capital Duties Directive.

The manual notes that Revenue disagrees with this determination and has not changed its position in relation to s31D SDCA 1999 in light of the determination. Section 4 of the manual outlines Revenue's position with respect to the determination.

No. 111 Stamp Duty Tax and Duty Manual – Part 9 Levies – Updated

Revenue has updated "Part 9: Levies" of the Stamp Duty manual to include additional guidance on the operation of s124 SDCA 1999,

which provides for stamp duty charges on credit cards and charge cards.

No. 112 Relief for Increase in Carbon Tax on Farm Diesel

The manual "Relief for Increase in Carbon Tax on Farm Diesel" has been updated to reflect the increase in the rate of mineral oil tax on farm diesel effective from 1 May 2023.

No. 113 Taxation of Foreign Retirement Lump Sums

Revenue has published a new "Taxation of Foreign Retirement Lump Sums" manual to reflect the introduction of s200A TCA 1997 by Finance Act 2022, which sets out the rules governing the treatment of lump sum payments from foreign pension arrangements.

Section 200A TCA 1997 applies to tax-resident individuals who are paid a lump sum payment from a foreign pension arrangement, as defined, on or after 1 January 2023. The lifetime tax-free limit on all lump sums that are paid to a resident individual on or after 1 January 2023 from a foreign pension arrangement is €200,000. This lifetime limit applies to a single lump sum or, where more than one lump sum is paid to an individual over time, to the aggregate value of those lump sums and/or a lump sum or sums received under existing pension lump sum rules under s790AA TCA 1997.

Amounts paid in excess of this tax-free limit are chargeable to tax under Case III of Schedule D in two stages. The portion between €200,000 and €500,000 is taxed at the standard rate of tax, and any portion above is taxed at the higher rate. The lump sum amount in excess of €500,000, if any, is also chargeable to USC.

The new manual also notes that a prior Revenue precedent on lump sum payments from foreign pensions (Precedent 28), which issued on 30 July 1987, stated the following: "Tax free lump sums in commutation of foreign pensions were not taxable in Ireland should the individual come to reside in the country following their retirement".

The manual states that, in common with most precedents over five years old, Revenue treats this precedent as having lapsed. Therefore the benefits associated with the precedent are no longer available. The tax treatment of foreign pension lump sums is now covered under s200A TCA 1997.

No. 114 Tax and Duty Manual on Imports of Food and Feed of Non-animal Origin

Revenue has updated the "Manual Relating to Imports of Feed and Food of Non-animal Origin" to include updated import procedures, updated legislative references and updated contact details.

No. 115 Capital Acquisitions Tax Manual – Part 05 Discretionary Trust Tax

Revenue has updated "Discretionary Trust Tax – Capital Acquisitions Tax Manual Part 5" in a number of paragraphs:

- In paragraph 5.1 to clarify that the definition of a discretionary trust for CAT purposes differs from and is wider than the definition for general law.
- In paragraphs 5.1, 5.2 and 5.3 to confirm relevant return filing dates.
- In paragraph 5.5 to clarify the payment date in relation to the annual charge.
- In paragraphs 5.1, 5.2, 5.3 and 5.5 to incorporate various legislative references.

No. 116 All Three Parts of the Administration & Control of Tax Warehouses Manual Have Been Updated

Revenue has updated all parts of the "Administration & Control of Tax Warehouses Manual".

"Part 1 – General Warehousing Provisions" has been updated as follows:

- Paragraphs 3.3.2 and 4.2.6 have been updated in line with s47 Finance Act 2021, which made 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 with effect from 13 February 2023.

- Section 4 has been updated to include the alcohol products tax relief for small producers of cider and perry introduced by Finance Act 2022.
- References to legislation in paragraphs 4.7.2, 4.7.3, 7.2 and 7.4 have been updated.

"Part 2 – Breweries, Microbreweries and Cider Manufacturers" has been updated as follows:

- Paragraphs 2.7.1, 3.2.2 and 4.8.1 have been updated to refer to Commission Implementing Regulation (EU) 2023/157, which amended Implementing Regulation (EU) 2021/2266, as regards the reference to the certificate and the self-certification of independent small producers of alcoholic beverages in the electronic simplified administrative document.
- Paragraphs 2.7.2 and 4.8.2 contain consolidated procedures for the import of qualifying beer or cider and perry from third countries.
- Minor revisions have been made to paragraphs 2.13 and 4.14 to ensure alignment with the scheme of relief for small producers of cider and perry introduced by Finance Act 2022.

"Part 3 – Distilleries" has been updated as follows:

- Paragraph 2.5 has been amended to remove the reference to Regulation (EC) No. 110/2008 and replace it with a reference to Regulation (EU) 2019/787 on:
  - the definition, description, presentation and labelling of spirit drinks;
  - the use of the names of spirit drinks in the presentation and labelling of other foodstuffs;
  - the protection of geographical indications for spirit drinks; and
  - the use of ethyl alcohol and distillates of agricultural origin in alcoholic beverages.

No. 117 Foreign Entity Classification for Irish Tax Purposes

Revenue has published a new "Foreign Entity Classification for Irish Tax Purposes" manual to provide clarity on the approach taken by Revenue when classifying a foreign entity for the purposes of Irish tax law. Where a foreign entity is involved in a transaction, the classification of that foreign entity can be central to determining any Irish tax implications.

No. 118 Stamp Duty Manual – Electronic Share Trading in Euroclear Bank – Updated

Revenue has updated the Stamp Duty manual "Euroclear Manual – Electronic Share Trading Rules, Procedures, Practices, Guidelines and Interpretations" to set out the procedure that is to be followed when claiming relief from stamp duty under any of the provisions of Chapter 1 of Part 7 of the Stamp Duties Consolidation Act 1999.

No. 119 Form IREF

Revenue has archived the manual "Part 27-01B-03 Form IREF", which included details of the changes to the Form IREF in June 2021, because the filing date for such forms has passed and therefore the manual is no longer relevant.

No. 120 Extension of Certain Stamp Duty Relief Schemes for Farmers

Revenue has updated the Stamp Duty manual "Transfers to Young Trained Farmers – Part 7: Section 81AA" to reflect recent amendments to s81AA SDCA 1999 by Finance Act 2023, as follows:

- the extension of young trained farmer relief to 31 December 2025 and
- to comply with EU State Aid rules, a reduction from four years to three years in respect of the period of time in which a person may obtain a relevant farming qualification after acquiring land and qualify for relief under s81AA.

In addition, Revenue has updated the Stamp Duty manual "Further Farm Consolidation Relief

– Part 7: Section 81C" to reflect the extension of the relief until 31 December 2025, which was provided for by Finance Act 2023.

No. 121 Recoupment of Overpayments of Salary by an Employer from an Employee

Revenue has amended the manual "Recoupment of Overpayments of Salary by an Employer from an Employee" to update examples, in parts 2 and 5, to reflect changes to the value of the standard rate tax band and personal tax credits introduced in Budget 2023.

No. 122 TDM 05-02-13 Remote Working Relief Has Been Updated

Revenue has updated section 5 of the "Remote Working Relief" manual to clarify the conditions relating to the €3.20 per diem payment. The changes to the manual note that the employer may make such a payment where:

- there is an agreement in place between the employer and employee under which the employee works from home;
- the employee performs substantive duties of his/her employment at home; and
- the employee performs his/her duties for substantial periods at home.

No. 123 Agent's Guide to the Collector General's Division

Revenue has amended the manual "Agent's Guide to the Collector-General's Division" to reflect the latest operational processes and current due dates. Some of the key updates are:

- Section 7 clarifies that local property tax (LPT) payments can be made by direct debit by accessing the LPT portal on Revenue's website.
- Section 9 confirms that an Agent Link for each property is required in respect of LPT. Given the active property market and that a property may have multiple owners, it is not possible to Agent Link for LPT via a taxpayer's PPSN/Tax Reference Number alone.
- Section 13 directs that agents should not provide their own address as the business address of their client. It also includes a clarification that final demands will issue to the business or official address of the taxpayer.
- Section 16 includes additional information regarding the Small Company Administrative Rescue Process.
- Section 19 has been updated to advise that Large Corporates Division now deals with tax relief at source for qualifying medical insurance premiums.
- Appendix 1 includes updated due dates to the current year. In addition, information has been inserted in relation to changes to preliminary tax rules for non-resident landlords and the introduction of the interest limitation rule in Finance Act 2021.

No. 124 Capital Acquisitions Tax Collection and Enforcement Guidelines Updated

Revenue has updated the manual "Capital Acquisitions Tax Collection and Enforcement Guidelines" at paragraph 2.2, "Payments by non-statutory instalments", by amending the first bullet point on page 6 to state that "payments are applied against tax in the first instance, then interest".

No. 125 Stamp Duty Manual – Part 8: Companies Capital Duty – No Longer Relevant

Revenue has archived the Stamp Duty manual "Part 8: Companies Capital Duty" as its contents are no longer relevant. Companies capital duty was abolished for transactions where the date of issue of the shares was on or after 7 December 2005.

No. 126 Part 06-08B-01 – Technical Guidance in Relation to Dividend Withholding Tax

Revenue published a new manual, "Technical Guidance Notes in Relation to the Operation of Dividend Withholding Tax", which incorporates guidance from the previous "Dividend Withholding Tax (DWT) Technical Guidance

Notes for Paying Companies, Authorised Withholding Agents (AWAs) and Qualifying Intermediaries (QIs)" (i.e. DWT Technical Guidance Notes).

Revenue notes that although much of the content remains unchanged, the following amendments have been made:

- The guidance on intermediaries operating through nominee companies in paragraph 6.4.5 of the new manual includes a reminder of the obligation to file a Form 21R in certain instances.
- The guidance on the treatment of PEPs, ISAs and SIPs previously in paragraph 10.37 of the DWT Technical Guidance Notes has been removed.
- The guidance previously in paragraph 10.30 of the DWT Technical Guidance Notes on how certain entities/types of entities are dealt with for DWT purposes has been amended to remove the list of entities that was in the previous publication. A link to the manual "Foreign Entity Classification for Irish Tax Purposes" has been provided.
- The guidance on exemption for offshore "umbrella funds" previously in paragraph 10.39 of the DWT Technical Guidance Notes has been removed.

The last two amendments, relating to paragraphs 10.30 and 10.39 of the DWT Technical Guidance Notes, apply with effect from 9 June 2023. Revenue notes that the manual "Foreign Entity Classification for Irish Tax Purposes", which was published on 18 May 2023, provides guidance where there is some level of uncertainty in respect of an entity – for example, whether it is regarded as "opaque" or "transparent" for tax purposes.

No. 127 Updated Guidelines for the Temporary Business Energy Support Scheme (TBESS)

Revenue's manual "Guidelines on the Operation of the Temporary Business Energy Support Scheme (TBESS)" has been updated to reflect enhancements to the scheme recently signed into law by way of the Finance Act 2023 and Ministerial Order.

These changes include a reduction in the energy costs threshold for accessing the scheme to 30% with effect from 1 September 2022, as well as an increase in the amount payable under the scheme to 50% of eligible costs from 1 March 2023. The scheme has been extended to 31 July 2023. The time limit for making a claim has also been extended to 30 September 2023 in respect of all claim periods.

The TBESS guidelines, including examples, where relevant, have been updated to reflect these changes to the operation of the scheme. Deemed reference unit prices for the June and July 2022 reference periods have been provided by the Sustainable Energy Authority of Ireland (based on data provided by suppliers and the Commission for Regulation of Utilities). These are published in Appendix III. The updated TBESS guidelines also include details of how to submit claims from May 2023.

No. 128 Update to TDM Excise Duty Rates on Energy Products and Electricity

Revenue's manual "Energy Products and Electricity Taxes – Excise Duty Rates" has been updated to reflect increases in mineral oil tax rates on certain mineral oils. The rate increases are effective from 1 June 2023. Relevant changes have also been made to the "Budget Excise Duty Rates" manual.

No. 129 Update to Customs Export Procedures Manual

Revenue's "Customs Export Procedure Manual" has been updated to reflect the launch of AES (Automated Export System) and the change of the official name for Turkey to Türkiye.

- AES went live on 21 March 2023, replacing the Automated Entry Processing (AEP) and eManifest systems for the processing of export declarations. It also underpins the UCC-compliant export procedure.
- AEP closed for new export declarations on 22 May 2023.

- Indirect exports that were commenced in AEP before 21 May 2023 will continue to receive responses through AEP until 31 May 2023.

No. 130 Stamp Duty Manual Part 6 – Special Provisions Relating to Uncertificated Securities

Revenue has updated the Stamp Duty manual "Part 6: Special Provisions Relating to Uncertificated Securities", which relates to stamp duty charged on Irish securities that are transferred electronically, to reflect the changes made to Chapter 1 of Part 6 of the Stamp Duties Consolidation Act 1999 (SDCA 1999), including the deletion of ss68, 69, 70, 71, 72, 73, 76, 77 and 78, as provided by s69 Finance Act 2022. The manual also provides guidance on Chapter 2 of Part 6 SDCA 1999, which was introduced by s62 of Finance Act 2020.

No. 131 Updates to Accounting for Mineral Oil Tax and Horticultural Relief Manuals

Revenue has updated the "Accounting for Mineral Oil Tax Manual" as follows:

- Updates were made in line with s45 Finance Act 2022, which amended s98 Finance Act 1999 to provide for carbon charge relief for certain activities related to horticultural production. This section commenced on 1 June 2023 by Ministerial Order.
- Mineral oil tax rates were updated in Appendix I to reflect changes that apply from 1 June 2023, along with the historical rates of mineral oil tax in Appendix XI.

In addition, sections 1, 2.2 and 3.2 of the manual "Excise – Guide to Horticultural Production Relief" have been updated to refer to the carbon charge relief as outlined above, and Appendix 1 has been updated with historical rates effective to 31 May 2023.

No. 132 Rent Tax Credit

Revenue has updated the "Rent Tax Credit" manual to include:

- the Form 11 fields and screenshots of same in respect of self-assessed taxpayers making a claim for rental payments made during the 2022 tax year (by submitting an income tax return through ROS);
- further details on the real-time claim procedures in respect of rental payments made during the 2023 tax year, using Revenue's real-time credit facility in myAccount; and
- additional information in section 7.1 to assist claimants, namely:
  - guidance for tenants on how to obtain the registration number assigned to the tenancy by the Residential Tenancies Board, where applicable; and
  - guidance for landlords who would prefer to provide their information directly to Revenue rather than to a tenant.

No. 133 Stamp Duty Manual – Section 83DA – Repayment of Stamp Duty under Affordable Dwelling Arrangements

Revenue has published a new Stamp Duty manual titled "Part 7: Section 83DA – Repayment of Stamp Duty under Affordable Dwelling Purchase Arrangements", containing guidance on the operation of s83DA of the Stamp Duties Consolidation Act 1999 (SDCA 1999), which was introduced by Finance Act 2022 and commenced by SI 240 of 2023 on 1 June 2023.

Section 83DA SDCA 1999 provides for a full repayment of stamp duty where a residential property is sold for the purposes of an affordable dwelling purchase arrangement under the Affordable Housing Act 2021 within 12 months of its acquisition. A repayment under s83DA SDCA 1999 will apply irrespective of the residential rate of stamp duty paid on the property, which is currently 1% or 2% on individual purchases and 10% on multiple purchases under s31E SDCA 1999.

No. 134 Update to State Aid Transparency Requirements

Revenue has updated the manual "State Aid Transparency Requirements: Publication of

Information Regarding State Aid Granted to Individual Taxpayers" to reflect the new publication threshold outlined in the Agricultural Block Exemption Regulation (ABER), i.e. Commission Regulation (EU) 2022/2472, and Finance Act 2023. The publication threshold has been reduced from €60,000 to €10,000 for schemes under ABER.

No. 135 Stamp Duty Tax and Duty Manuals (TDMs) – "Section 83DB Repayment of Stamp Duty in Respect of Certain Residential Units" – New Manual

Revenue has published a new Stamp Duty manual titled "Part 7: Section 83DB – Repayment of Stamp Duty in Respect of Certain Residential Units", which contains guidance on the operation of s83DB of the Stamp Duties Consolidation Act 1999 (SDCA 1999). Finance Act 2022 provided for a new s83DB SDCA 1999, which was commenced by SI 240 of 2023 on 1 June 2023.

Section 83DB SDCA 1999 provides for a partial repayment of stamp duty where a residential property is:

- let to a housing authority or an approved housing body for social housing purposes;
- designated as a cost rental dwelling under the Affordable Housing Act 2021;
- registered as a designated centre under the Health Act 2007, which provides care in the community for those with special needs; or
- registered as children's residential centre under the Child Care Act 1991, which provides homes for children in care.

A repayment under s83DB SDCA 1999 will apply to the difference between the amount of stamp duty paid at the higher rate (10%, as provided for under s31E SDCA 1999) and the amount of duty that would have been payable had the standard rate (1% or 2%) applied.

Section 83DB not only provides for two new partial-repayment schemes but also amalgamates the new schemes with two pre-existing partial-repayment schemes that have until now been provided for under s83E (social housing leases) and s83F (cost rental dwellings) SDCA 1999. Section 68 of Finance Act 2022 repealed both of these sections. These changes have also been reflected in the following manuals:

- "Part 5: Section 31E – Stamp Duty on Certain Acquisitions of Residential Property (10% Rate of Duty)",
- "Part 7: Section 83E – Repayment of Stamp Duty where Certain Residential Units Leased (Social Housing)" and
- "Part 7: Section 83F – Repayment of Stamp Duty on Cost Rental Dwellings".

The manual for s31E has also been updated in section 2.1, "Apartments".

No. 136 New VAT Tax and Duty Manuals

Revenue has published the following new VAT manuals:

- "VAT Treatment of Clothing",
- "VAT Treatment of Human Medicines" and
- "VAT Treatment of Animal Medicines".

No. 137 New TDM – Non-resident Landlord Withholding Tax

Revenue has released a new "Non-resident Landlord Withholding Tax" manual on the new online system, which is due to begin operation from 1 July 2023.

No. 138 Importation from Third Countries of Live Animals and Products of Animal Origin

Revenue has updated the "Manual on the Personal Importation of Live Animals and Products of Animal Origin" to include updated contact details (paragraph 4), legislative references (paragraph 5) and updated weight allowances in personal luggage and postal consignments (Annex 1).

No. 139 Payment of Preliminary Corporation Tax

Revenue's "Payment of Preliminary Corporation Tax" manual has been updated at paragraph 3 to clarify that if close company surcharges

apply, those amounts should be included in calculating the corporation tax for the preceding accounting period when determining whether a company is a "small company" for the purposes of preliminary tax. Close company surcharges are treated as corporation tax chargeable in accordance with ss440(6) and 441(5) TCA 1997.

No. 140 Expressions of Doubt (41a-03-00)

Revenue's manual "Expression of Doubt (Full Self-Assessment) IT/CT/CGT" has been updated at paragraph 3 to clarify that even where an expression of doubt has been accepted as genuine, interest will apply where a liability is due and it has not been paid within 30 days of an assessment's being raised.

No. 141 Treatment of Pensions Taxable in Ireland in Respect of Service in OECD and Certain Other International Organisations

A new Revenue manual titled "Treatment of Pensions Taxable in Ireland in Respect of Service in OECD and Certain Other International Organisations" explains the tax treatment of pensions received by Irish-resident retired employees in respect of service in certain international organisations, including the OECD, and how these pensions are dealt with in accordance with international agreements.

No. 142 iXBRL – 2023 Taxonomies and New Mandatory Tag

Revenue's manual "Submission of iXBRL Financial Statements as Part of Corporation Tax Returns" has been updated to confirm that Revenue will accept iXBRL submissions tagged with the Financial Reporting Council's 2023 Irish Extension Taxonomies from 2 September 2023. The EU IFRS taxonomy now contains tags for IFRS 17, "Insurance Contracts", and these should be used by entities that prepare their accounts in accordance with that standard.

In addition, Revenue will require that all iXBRL submissions declare the functional/presentation currency of the financial statements using the "PrincipalCurrencyUsedInBusinessReport" tag from 2 September 2023.

No. 143 Payment and Receipt of Interest and Royalties without Deduction of Income Tax

Revenue's manual "Payment and Receipt of Interest and Royalties without Deduction of Income Tax" has been updated to refer to the International Bank for Reconstruction and Development in section 8, "Payments to certain statutorily tax-exempt bodies".

No. 144 Stamp Duty Manual – Electronic Share Trading in CREST – Updated

Revenue has updated the manual "CREST – Electronic Share Trading Rules, Procedures, Practices, Guidelines and Interpretations" to set out the provision in Chapter 2 of Part 6 of the Stamp Duties Consolidation Act 1999 (SDCA 1999) for stamp duty to be charged on the transfer of an interest in dematerialised securities. The manual has also been updated for the procedure to be followed when claiming relief from stamp duty under any of the provisions of Chapter 1 of Part 7 SDCA 1999.

No. 145 myAccount – First Time Employees

Revenue has published a new manual, "myAccount – First Time Employees", providing guidance to taxpayers on how to register their first job. Information is given on registering first employments through either MyGovID or myAccount.

No. 146 Employers' Guide to PAYE (Applicable up to 31 December 2018)

"The Employers' Guide to PAYE" (applicable up to 31 December 2018) has been updated at Appendix 2, "List of forms used by employers/agents", to remind taxpayers that the Forms P30, P45, P46 and P35 have been abolished and replaced by new procedures under PAYE Modernisation. Accordingly, these forms are not available for filing in ROS online or offline.

No. 147 Vehicle Registration Tax (VRT) Online Payments in ROS and myAccount

Revenue has updated the manual "Vehicle Registration Tax (VRT) Online Payments in ROS and myAccount" as follows:

- Paragraph 2, "Online enhancement to VRT": Electronic funds transfer (EFT) payments are now discontinued, and reference to them has been deleted.
- Paragraph 4, "Making a VRT online payment – ROS customers": New information has been inserted to include the non-European Economic Area address field screen that populates if a customer inputs an IBAN from a non-EEA country.
- A new appendix has been added, "Appendix 1 – European Economic Area (EEA) list of countries": This lists the EEA countries.

No. 148 Importation of Fireworks

Revenue's "Importation of Fireworks" manual has been updated to include an email address for the Department of Justice (explosives@Justice.ie) from where more information on the legislation relating to explosives in Ireland can be requested.

No. 149 Liquidation of Companies and Other Company Law Issues

Revenue's manual "Liquidation of Companies and Other Company Law Issues" has been amended as follows:

- Section 16 includes information on the Small Companies Administrative Rescue Process.
- Reference to the Office of the Director of Corporate Enforcement has been removed and replaced with the Corporate Enforcement Authority throughout the manual.
- Reference to the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 extension to 31 December 2021 has been removed.

No. 150 Exchange of Information – Deferral of DAC2-CRS and FATCA Filing Deadlines

Revenue informed taxpayers that the filing deadline for DAC2-CRS and FATCA for the 2022 filing period has been deferred from 30 June 2023 to 14 July 2023, owing to filing issues in ROS.

Taxpayers can continue to file their returns in ROS and will receive an on-screen acceptance message. However, taxpayers may experience a delay in receiving confirmation to their Revenue Record. If this is the case, taxpayers are asked not to refile unless they have not received the confirmation by 7 July.

Queries in relation to this matter can be raised via MyEnquiries, selecting AEOI (Automatic Exchange of Information) and DAC2-CRS, or by telephone at +353 42 9353337.

No. 151 Treatment of Certain Patent Royalties Paid to Companies Resident Outside the State

Revenue has updated the manual "Treatment of Certain Patent Royalties Paid to Companies Resident Outside the State" at paragraph 5 to clarify the notification requirements for companies availing of the administrative practice set out in the manual.

No. 152 Relevant Contracts Tax: Incorrect Operation of RCT

Revenue has updated the manual "Relevant Contracts Tax for Subcontractors" to include a new section 9, which deals with the incorrect operation of RCT by a principal.

No. 154 Manual on EU Sanctions in Response to the Situation in Ukraine

Revenue has updated its "Manual on EU Sanctions in Response to Situation in Ukraine" as follows:

- Paragraph 2 has been amended to include updated legislative references.
- Paragraph 4 has been updated to include details of the 11th sanctions package.
- A new paragraph 6 has been added to provide advice on the circumvention of sanctions.

No. 155 EU Reporting Obligations for Platform Operators

Council Directive 2011/16/EU on administrative cooperation in the field of taxation, known as

the DAC, provides for the automatic exchange of information between the tax administrations of EU Member States. The DAC was amended by Council Directive (EU) 2021/514 (i.e. DAC7) in 2021 to extend the scope of the DAC provisions.

With effect from 1 January 2023, DAC7 obliges certain platform operators to collect and automatically report information on certain sellers using their platform to earn consideration. Revenue published a new DAC7 manual titled "EU Reporting Obligations for Platform Operators".

Revenue has also created a dedicated DAC7 webpage to provide further information to practitioners and platform operators on how the new obligations will operate in Ireland.

No. 156 Automatic Exchange of Information (AEOI)

Revenue has updated the manual titled "Guide to Exchange of Information under Council Directive 2011/16/EU, Ireland's Double Taxation Agreements and Tax Information Exchange Agreements and the OECD/Council of Europe Convention on Mutual Administrative Assistance in Tax Matters – Role of International Tax Division". The manual has been updated to include Appendix 1, "Table of AEOI exchange relationships", to inform taxpayers of the exchange agreements that Revenue has in place under various automatic exchange-of-information frameworks.

No. 157 Rent-a-Room Relief

Revenue has updated the "Rent-a-Room Relief" manual to include a new paragraph 7.2 containing material on the rent tax credit and to delete obsolete material on owner-occupier relief under certain property-based tax incentive schemes and relief from stamp duty for first-time buyers and certain owner-occupiers.

No. 158 Pensions Manual Chapter 27 Amended

Revenue has updated Chapter 27 of the Pensions manual "Taxation of Retirement Lump Sums", at paragraph 6, to provide further information on the tax and filing obligations regarding excess lump sums. This includes instructions on when Revenue Payroll Notifications and Form 790AA should be submitted and the details required.

No. 159 Investment Limited Partnership (ILP) February 2023 Filing – Deadline Extension and Updated Form ILP1 Available

Revenue has made available a new version of the Form ILP1 which can be downloaded from the Collective Investment Vehicles webpage, in the Related Forms panel.

Section 739J(3) TCA 1997 obliges investment limited partnership (ILPs) to file this statement annually. This new version of the Form ILP1 should be used for filings in respect of the year of assessment 2022. The filing deadline for the Form ILP1 in respect of the year of assessment 2022 is extended to 14 September 2023. The Form ILP1 should be completed and returned electronically to Revenue via MyEnquiries to largecasesdiv@revenue.ie.

The Form ILP1 has been updated by the addition of the following panels:

- name of signatory in plain text,
- net asset value of the ILP at the end of the year of assessment,
- general overview of business activities carried out by the ILP in the year of assessment,
- details of any material transactions carried out by the ILP in the year of assessment,
- details of any transactions entered into with persons connected with any partner in the ILP in the year of assessment,
- disclosure of assets held by the ILP at end of the year of assessment (which includes disclosure of asset type, location and value) and
- detailed guidance notes attached to the updated Form ILP1 to assist completion of the statement, including practical examples illustrating the level of detail required.

No. 160 Universal Social Charge

Revenue has updated the "Universal Social Charge" manual at paragraph 11.2, "Personal retirement savings account", to clarify that employer PRSA contributions are not subject to PAYE and are, therefore, not chargeable to PRSI under the PAYE system.

Revenue has similarly updated paragraph 11.3, "Pan-European personal pension product", to clarify that employer PEPP contributions are not subject to PAYE and are, therefore, not chargeable to PRSI under the PAYE system.

No. 161 VAT Treatment of Education and Vocational Training

Revenue has made the following amendments to the VAT manuals primarily to delete content that is no longer relevant:

- deleting section 6.3, "Vocational training providers post Finance Act 2015", in the manual "VAT Treatment of Education and Vocational Training";
- amending section 1, "Union Scheme", deleting the previous section 2.2, "What if a supplier is already registered for MOSS?", and amending the current section 2.2, "When will the registration take effect?", in the manual "Union Scheme – One Stop Shop (OSS)"; and
- amending section 3.1, "When will the registration take effect?", and deleting section 6, "Existing MOSS registrations", in the manual "Non-Union Scheme – One Stop Shop (OSS)".

No. 162 Instruction Manual on End Use Procedure

Revenue has updated the "Instruction Manual on End-Use Procedure" at sections 3.4 and 5.1 to include the new data elements for the procedure codes required when completing a declaration for end use on the Automated Import System.

No. 163 DIRT and Company, Pension Scheme and PEPP Provider Deposits

Revenue has updated the manual "Accounts Liable to DIRT, Company, Pension Scheme and PEPP Provider: Deposits and Foreign Bank Accounts (AIS)" to reflect the Finance Act 2022 amendments in respect of pan-European personal pension product (PEPP) providers. The amendments provide that interest on a deposit of a PEPP provider that is an asset of a PEPP can be paid gross (i.e. without deduction of deposit interest retention tax (DIRT)), where a declaration, in accordance with s263F TCA 1997, has been provided to the deposit taker.

No. 164 Exempt Unit Trusts (EUTs)

Revenue's manual "Taxation of Unit Trusts for Pension Schemes and Charities – Exempt Unit Trusts (EUTs)", which provides guidance relating to EUTs, has been updated for amendments introduced by s37 Finance Act 2022 relating to the filing obligation of EUTs.

No. 165 Guidelines on the European Union (Tax Dispute Resolution Mechanisms) Regulations 2019

Revenue has published a new manual titled "Guidelines on the European Union (Tax Dispute Resolution Mechanisms) Regulations 2019" to provide guidance on the dispute resolution procedures contained in the following Regulations, which transposed the EU Directive on tax dispute resolution mechanisms (EU 2017/1852 of 10 October 2017) into Irish law:

- European Union (Tax Dispute Resolution Mechanisms) Regulations 2019 (SI 306 of 2019) and
- European Union (Tax Dispute Resolution Mechanisms) (Amendment) Regulations (SI 673 of 2020).

The Directive sets out a framework for the resolution of tax disputes between Ireland and one or more EU Member States arising from the interpretation or application of double taxation agreements and the EU Arbitration Convention.

It builds on existing dispute resolution mechanisms contained in double taxation agreements and the EU Arbitration Convention and provides for a more streamlined approach to the effective resolution of tax disputes that could give rise to double taxation for taxpayers.

It does not replace or amend Ireland's double taxation agreements or the EU Arbitration Convention. The Directive aims to provide taxpayers, both individuals and companies, with a more effective and efficient framework for the resolution of tax disputes.

No. 166 Research and Development (R&D) Corporation Tax Credit

Revenue has updated the manual "Research and Development (R&D) Corporation Tax Credit" to incorporate the changes to the R&D tax credit introduced by Finance Act 2022, which have been reflected throughout the manual, with examples provided where appropriate.

Key changes introduced to Part 29 TCA 1997 by Finance Act 2022 are:

- Sections 766C and 766D TCA 1997 were introduced, providing for an R&D corporation tax credit.
- The ability to accelerate the payment of the second instalment and the final instalment of an R&D tax credit that arose in an accounting period that commenced before 1 January 2022 under ss766(4D) and 766A(4C) TCA 1997.
- Where a company is making a claim for an accelerated payment of the second and final instalment, and/or a claim for an R&D corporation tax credit under s766C or s766D in an accounting period for which a Form CT1 for 2022 is due to be filed, the company is required to file an R&D Specified Return 2022, which forms part of the Form CT1 2022. The updated manual provides guidance in section 8.6.1 on how a claim should be made.

The manual has also been updated to remove obsolete material and to include a new section 4.7 on costs associated with cloud computing.

No. 167 Value Added Tax (VAT) Repayment Offset

Revenue's manual "Value Added Tax (VAT) Repayment Offset" has been updated to reflect how a taxpayer/agent can now offset a VAT refund against warehoused tax debt via the VAT3 return, if they wish to do so to reduce the balance of debt owed.

Section 1.2 of the manual includes a screenshot and information on this new facility. Taxpayers that have warehoused employer's PAYE, VAT or income tax will be presented with an option to allow them to offset the repayment amount to tax periods within the debt warehouse. A maximum of two debt-warehoused periods can be selected for offset.

The debt-warehousing offset will be the final instruction carried out when offsetting in circumstances where there are other tax periods with liabilities.

No. 168 Agent's Guide to the Collector-General's Division

Section 22.5 of the "Agent's Guide to the Collector-General's Division" has been updated to reflect developments to the ROS agent screens to prompt agents to ensure that information being supplied in respect of VAT 58 and VAT 71 claims is accurate and relates to the correct client.

No. 169 Irish Real Estate Funds (IREF) Guidance Note and IREF Declarations

The Revenue manuals "Irish Real Estate Fund (IREF) Guidance Note" and "Irish Real Estate Funds (IREFs) Declarations" have been updated to reference the pan-European pension product (PEPP) provisions introduced by Finance Act 2022 and to reflect that all current approved minimum retirement funds (AMRFs) effectively became approved retirement funds (ARFs) as of 1 January 2022, following the Finance Act 2021 amendments to the AMRF legislation.

In addition, the manual "Irish Real Estate Funds (IREFs) Declarations" has been updated to:

- request supporting documentation evidencing the equivalent nature of an entity where appropriate;
- request additional baseline information where appropriate;

- remove detailed guidance regarding the transitional arrangements that were in place to assist with the introduction of the IREF declaration process but have now expired.

No. 170 Guidance on Interest Limitation

Revenue has updated the manual "Guidance on the Interest Limitation Rule" to include a scenario where a company leaves one interest group and joins another, in Example 3.4.1. The manual has also been updated to include Appendix 2, "Schedule of material updates", which outlines updates to the guidance.

No. 171 Stamp Duties Consolidation Act 1999 – Notes for Guidance Updated

Revenue has published up-to-date "Notes for Guidance – Stamp Duty 2023" to include all amendments to the Stamp Duties Consolidation Act 1999 by subsequent Acts, up to and including Finance Act 2023.

No. 172 Guidance on the Defective Concrete Products Levy – Part 18E TCA 1997

Finance Act 2022 provided for a new levy to apply to the first supply of certain concrete products on or after 1 September 2023. Revenue has published a "Defective Concrete Products Levy" manual to provide guidance on this measure. Revenue also recently developed a dedicated Defective Concrete Products Levy (DCPL) webpage.

The DCPL will apply at a rate of 5% of the market value of concrete products within scope of the levy, at the point of first supply of those products within the State on or after 1 September 2023. The person who makes a first supply of a concrete product that is within scope of the levy is the chargeable person in respect of the levy. This would include individuals who use in-scope concrete products sourced from outside the State for private or business use in the State. The manual provides general guidance on how the levy operates, together with practical examples. Revenue will publish further information in the coming weeks, including on how chargeable persons can register for the DCPL and make returns.

No. 173 Revenue Pensions Manual – Chapter 10 Updated

Paragraph 2 of Revenue's "Pensions Manual – Chapter 10: Benefits on Death-in-Service" has been updated to clarify that where a pension scheme member dies in service, the deceased member's benefits (after taking a tax-free lump sum) can be paid as an annuity or transferred into an approved retirement fund (ARF). However, the scheme cannot pay the balance of the benefits as a taxable lump sum to the surviving spouse, civil partner or dependent.

No. 174 Revenue Officers Entering Construction Sites

Revenue has updated manual the "Revenue Officers Entering Construction Sites", at Part 3, to reflect the wording of s1078(2)(j) TCA 1997 more closely. The manual also now includes a reference to s1078(3) TCA 1997, which relates to possible fines and/or imprisonment for anyone convicted under this section.

No. 175 Farming Accelerated Allowances for Slurry Storage Facilities [Section 658A TCA 1997]

Revenue has published a new manual, "Accelerated Capital Allowances for Slurry Storage Facilities", to provide guidance on s658A TCA 1997. That section provides for a scheme of accelerated capital allowances for capital expenditure incurred on slurry storage facilities by a person carrying on a trade of farming. The expenditure must be incurred in the period 1 January 2023 to 31 December 2025. The qualifying expenditure can be written off at a rate of 50% per annum over a period of two years. There is a limit of €500,000 on the total amount of relief that can be granted to any person under the scheme.

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

Mark Ludlow
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	Topic	Court
01	**Four-Year Time Limit and Jurisdictions of Appeal Commissioners and Courts**	Court of Appeal
02	**Revenue Offences – Settlement Agreement and Legitimate Expectation Regarding Prosecution**	Court of Appeal
03	**VAT and Excise Duty – Right to Disclosure of Information by Revenue**	High Court
04	**Capital Gains Tax – "Interest in Land"**	Tax Appeals Commission
05	**Income Tax – "Proprietary Directors"**	Tax Appeals Commission
06	**Capital Gains Tax – "Stapled Investment" and "Debt on Security"**	Tax Appeals Commission

01 Four-Year Time Limit and Jurisdictions of Appeal Commissioners and Courts

In the case of ***Colm Murphy v Revenue Commissioners*** [2023] IECA 160 the Court of Appeal considered the jurisdiction of the Appeal Commissioners (and a court, on appeal) to hear time-limit arguments. Haughton J delivered the judgment, with Noonan J and Donnelly J in agreement.

The taxpayer was selected for a Revenue audit in 2008 under the income tax, CGT and VAT tax heads. In April/May 2009 the taxpayer made disclosures to Revenue. On 18 May 2009 the audit was suspended as the matter had been escalated to a "Revenue enquiry" by Revenue's Regional Investigations Branch. In 2013 the taxpayer was informed by his local branch that the Revenue enquiry had been concluded and so his Revenue audit would recommence. Tax assessments subsequently issued in September 2013.

The taxpayer appealed those assessments to the Appeal Commissioners and subsequently to the Circuit Court. Before the Circuit Court he argued that the assessments should be statute barred as having been raised beyond the four-year time limit provided by s955 TCA 1997. The Circuit Court held that the taxpayer had not made a "full and true disclosure" and so could not rely on the four-year time limit. Nevertheless, the Circuit Court agreed to state the case to the High Court on a point of law.

At the hearing before the High Court the taxpayer also raised (for the first time) an argument concerning s956 TCA 1997, contending that Revenue was precluded from making enquiries beyond the four-year time limit, and submitted that the recommencement of the Revenue audit in 2013 was thus contrary to s956. The High Court heard this argument but ultimately dismissed it on the basis that because the taxpayer made three prompted disclosures after the tax returns were submitted, he could not benefit from the protection of the four-year time limit under s956 (i.e. had the original tax returns been full and complete, the disclosures (prompted by the original 2009 audit notice) would not have been required). The taxpayer appealed that decision to the Court of Appeal.

The Court of Appeal reviewed the case law on the relative jurisdictions of the Appeal Commissioners and of the High Court and the Court of Appeal. It held, in dismissing the appeal, that:

- The High Court did not have jurisdiction to consider the s956 TCA 1997 arguments raised by the taxpayer at the hearing of the case stated because no issue in relation to s956 had been properly raised or canvassed at the original hearing of the matter (before the Circuit Court) by the appellant.
- As a more fundamental, jurisdictional, point, the court concluded that:
  - The Appeal Commissioners have a limited jurisdiction, which extends to determine the quantum of tax on a lawful assessment.
  - The jurisdiction of the Appeal Commissioners does not extend to challenging the validity of the assessment, not even as a matter of "practicality and convenience" (in this regard Murray J's observations in *Stanley v Revenue* [2019] 2 IR 218 were cited with approval).
  - Accordingly, the taxpayer's arguments in respect of the assessment's having been raised beyond the four-year time limit prescribed by s955 and arguments concerning "procedural fairness" in general had been raised in the wrong forum. Neither the Appeal Commissioners nor the Circuit Court had jurisdiction to hear them; rather, the correct forum would have been the High Court on a judicial review.
  - On hearing a case stated (as opposed to a judicial review) from the Appeal Commissioners/Circuit Court, the High Court (and by extension the Court of Appeal) is exercising a limited jurisdiction provided to it by statute and it cannot assume to itself a broader jurisdiction than that conferred on it.

The case concerned a tax appeal taken under the process that pre-dated the Finance (Tax Appeals) Act 2015 and the establishment of the Tax Appeals Commission (TAC). It also concerned s955 and s956, which have subsequently been replaced by s959AA and s959Z, respectively, of TCA 1997. However, as the judgment notes, the jurisdiction of the High Court to hear appeals from the TAC under the 2015 Act (s949AR TCA 1997) is "in substantially the same terms" as under the prior procedure (s941(6) TCA 1997), and so the judgment is also relevant to the current process.

02 Revenue Offences – Settlement Agreement and Legitimate Expectation Regarding Prosecution

In the case of ***Brian Murphy v Revenue Commissioners and the Director of Public Prosecutions*** [2023] IECA 110 the Court of Appeal considered whether a settlement agreement precluded prosecution. Birmingham P delivered the judgment.

The appellant, who is facing prosecution on indictment for revenue offences, had brought judicial review proceedings before the High Court in an attempt to halt those prosecutions. The appellant had been unsuccessful before the High Court and

appealed that decision to the Court of Appeal.

The facts of the matter were that the appellant had entered into a tax settlement with Revenue. The settlement agreement concerned civil proceedings for recovery of a tax debt. During the negotiation of the settlement agreement the appellant had sought the removal of a clause stating that the settlement was without prejudice to prosecution, and the final version of the agreement, which he signed, had the "without prejudice to prosecution" language removed.

The appellant's argument was that his tax settlement with Revenue had been entered into on the basis that no criminal prosecutions would be continued or initiated against him and submitted that it was unjust and inequitable to permit prosecutions to proceed in such circumstances. He maintained that Revenue's actions amounted to representations and promises that no prosecution would ensue and that therefore he had a legitimate expectation that no prosecution would follow. The appellant asserted that he had a legitimate expectation that Revenue would adhere to its Code of Practice for Revenue Audit and the Revenue Customer Charter, which the appellant contended that Revenue had contravened.

The High Court had held that the settlement agreement referred solely to the debt collection proceedings and that if it had been intended also to preclude criminal proceedings it should have expressly stated as much. The High Court also noted that the Director of Public Prosecutions was not a party to the settlement agreement. The High Court concluded that the settlement agreement had to be read objectively and there was "no sensible basis for reading the settlement agreement as involving anything other than the compromise of the extant High Court debt collection proceedings explicitly referenced in the agreement".

The appellant appealed the High Court's judgment to the Court of Appeal. The question before the Court of Appeal was summarised at paragraph 25 of the judgment:

> "We know that the draft agreement furnished to the taxpayer did not contain a without prejudice to prosecution or enforcement clause. It was silent on the issue. The question arises whether the absence of such a clause, where, on the basis of the attitude previously taken by the Revenue Commissioners, it might have been expected to be found, amounts to a representation by the Revenue Commissioners that there would be no prosecution."

For the following reasons, Birmingham P held, in dismissing the appeal, that the absence of a "without prejudice to prosecution or enforcement" clause did not amount to an unambiguous and unequivocal representation to the effect that there would be no prosecutions:

- The heading of the settlement agreement specifically referred to the title of the civil proceedings only, and the settlement agreement related to certain taxes in certain specific periods, whereas the prosecutions related to taxes in different periods. Therefore, factually, "[t]he prosecution related to a matter that was entirely separate and distinct".
- At the time of the settlement agreement there were criminal proceedings already in being, and therefore: "This was not a case of proceedings which might hypothetically or theoretically be instituted. These were proceedings already in being. By the time of the settlement of the civil debt proceedings, the taxpayer had also been informed that he was to be interviewed under caution in relation to other possible tax offences and that a decision to prosecute would be a matter for the solicitor for the Revenue Commissioners and the Director" (para. 26).
- No reasonable person would interpret the omission of a clause in the document expressly reserving the right to prosecute as amounting to an unambiguous commitment not to prosecute (para. 27).

- The taxpayer's actions at the time were inconsistent with his holding a belief that he had achieved a situation where ongoing prosecutions would be closed and no new prosecutions would be initiated. If the taxpayer had held such a belief, then he would have sought to have the criminal proceedings that were extant against him at that time struck out without delay (para. 28).
- The appellant had also contended that Revenue's agent had made an oral statement to him that she would seek approval for a settlement that would preclude prosecution. The Court of Appeal noted that the High Court judge had heard the parties' evidence and had found Revenue's agent's evidence to be credible and corroborated by contemporaneous documentation. The High Court judge therefore concluded, on the balance of probabilities, that the alleged oral representation had not been made (para. 29). Birmingham P held, based on the transcripts before him, that it was reasonable for the High Court to reach that finding (para. 30).

Note: The Court of Appeal consisted of a three-judge panel. Birmingham P's judgment is silent on whether the other panel members, McCarthy J and Kennedy J, were in agreement with it. As at the date of writing this case note, no individual judgments of McCarthy J and Kennedy J have been published on the Courts Service website.

03 VAT and Excise Duty – Right to Disclosure of Information by Revenue

In the case of ***Michael Quigley v Revenue Commissioners*** [2023] IEHC 244 the High Court considered the circumstances in which Revenue is required to disclose information to the taxpayer.

The taxpayer (hereafter "the appellant") brought judicial review proceedings in the High Court against (1) Revenue's decision to refuse to furnish him with the names, details and particulars of 44 of his customers whom Revenue had interviewed during its investigations into his sales and (2) the refusal by the Tax Appeals Commission (TAC) to direct Revenue to furnish that information.

Revenue's calculations of the appellant's tax liability were partly based on its interviews with 44 of the appellant's customers. In effect, because 75% of those 44 customers claimed never to have purchased mineral gas oil (MGO) from the appellant (even though the appellant's records showed that they were MGO customers), Revenue discounted his purported MGO sales to traceable customers by 75%, thereby increasing the appellant's liability to VAT and excise duty.

The appellant requested information on the 44 customers and documentation relating to their interviews with Revenue, and when that request was refused, he sought a direction from the TAC ordering Revenue to furnish that information. The TAC refused to issue the direction on the basis that the information originated from the appellant's own records and related to his own customers, whose identities he knew, and therefore "the information is to this extent within the appellant's own knowledge, possession and procurement" (para. 42).

The question before the High Court was whether the information sought by the appellant was required by him to vindicate his right to fair procedures in the appeal process before the TAC.

The High Court denied the orders requested by the appellant because the relief had been sought prematurely. The High Court held that the appellant has the burden of proof under the statutory framework of the tax appeals process. Therefore it was for the appellant to prove that his tax treatment was correct using his own records and evidence. The court noted that the issues surrounding the disclosure of the information sought from Revenue would fall away in circumstances where, despite having signalled that the information was the basis on

which the tax was assessed, Revenue did not actually look behind the appellant's records and his evidence at the hearing, i.e. in circumstances where the matter was left to be determined solely on the strength or otherwise of the appellant's evidence "without any challenge being maintained on the basis of third-party information".

However, the High Court noted that if, at the hearing, Revenue actually sought to introduce such third-party information to challenge the appellant's evidence, then the appellant's right to fair procedures would have to be protected by the TAC and he could make further submissions, at that point, if necessary:

> "If, however, the Applicant's records are impugned as to their veracity and his honesty is called into question during the course of the hearing before the Tax Appeals Commissioner, it will be a matter for the Tax Appeals Commissioner then seized of the appeal to vindicate his right to fair procedures and constitutional justice. This may entail refusing to allow a line of questioning or refusing to admit hearsay evidence. Alternatively, it may entail affording the Applicant an opportunity to challenge through cross-examination evidence called to impute the veracity of his records with such disclosure as fairness and effective cross-examination requires, even if this means the adjournment of proceedings so that records may be disclosed. A range of rulings designed to ensure fairness may arise for consideration and are available to the Tax Appeals Commissioner hearing the appeal. Should it become relevant and necessary to do so, it is open to the Applicant to make such further submission as may be considered appropriate including submissions in reliance on the line of authority from the CJEU." (para. 144)

04 Capital Gains Tax – "Interest in Land"

In tax appeal **72TACD2023** the TAC considered the meaning of the term "interest in land" for the purposes of s980 TCA 1997.

The appellant acquired a portfolio of loans that were secured on Irish land ("the portfolio"). The appellant is not Irish resident and does not have a branch in Ireland. In 2016 the appellant sold the portfolio to an unconnected purchaser. That purchaser requested that a CG50A clearance certificate be obtained for the purposes of s980 TCA 1997. The appellant engaged with Revenue and disputed that s980 applied to the sale. Ultimately, the appellant paid Revenue the sum of €1,092,085 on a "without prejudice" basis (being the amount of CGT that would arise if the disposal were within the scope of Irish CGT), and Revenue wrote to the purchaser to say that a CG50A would not be required and no deduction needed to be made by the purchaser under s980(4)(a). Revenue raised no assessment to CGT at the time of the payment in 2016.

In December 2020 the appellant sought a refund of the sum of €1,092,085 that it had paid to Revenue. Revenue refused the refund and raised a CGT assessment for that sum, which was then the subject of the appeal.

The questions before the TAC were:

- whether the disposal of a portfolio of Irish mortgage loans secured over Irish land constituted a disposal of an "interest in land" for the purposes of s5 TCA 1997,
- whether the disposal came within the charge to CGT imposed on non-residents pursuant to s29(3) TCA 1997,
- whether s537 TCA 1997 overrode s29 TCA 1997 and
- whether s643 TCA 1997 could relieve the charge to tax.

The TAC held, in dismissing the appeal, that the portfolio was an interest in land and that

the appellant was subject to CGT pursuant to s29(3) TCA 1997. The Commissioner referred to the High Court's judgment in the case of *Cintra v The Revenue Commissioners* [2023] IEHC 72, which had held that "land" for the purposes of s29(3)(a) should be interpreted in accordance with the meaning given to that word in s5 TCA 1997. The Commissioner quoted an extract from the judgment of Butler J, which included the finding "that 'land' for that purpose means a freehold or leasehold estate **or one of the lesser interests formally recognised by the Common Law and now codified in s.11(4) of the 2009 Act** [emphasis added by the Commissioner]".

The 2009 Act referred to in that extract is the Land and Conveyancing Law Reform Act 2009 (LCLRA 2009), and the Commissioner's decision notes that s11(4) LCLRA 2009 provides that "[t]he only legal interests in land which may be created or disposed of are – (a) an easement, (b) a freehold covenant, (c) an incumbrance,...". The Commissioner noted that "incumbrance" is defined in s3 LCLRA 2009 as including "an annuity, charge, lien, mortgage, portion and trust for securing an annual or capital sum;...". Accordingly, the Commissioner concluded that a mortgage was an "interest in land" for the purposes of s5 TCA 1997 and comprises "land" for the purposes of s29(3) TCA 1997.

The Commissioner also dismissed the appellant's s537 TCA 1997 argument on the basis that that section specifically applies to the conveyance of an asset "as security" (i.e. being the granting of the mortgage by the borrower to the lender), and the Commissioner accepted Revenue's argument that the section does not capture a secondary assignment of a security (i.e. between lenders).

The Commissioner also rejected the appellant's s643 TCA 1997 argument (which was that it held the portfolio as trading stock rather than as a capital asset chargeable to CGT), holding that the appellant had provided insufficient evidence (many of the appellant's key employees had moved on to other roles, and the evidence given on this issue at the hearing was largely treated as hearsay) and so had not discharged its burden of proof to show that it satisfied the conditions of that section.

05 Income Tax – "Proprietary Directors"

In tax appeal **92TACD2023** the TAC had to consider whether two individuals were "proprietary directors" of a company.

The issued share capital of the company consisted of 1,000 ordinary shares of £1.00 each and 4,000 A ordinary shares of £1.00 each. For the years under appeal the two appellants each held 300 ordinary shares, and other shareholders (who were close relatives of the appellants) held the balance of the issued shares of the company (i.e. the remaining 400 ordinary shares and the 4,000 A ordinary shares).

The company's articles of association provided that the A ordinary shares were non-voting and had no right to a return of capital on a winding-up (other than what had been paid up on them) but had a right to such dividends as may be declared by the company from time to time on that class of share. The company's articles of association imposed no limits on the rights attaching to the ordinary shares.

Section 472 TCA 1997 provides that an individual will be a "proprietary director" if he or she satisfies either an "ownership test" or a "control test". Revenue argued that the appellants were proprietary directors under the control test.

The question before the TAC was whether the appellants controlled more than 15% of the ordinary share capital of the company and so were proprietary directors for the purposes of s472 TCA 1997. Section 472 defines "proprietary

director" as "a director of a Company who is either the beneficial owner of, or able, either directly or through the medium of other Companies or by any other indirect means, to control, more than 15 per cent of the ordinary share capital of the company".

The Commissioner held that the "ordinary share capital" of the company consisted of both the ordinary shares and the A ordinary shares as neither share class fell within the definition of "preference shares".

The Commissioner, allowing the appeal, accepted the appellants' argument that for the purposes of s472 it is control over the ordinary share capital that is at issue, and not control of the company or control of the voting rights in the company.

> "between them, the appellants have 100% of the voting rights in a general meeting and so collectively control the Company's affairs, but control of a Company's affairs does not equate to control of a Company's ordinary share capital. Control is exercised over shares by being in a position to enjoy the rights attached to those shares." (para. 65)

The determination notes that Revenue has sought to appeal the TAC's decision to the High Court.

06 Capital Gains Tax – "Stapled Investment" and "Debt on Security"

In tax appeal **94TACD2023** the TAC considered whether the loan element of a "stapled investment" was a "debt on security".

In 2005 and 2006 the appellant acquired "units" in a PLC. Each unit consisted of a zero-coupon loan note with a nominal value of €90 and an "A" ordinary share, which had a nominal value of €10. The units were described by the appellant's counsel as "stapled investments", for which the following definition was furnished:

> "a financial product that consists of two or more securities that are bound to form a single unit that cannot be bought or sold separately. Usually a stapled security consists of a unit in a unit trust and a share in a company. The two securities are bound via a number of contractual documents, including the unit trust deed, company constitution and associated stapling agreement. Investors receive a single security."

The terms of the investment provided that shares and loan notes had to be purchased together, no transfer of loan notes could be made unless the corresponding shares were also transferred, and where any person was required to transfer his shares (or a portion thereof), he would also have to transfer his loan notes (or the corresponding portion thereof).

The PLC's venture failed, and it was liquidated. The appellant suffered a total monetary loss on his investment. He claimed CGT losses on the full value of his investment (i.e. on both the loan and the share element).

The question before the TAC was whether the loan notes constituted a "debt on security" within the meaning of s541 TCA 1997 such that the appellant would be entitled to claim loss relief for CGT purposes on their disposal.

The appellant argued that, because of the terms of the investment, the shares and the loan notes were a single "stapled investment" that ought to be viewed as "strictly equity in nature" and thus allowable for CGT loss relief purposes.

The TAC held, in dismissing the appeal, that:

- Although they were contractually interdependent, separate deal notes were issued for the shares and the loan notes, and therefore the Commissioner was

required to look at the rights attaching to each in isolation.

- CGT losses are not allowed on normal debts but only on a "debt on security".
- Although the term "debt on security" is not defined in legislation, case law had set out that the debt must have a "bundle of rights" that enable it to be realised or dealt with at a profit.
- The appellant's loan notes had no such rights and, accordingly, could not amount to a "debt on security".

Direct Tax Cases: Decisions from the UK and European Courts

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	Topic	Court
01	**Corporation Tax – "UK-Source" Interest**	UK Upper Tribunal
02	**Income Tax – Distribution Treatment**	UK Upper Tribunal
03	**Corporation Tax – Treaty Interpretation**	UK Upper Tribunal
04	**Income Tax – Domicile of Choice**	UK First-tier Tribunal
05	**Corporation Tax – Allowable Expenditure**	UK Upper Tribunal
06	**Amazon Case – State Aid**	Court of Justice of the European Union

01 Corporation Tax – "UK-Source" Interest

In ***Hargreaves Property Holdings Ltd v HMRC*** [2023] UKUT 120 (TCC) the Upper Tribunal (UT) dismissed the taxpayer's appeal against the determination of the First-tier Tribunal (FTT) that UK income tax should have been deducted from interest payments on debt financing provided to the group. The FTT's decision was reviewed in "Direct Tax Cases: Decisions from the UK Courts and Other International Cases", *Irish Tax Review*, 35/1 (2022).

Hargreaves Property Holdings is a UK-tax-resident parent of a group of companies involved in property investment, construction and redevelopment activities in the UK. Hargreaves drew down several loans from connected parties. It had argued that the source of the interest payable under the relevant loans was outside the UK and that therefore it should not be regarded as "arising in the UK" under the UK equivalent of s246 TCA 1997.

The key factors that the taxpayer relied on to point to a non-UK source were that the relevant creditors were based outside the UK, the loans were not governed by UK law and contained exclusive foreign jurisdiction provisions, the loans were not secured by UK property assets, and the debtor's and creditor's bank accounts were located outside the UK when interest payments were made. However, the UT rejected the conclusion reached by Hargreaves and endorsed the multi-factorial approach adopted by the FTT – in line with the judgment in the seminal "Greek Bank" case (*National Bank of Greece v Westminster Bank* [1971] AC 945). The UT further agreed with the FTT's attribution of weight in this exercise. The UT held that the

FTT had been correct to give more weight to the factors of debtor residence, location of the assets out of which interest would be paid and location of the assets against which judgment would be enforced.

Hargreaves also argued that some of the interest payments made under the loans, which were refinanced after a period of less than a year (or close to a year), were not payments of "yearly interest" and should therefore not be caught by the UK equivalent of s246 TCA 1997. Hargreaves argued that the loans had independent existence, were commercially driven and were repaid within a period of around (or less than) a year and that, on each occasion before the repayment/readvance pattern took place, an enquiry was made of the relevant lender regarding whether it wished to continue providing funds. The UT agreed with the FTT's conclusion that, despite the individual loans' remaining outstanding for less than or around a year, the interest payable on those loans was indeed "yearly" in nature when the loans were not viewed "in isolation and with blinkers".

The case illustrates the application of the source principle for interest. The judgment underlines the importance of the residence of the debtor, and the location of the assets used to pay the interest, when determining the source of interest. It also demonstrates that if the intention is to provide long-term funding for the borrower, the interest payments will likely be "yearly" in nature.

02 Income Tax – Distribution Treatment

In ***HMRC v J Conran; JC Vision Ltd v HMRC*** [2023] UKUT 166 (TCC) the Upper Tribunal (UT) overturned a decision of the First-tier Tribunal (FTT) in relation to whether a payment for the transfer of a licence constituted a distribution.

The taxpayer in the case, Jasper Conran (JC), was the 99% owner of a UK LLP that sold a business to a related company that was ultimately 100% owned by JC. The business transferred was valued at £8.25m. The related company made a payment equal to that amount to the LLP partners. The FTT's ultimate decision resulted in the taxpayer's paying no tax at all as he was not liable to capital gains tax or income tax on the amount received from the purchaser of the licence. The FTT decision was reviewed in "Direct Tax Cases: Decisions from the UK and European Courts", *Irish Tax Review*, 35/2 (2022).

The FTT had concurred with HMRC that the business valuation was overstated but also found that the amount was not taxable as a distribution as JC had received the £8.25m in his capacity as partner in the LLP that he controlled, rather than as a shareholder.

In relation to the determination of the open-market value of the assets transferred, the UT upheld the FTT's decision that the value actually transferred was £1, as the transfer did not include the trademark (which was necessary to make the licence agreement business operable as a going concern).

The UT further held that there was insufficient evidence to displace the burden on the taxpayer to show that he had received the £8.25m in some capacity other than as an indirect shareholder. The UT noted that the taxpayer was "simply moving his assets/cash around wholly controlled vehicles". The business had not been offered to anyone else. A clause in the contract provided that the price was driven not by the value of the business but by the extent of favourable tax treatment for the purchaser. Accounting evidence also agreed that if the valuation was £1, the payment would be treated as a distribution. The UT determined that all of these factors indicated that the payment was made in respect of the taxpayer's taking a directing role as shareholder and that the payment was in respect of his being ultimate shareholder in the related company, rather than his status as partner in the LLP.

03 Corporation Tax – Treaty Interpretation

In ***GE Financial Investments v HMRC*** [2023] UKUT 146 (TCC) the Upper Tribunal (UT) reversed the decision of the First-tier Tribunal (FTT) that a UK-resident company was not also US resident for the purposes of the UK–US double taxation treaty. The FTT decision was reviewed in "Direct Tax Cases", *Irish Tax Review*, 34/3 (2021).

The taxpayer, G E Financial Investments Ltd (GEFI), was incorporated in the UK. It was also a limited partner in a Delaware limited partnership (LP) that was engaged in financing activities. GEFI's shares could be transferred only at the same time as those of GE Financial Investments Inc. (GEFI Inc.), a US-incorporated member of the group. They were treated as "stapled stock" for US tax purposes. As a result, the UK-incorporated company was treated as a domestic corporation for US tax purposes and therefore liable to US federal income tax on its worldwide income. HMRC rejected the taxpayer's claims for double taxation relief.

The FTT held that, despite the fact that GEFI was liable to federal tax in the US in that way, it was not resident in the US for treaty purposes. The FTT also held against the taxpayer in relation to whether GEFI carried on business in the US through a permanent establishment there for the purposes of Article 7 of the UK–US double taxation convention.

The UT held that the connection between the criteria used in Article 4(1) of the convention was that they were all commonly accepted ways in which "full" taxation is imposed: nothing more and nothing less. Unlike the FTT, the UT determined that there was no credible basis for an additional requirement for the criteria to be of a direct nature in the form of a legal connection between the corporation and the US. As the share stapling rule adopted by the US imposed "full" taxation on GEFI, the UT held that GEFI was a resident of the US for the purposes of the UK–US double taxation convention.

Although the "resident" issue decided the case in the favour of the taxpayer, the tribunal also considered whether GEFI would be entitled to a credit against UK tax for US tax paid by virtue of the fact that it was carrying on business in the US through a permanent establishment there. On this issue, the UT determined that the FTT had considered the relevant principles as established by the authorities. In this regard, the UT confirmed the decision of the FTT that GEFI's activity was not sufficient to constitute the carrying on of a business.

04 Income Tax – Domicile of Choice

In ***Strachan v HMRC*** [2023] UKFTT 617 (TC) (5 July) the First-tier Tribunal (FTT) determined that although the taxpayer had failed to acquire a domicile of choice in Massachusetts, HMRC had not met the burden of proving that the loss of tax was brought about by carelessness.

The taxpayer filed tax returns for the tax years 2011–12 to 2015–16 on the basis that he was domiciled in Massachusetts. HMRC disagreed and raised assessments for tax on income that would have been charged to UK tax were the taxpayer to be domiciled in England.

The taxpayer contended that a domicile of choice was established in a jurisdiction when a person had a "home" in that place, and the home was his "chief residence" by virtue of his intention to end his days there. However, the FTT concluded that to establish a person's "chief residence" all relevant factors have to be considered: it is not enough simply to have a home in another place and intend to end your days there.

The tribunal held that the taxpayer did not have his chief or principal home in Massachusetts and he had not intended to "end his days"

there. Furthermore, he never intended to "end his days" in Connecticut. Thus, the taxpayer was held to have never had a domicile of choice in Connecticut.

If the taxpayer was successful on the "carelessness" point, then extended time limits for raising assessments would not apply, meaning that some of the assessments would be out of time. The taxpayer had not taken any professional advice on his domicile status since 1987. The burden ultimately was on HMRC to show that a reasonably competent adviser would have told the taxpayer that the position adopted on domicile status was wrong. The tribunal held that HMRC had not been able to show that had the taxpayer taken advice, the loss of tax would have been avoided – in other words, that the loss of tax had been "brought about" by his carelessness.

05 Corporation Tax – Allowable Expenditure

In ***HMRC v Perenco UK Ltd*** [2023] UKUT 169 (TCC) (19 July 2023) the Upper Tribunal (UT) upheld the decision of the First-tier Tribunal (FTT) to allow expenditure claims made by Perenco in respect of the costs of replacing a cooling plant at a gas processing terminal. HMRC had argued that the expenditure fell to be disallowed for specific UK tax legislation for oil companies on the basis that it had been "met directly or indirectly" by the owners of three gas fields who paid to use the terminal. A number of provisions are drafted in similar terms in Irish tax legislation.

The contractual arrangements between the taxpayer and field owners for the services provided at the terminal were set out in transportation and processing agreements (TPAs). Pursuant to a number of these TPAs, the field owners were required to make additional payments in relation to work carried out, on a pro rata basis according to the proportion of the throughput at particular terminals.

The UT confirmed the FTT's finding that such reimbursement did not meet "directly or indirectly" the taxpayer's expenditure on the works. The amounts were additional contractual consideration for the services provided to the oil field owners by the taxpayer. In support of this conclusion, the UT made the following statement:

> "if A pays a sum of money to B in order to receive goods or services in return, on the basis of an arm's length commercial contract, A's payment is properly to be regarded as consideration for what A receives and not as a way of meeting B's expenditure, even if A's payment is calculated to reflect B's expenditure attributable to those goods or services (with or without the addition of a profit margin)."

Accordingly, expenditure incurred by the taxpayer to carry out work on its gas terminal to comply with new environmental regulations was an allowable deduction.

06 Amazon Case – State Aid

In 2017 the European Commission held that Amazon as a group received an individual selective advantage in the form of the tax ruling from the Luxembourg tax authorities that resulted in, according to the EC, a transfer pricing result and methodology that was not in line with the arm's-length principle.

On 12 May 2021 the General Court (GC) concluded that the Commission did not sufficiently demonstrate the existence of an advantage on a number of grounds, including that the Commission had made an error in performing its functional analysis and had not established the existence of a selective advantage.

The Commission appealed the judgment of the GC before the Court of Justice of the European Union (CJEU).

On 8 June 2023 Advocate-General (AG) Juliane Kokott of the CJEU delivered her opinion in the case (**C457/21 P)**, concluding that the Commission did not rely on the correct reference framework for its review of a selective advantage. She emphasised that the identification of the reference system is key in determining the existence of a selective advantage. The Commission had relied solely on the OECD guidelines, to which Luxembourg law did not refer at the time of the tax ruling. According to the AG, this reliance was inappropriate.

International Tax Update

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01 BEPS: Pillar One and Pillar Two, Recent Developments

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06 Saudi Arabia: ZATCA Changes Position on PEs

07 OECD Publishes "International Standards for Automatic Exchange of Information in Tax Matters: Crypto-Asset Reporting Framework and 2023 Update to the Common Reporting Standard"

08 Australia: Public CbCR

09 New Zealand Digital Services Tax

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01 BEPS: Pillar One and Pillar Two, Recent Developments

OECD: Pillar One

The OECD published a consultation document on Pillar One – Amount B, the scope and pricing approach being two of the key items for consultation. The consultation period ran from 17 July to 1 September. Work on Amount B is expected to be completed by the end of 2023.

OECD: Pillar Two

In July the OECD issued documents covering the GloBE Information Return (GIR) and administrative guidance. There will be a centralised filing and exchange framework, and the GIR will form part of that framework. Along with the above, there were details on two new safe harbours:

- A permanent safe harbour for jurisdictions that introduce a qualified domestic minimum top-up tax (QDMTT). It will be important that Ireland and other countries ensure that the QDMTT is designed in a way that meets the safe harbour conditions.
- A transitional undertaxed profits rule (UTPR) safe harbour. Under the transitional UTPR safe harbour, no top-up tax will be payable

under the UTPR in respect of any undertaxed profits of a business in its ultimate parent-entity country if that country applies a nominal statutory corporate income tax rate of at least 20%. This is a temporary safe harbour and will defer the application of the UTPR to such profits until 2026 (i.e. for years beginning on or before 31 December 2025). Groups headquartered in countries such as the United States and China should benefit from the new safe harbour.

The documents also provided guidance on substance-based income exclusion, the treatment of tax credits and currency conversion rules.

OECD releases outcome statement: 138 countries and jurisdictions agree historic milestone to implement global tax deal

Earlier in July the OECD agreed an Outcome Statement that recognises the progress made on the BEPS project and allows jurisdictions to move forward with international tax reform. The Outcome Statement includes the package of deliverables that have been developed to address the remaining elements of the Two-Pillar Solution, which include:

- a text of the Multilateral Convention (MLC) allowing for Amount A of Pillar One,
- a proposed framework for the simplification and streamlined application of the arm's-length principle for marketing and distribution activities (Amount B of Pillar One; a consultation document has been released),
- the subject-to-tax rule and
- a comprehensive action plan that will be prepared by the OECD to support the implementation of the Two-Pillar Solution

The members also agreed not to introduce new digital services taxes (DSTs), or similar measures, for any company before the MLC enters into force or 31 December 2024, whichever is earlier. Canada was one of a minority of countries that did not sign up to the statement. The Canadian Finance Minister is quoted as saying that "without any firm and binding multilateral timeline to implement Pillar One, Canada cannot support the extended standstill". Canada plans proceed with the introduction of a DST in 2024.

Australia: Pillar Two public consultation

The Australian Tax Office started a public consultation on the implementation of Pillar Two with taxpayers, selected on the basis that they are likely to be within scope of the rules, and their advisers. Although policy is developed by the Treasury, the administrative matters are within the remit of the tax authority.
The consultation period runs from July to November 2023.

Bahamas releases green paper on Pillar Two challenges

On 18 May 2023 the Bahamian Ministry of Finance released a green paper on "Corporate Income Tax Strategies for the Bahamas", which sought to address the challenges posed by Pillar Two. The Ministry aimed to obtain stakeholder feedback in the period up to 3 July. There is currently no corporate income tax in the Bahamas. However, businesses pay a yearly business licensing fee ranging from 0.50% to 1.25% on their annual gross turnovers.

Bermuda: Public consultation on introduction of corporate income tax

In early August the Government of Bermuda announced that it is considering the introduction of a new corporate income tax regime that would be within the scope of the Pillar Two rules. Bermuda does not currently impose corporate income tax. The Government's view is that retaining the status quo approach would likely erode the country's competitiveness. The first public consultation on the subject runs until 8 September 2023.

Czech Republic: Draft law published implementing minimum taxation Directive

In August the lower chamber of the Czech Republic's Parliament approved a draft law for the implementation of the Pillar Two Directive. This was approved in the first reading, but the

draft law must pass two further readings in the lower chamber. Thereafter, it must be approved by the Senate, signed by the President and published in the *Official Gazette*.

Finland: Pillar Two public consultation

In August the Finnish Government opened a public consultation on the draft Bill to implement the EU Directive on Pillar Two. The legislation, once approved, would be effective from 1 January 2024.

Germany: Draft legislation

In August the German Government approved draft legislation on the implementation of the EU Pillar Two Directive. A discussion draft had been published in July, and the August draft contained some changes from the July version. The changes included technical amendments (e.g. transfer pricing adjustments) and amendments to German GAAP rules on the calculation of deferred taxes. The upper and lower houses of the Parliament must approve the draft law. It is expected that the law can be approved by the end of 2023.

Guernsey, Jersey and Isle of Man agree on joint approach to Pillar Two

In a joint press release on 19 May 2023 Guernsey, Jersey and the Isle of Man announced that they have agreed on a common approach to implement the global minimum tax under the OECD Pillar Two. The countries have agreed to the adoption of the income inclusion rule and the domestic minimum tax from 2025. They will continue to engage with stakeholders to assist businesses in preparing for the changes, and the Isle of Man stressed that the majority of companies resident on the island will remain within the current 0/10% tax regime, being out of scope of the new rules.

Ireland: Pillar Two public consultation

In July the Irish Minister for Finance launched a consultation on a second Feedback Statement on the transposition of the Pillar Two Directive. That consultation closed on 21 August and addressed safe harbour rules, Pillar Two elections, the OECD Model Rules (along with commentary and advice), administration and the GloBE Information Return. The first Feedback Statement was published in March of this year covered draft legislative approaches to the GloBE rules and administrative matters.

Italy: Pillar Two legislation

In August new legislation came into force in Italy empowering the Government to implement the EU Directive on Pillar Two. The legislation also reflects planned tax reforms and allows the Government 24 months to issue decrees to execute the changes required. The reforms extend to reducing the tax burden (including a reduced corporation tax rate for a two-year period in certain circumstances), deterrence of tax evasion and avoidance, measures to increase the country's global competitiveness and measures in line with EU legislation.

Luxembourg: Draft legislation

In early August draft legislation for the implementation of the Pillar Two Directive was published in Luxembourg. The legislation is broadly in line with the Directive.

Netherlands: Bill presented to Parliament for Minimum Tax Rate Act 2024

At the end of May the Bill for the implementation of Pillar Two was submitted to the Dutch Parliament. The Bill will be discussed by the Parliament and upper house and is expected to enter into force on 31 December 2023.

New Zealand: Bill implements OECD Pillar Two GLoBE rules

In May the New Zealand Government introduced a Bill detailing Pillar Two implementation. The effective date of implementation of the GloBE rules will be determined once a "critical mass" of countries have adopted the rules; however, the effective date would not be earlier than 1 January 2024 for the income inclusion rule and 1 January 2025 for the undertaxed profits rule. The Bill also proposes the introduction of a domestic income inclusion rule (DIIR), along with measures to manage tax credits for tax paid under the DIIR. The Bill also proposes a new penalty of up to NZD 100,000 for failure to

submit a complete country-by-country report on a timely basis.

Norway: Consultation on proposed global minimum tax rules

In June Norway's Ministry of Finance submitted a proposal for consultation on the introduction of the Pillar Two global minimum tax rules. The proposal includes details on an income inclusion rule, with details on an undertaxed profits rule to be released later. The consultation closed on 1 August.

Republic of Korea: Revision to timeline for introduction of Pillar Two measures

In July the Ministry of Economy and Finance announced its proposed 2023 tax revision Bill. The Bill set out that implementation of the undertaxed profits rule would be postponed to 1 January 2025, broadly in line with timelines elsewhere. There is no change to the date from which the income inclusion rule will be effective – 1 January 2024. The Bill also included changes to transfer pricing documentation requirements, one notable change being that the submission deadline for local file, master file and country-by-country reports would be brought back from 12 months to 6 months after the financial year-end.

Switzerland: Voters approve constitutional amendment to implement Pillar Two in 2024

In June Switzerland voted in favour of the amendment to the Swiss Constitution that would allow for the introduction of the Pillar Two rules in the country. This is one of the most significant changes to the Swiss corporate income tax system in the past century.

02 BEPS: Multilateral Instrument Ratification

In May the OECD announced that Vietnam had deposited its instrument of ratification of the Multilateral Instrument (MLI). Tunisia also deposited its instrument of ratification of the MLI, in July.

03 US Tax Developments

Proposed regulations for information on digital assets

In August the US Internal Revenue Service and Department of the Treasury issued proposed regulations setting out guidance on reporting information on digital assets. The regulations (under ss6045 and 6050W of the Internal Revenue Code) require brokers to report digital asset transactions by customers from 1 January 2025.

04 EU Tax Developments

FASTER Directive

The European Parliamentary Research Service issued a briefing document at the end of August on the proposed FASTER Directive. The aim of the Directive is, essentially, to improve the processes for the double taxation relief on payments within the EU and thereby promote cross-border investment in the EU. The proposal sets out two options: relief at source or a quick refund system. The European Commission tabled the FASTER proposal in June of this year with the

intention that transposition would take place by 2027.

Denmark: Amendments to WHT on dividends from tax-free portfolio shares

In May 2023 Denmark introduced a new provision allowing tax to be withheld at a rate of 15.4% on dividends from tax-free portfolio shares. The changes entered into force on 1 May 2023. The tax-free portfolio shares are unlisted shareholdings of <10%. The amendment brings foreign entities receiving dividends from Danish shares into scope of Danish dividend withholding tax.

Germany: Legislation enacted to implement EU Public CbCR Directive

In June Germany published its law implementing the provisions of the EU Public Country-by-Country Reporting (CbCR) Directive. The German public CbCR rules are in line with the EU public CbCR rules, but their scope differs from those of the existing German (non-public) CbCR rules.

Germany publishes draft decree on interpretation of anti-hybrid rules

In July the German Ministry of Finance published its first draft of a decree on the interpretation of the German anti-hybrid rules, which sets out the German tax authority's view on the rules. It sets out that the rules were not intended to go beyond the rules as per the EU Directive. The decree confirms that expenses incurred after 31 December 2019 that originate from hybrid transactions that were entered into before 31 December 2019 should not be within the scope of the anti-hybrid rules. (There are, however, exceptions for continuing obligations, e.g. certain loan arrangements.)

Germany: Replacement of previous transfer pricing guidance

The Ministry of Finance published an update decree that provides "administrative principles regarding transfer pricing". The 2022 OECD Transfer Pricing Guidelines are incorporated in the updated decree. The decree does not include previous, 2021, guidance regarding inter-company financing structures, which had been rejected by the Federal Tax Court in two decisions published after the 2021 guidance.

Greece: DAC7 Bill submitted to Parliament

The Bill for the implementation of DAC7 in Greece was submitted to the Parliament in August. This followed a public consultation on the implementation of DAC7. The Bill is subject to parliamentary approval. A press release issued by the Ministry of Finance outlined that the penalties provided for under the Bill are greater than those for tax infringements under existing legislation.

- For digital platforms that do not comply, penalties include suspension of activity, fines of up to €500,000 and having access to the platform blocked.
- For users that do not declare the required information on the platform, penalties include the closure of their account on the platform and the withholding of payments.

Ireland: Public CbCR Directive transposed

The Public CbCR Directive was transposed into domestic legislation in Ireland by the 22 June deadline. Application of the Regulations commences from the first financial year on or after 22 June 2024.

Luxembourg enacts DAC7 rules

In early May the Luxembourg Chamber of Deputies adopted a Bill to implement DAC7. The legislation was published in the *Official Journal* later that month.

Luxembourg: Draft legislation on revised investment tax credit

In July the Luxembourg Government presented a draft law to the Parliament proposing changes to the current investment tax credit. This is part of a package of measures targeting mining, craft, commercial and industrial businesses agreed in September 2022. The Parliament will now review and vote on the draft law. The current investment tax credit includes a tax credit for overall investments at a rate of 8% for the first €150,000 of investment and 2% for investments above €150,000, as well as a tax credit for additional investments at a rate of 13%.

Luxembourg: Public CbCR Directive transposed

The Public CbCR Directive was required to be transposed into domestic legislation by EU Member States by 22 June 2023. Luxembourg completed this process in August.

Romania: Public CbCR Directive

In July Romania introduced the EU Public CbCR requirements, applying to periods from 1 January 2023. As included in previous updates, this date is before the deadline of 22 June 2024 set by the EU Directive.

05 UK Tax Developments

Transfer pricing documentation

The UK has formally introduced requirements for transfer pricing master files and local files in line with OECD requirements. The new documentation requirements have effect for corporation tax for accounting periods beginning on or after 1 April 2023. HMRC will also consult on the introduction of a summary audit trail to supplement the local file documentation.

Consultation on umbrella companies

On 6 June 2023 a new joint consultation was opened by HMRC and the Department for Business and Trade that aims to tackle non-compliance in the umbrella company market. Umbrella companies act as employment intermediaries and employ individuals on behalf of employment businesses, who are then supplied to end clients. The new consultation seeks stakeholders' views on proposals to regulate the umbrella company market for employment rights purposes, as well as inviting opinions on options to discourage the use of temporary labour and non-compliant umbrella companies.

06 Saudi Arabia: ZATCA Changes Position on PEs

Saudi Arabia's Zakat, Tax and Customs Authority (ZATCA) issued a circular on 17 May 2023 stating that a non-resident's employees or personnel must be physically present in Saudi Arabia for the establishment of a service permanent establishment (PE). This represents a change, as ZATCA previously argued that a "virtual" fixed place of business PE could arise for a foreign service provider entering a service contract lasting six months or more with Saudi-resident companies. The service PE concept, which is included in 54 of 57 of the country's double taxation agreements, outlines that a PE arises if services are provided by an enterprise for more than 183 days in any 12-month period in Saudi Arabia.

07 OECD Publishes "International Standards for Automatic Exchange of Information in Tax Matters: Crypto-Asset Reporting Framework and 2023 Update to the Common Reporting Standard"

The OECD published its "International Standards for Automatic Exchange of Information in Tax Matters: Crypto-Asset Reporting Framework and 2023 Update to the Common Reporting Standard" in June. This is a set of rules and exchange agreements for the Crypto-Asset Reporting Framework and updated Common Reporting Standard (CRS)

that will ensure that the tax-transparency architecture remains effective. It includes amendment of the CRS to bring certain electronic money products, central bank digital currencies and indirect investments in crypto-assets into scope.

08 Australia: Public CbCR

After a public consultation process – which included feedback that the proposed disclosures required would be greater than those required by the EU or under BEPS Action 13 – the Australian Treasury has deferred the introduction of public country-by-country reporting until 1 July 2024.

09 New Zealand Digital Services Tax

At the end of August the New Zealand Government announced that a digital services tax (DST) Bill would be introduced. However, the future of the legislation remains to be seen, given the general election in early September. In any event, the Government press release noted that a DST would not be introduced until 1 January 2025.

10 Singapore: Income Tax Bill

The Singaporean Ministry of Finance issued the draft Income Tax (Amendment) Bill 2023 for public consultation in June. The Bill proposes tax measures announced in the Budget, along with other changes relating to international tax developments and changes after review by the Ministry of policy and administrative matters. One notable proposed change is a provision that would introduce capital gains tax on the sale/disposal of foreign assets in certain cases where the gains are received in Singapore.

VAT Cases & VAT News

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VAT Cases

01 Direct Link Between Supply of Services and Consideration: CJEU Judgment

02 Accommodation Services and Special Scheme for Travel Agents: CJEU Judgment

03 Supply of Services and Existence of Fixed Establishment: CJEU Judgment

04 Revised Pharmacy Scheme – Amended Returns: TAC Determination

05 Vocational Training Services Exemption: TAC Determination

06 Evidentiary Requirements for Zero-Rated Supplies: TAC Determination

01 Direct Link Between Supply of Services and Consideration

The Court of Justice of the European Union (CJEU) delivered its judgment in the case of ***Gemeinde A v Finanzamt*** C344/22 on 13 July 2023, which related to Gemeinde A's right to deduct input VAT and the interpretation of Articles 2 and 13 of the VAT Directive. Gemeinde A is a state-recognised air spa town in Germany; its spa administration is managed as a government-operated business under municipal law, and for the purposes of corporation tax it qualifies as a commercial business. Gemeinde A collects a spa tax, which covers the costs of erecting and maintaining the facilities provided for spa and leisure purposes. Certain categories of person are subject to the spa tax, but it is not collected from day visitors or non-local persons or residents working or training in the area. For non-local persons the tax is set at a certain amount per day of stay, and for resident persons an annual flat rate applies irrespective of duration, frequency and season of their stay. There are also reporting requirements for accommodation providers and travel agents. The spa facilities are freely accessible to all.

Gemeinde A incurred expenditure on the erection, maintenance and renovation of the spa facilities using the revenue collected from the spa tax and reclaimed the input VAT incurred on the works. After an audit, the tax authority disallowed input VAT that did not relate to the operation of the spa business.

The first question referred was whether the provision of the spa facilities constitutes an economic activity and, if so, whether Gemeinde A is a taxable person. To answer the question, the court needed to establish whether Gemeinde A supplied a service for consideration. The referring court noted that as the spa facilities may be used free of charge

by persons who are not subject to the spa tax, when compared to the general public who can use the facilities free of charge, "the recipient of the service received in return for the spa tax is not identifiable, since the person liable to that tax has not received any specific consumable benefit which goes beyond the benefit received by the general public". However, that court doubted whether the legal relationship between Gemeinde A and the spa guests should be taken in isolation, as the spa guests pay a spa tax which represents consideration for use of the spa facilities (it is paid per day's stay). On this basis, it referred the matter to the CJEU.

Based on the information provided, it was inferred that a supply of services occurred, and it had to be determined whether they were provided for consideration. Where Gemeinde A imposes a spa tax on visitors when those facilities are freely and gratuitously accessible to everyone, does that constitute a supply of services for consideration? The court noted that a supply of services is carried out for consideration:

> "only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the actual consideration for an identifiable service supplied to the recipient. That is the case if there is a direct link between the service supplied and the consideration received."

The court noted that in this case there did not appear to be a legal relationship in which there is reciprocal performance between (1) Gemeinde A, which, under municipal by-laws, imposes a spa tax of a certain amount per day's stay on visitors staying in the municipality, and (2) those visitors who are entitled to use the spa facilities made available by Gemeinde A, which are freely accessible to everyone, including persons not subject to that tax.

By reference to earlier case law, the court stated that a direct link exists where two services are mutually dependent on each other, i.e. one is made only on condition that the other is also made, and vice versa. In this case the spa tax had to be paid in accordance with the municipal by-law and was linked to the stay in the area rather than the use of the spa facilities by the persons required to pay it. The persons who were required to pay it could avail of the spa facilities, but those same facilities were also available free to everyone. The court indicated that the spa tax could not be regarded as a payment for the provision of services. Therefore, it held that the provision of spa facilities does not constitute a supply of services for consideration where Gemeinde A imposes a spa tax and the obligation to pay that tax is linked to one's stay in the area rather than the use of the spa facilities.

The second question referred related to the territorial scope for the purposes of determining whether a significant distortion of competition existed, and this did not need to be answered based on the reply to the first question. This case is relevant when considering whether a form of consideration payable is for a supply of services and whether it satisfies the direct link requirement for the supply to come within the scope of VAT. As this is a fundamental principle of VAT, the court's narrative in relation to the purpose of the payment is helpful in determining when a direct link arises.

02 Accommodation Services and Special Scheme for Travel Agents

The CJEU judgment in the case of ***Dyrektor Krajowej Informacji Skarbowej v C. sp. z o.o., in liquidation*** C108/22 was published on 29 June 2023. This case concerned the special scheme for travel agents as provided for under Article 306 of the VAT Directive (TOMS/TAMS) and whether it applied to a hotel services consolidator. C. sp. z o.o.,

in liquidation ("C"), a Polish company, was involved in the resale of accommodation services in its own name to other taxable persons without ancillary services. C did not have its own accommodation capacity, so it purchased accommodation services in its own name and on its own behalf and resold them to its taxable customers. The resale price included the original purchase price and C's margin. On occasion it also provided advice on the choice of accommodation and assistance with travel arrangements.
C applied the special scheme to its services. The tax authority, however, took the view that the services did not come within the concept of "tourist service" under Polish VAT legislation. It was of the view that a tourist service must comprise a complex service with a number of external and internal services rather than a single service.

The question referred was whether the special scheme for travel agents applies where accommodation services are purchased from taxable persons and resold to other taxable persons without the addition of ancillary services. The referring court was concerned with whether the principle of neutrality would be infringed. This was in the context of the resale of accommodation services provided without ancillary services being taxed under general VAT scheme but the resale of such services combined with additional services falling under the special scheme. The court noted the rules of the scheme and its essential aim – in particular, the fact that it is to be applied where travel agents deal with customers in their own name and use supplies of goods or services bought in from third parties in the provision of travel facilities.

As C purchased accommodation services in its own name from other taxable persons and then resold them to its taxable customers, the court stated that it satisfied the substantive conditions of Article 306. It also noted that C carried out transactions that were identical or comparable to those of a travel agent or tour operator. But it had to consider whether the special scheme applied where the accommodation was not accompanied by ancillary services. The court noted that if it did not apply, this would lead to a complicated tax system. The VAT rules applicable would depend on the constituents of the services offered to each traveller, and such a tax system would fail to comply with the aims of the Directive. The court referred to earlier case law (*Alpenchalets Resort* C552/17), which held that:

> "Articles 306 to 310 of the VAT Directive must be interpreted as meaning that the mere supply by a travel agent of holiday accommodation rented from other taxable persons or such a supply of a holiday residence combined with the supply of additional ancillary services, regardless of the importance of those ancillary services, each amount to a single service covered by the special scheme for travel agents."

The court therefore held that the service:

> "provided by a taxable person, which consists in purchasing accommodation services from other taxable persons and reselling them to other economic operators, is covered by the special VAT scheme applicable to travel agents, even though those services are not accompanied by ancillary services in accordance with Article 306."

The decision brings some clarity to a question that often arises in the context of Travel Agents Margin Scheme/Tour Operators Margin Scheme ("TAMS"/"TOMS") – is a single service sufficient to bring a supply within the scope of the special scheme? The operation and application of the special scheme is on the European Commission's agenda as an area requiring review and possible reform and harmonisation; the work has been paused, but a legislative initiative is expected in 2024.

03 Place-of-Supply Rules for Services and Fixed Establishment

The CJEU judgment in the case of ***Cabot Plastics Belgium SA v État Belge*** C232/22 was delivered on 29 June 2023. This case related to the interpretation of Article 44 of the VAT Directive (which sets out the general business-to-business (B2B) place-of-supply rule for services), together with Article 11 of the Implementing Regulation (EU 282/2011) ("the IR") (which sets out the characteristics of a fixed establishment). The Belgian tax authority sought to impose additional VAT on Cabot Plastics Belgium SA ("Cabot Plastics").

Cabot Plastics entered into a tolling agreement with Cabot Switzerland GmbH. Cabot Switzerland, established in Switzerland, is the main operating company of the Cabot group for EMEA and is VAT-registered in Belgium in relation to its sales of carbon-based products. Cabot Plastics and Cabot Switzerland are separate legal entities but financially linked as they have a common parent. Under the tolling agreement, Cabot Plastics exclusively uses its own equipment to process raw materials into products used in the manufacture of plastics, for the benefit and under the direction of Cabot Switzerland. The products are stored by Cabot Plastics before being sold by Cabot Switzerland in Belgium and Europe. Most of Cabot Plastic's turnover is derived from this service.

Paragraph 10 of the judgment sets out the additional services provided by Cabot Plastics to Cabot Switzerland. From a VAT point of view, Cabot Plastics treated the supplies as taking place in Switzerland, where the recipient of the services was established. A prior ruling for corporation tax purposes had provided that its business did not involve Cabot Switzerland's having an establishment in Belgium. After an audit in 2017, the tax authority came to the view that Cabot Switzerland had a fixed establishment in Belgium for the purposes of the VAT legislation and therefore that the supply of services provided by Cabot Plastics to it had to be regarded as taking place in Belgium and subject to VAT in Belgium.

Cabot Plastics argued that the place of supply of the services that it invoiced to Cabot Switzerland was not Belgium but Switzerland, where Cabot Switzerland has established its place of business. The tax authority considered that the technical resources constituting the fixed establishment are the production plants, the distribution centre and the storage areas, which belong to Cabot Plastics but must be regarded as being made available to Cabot Switzerland under the tolling agreement, as it provides that Cabot Plastics' equipment is to be used exclusively for the benefit and under the direction of Cabot Switzerland, so that Cabot Switzerland has free use of that equipment.

With regard to human resources, the tax authority indicated that they are made up of the operational staff of Cabot Plastics made available to Cabot Switzerland, which makes it possible for Cabot Switzerland to make sales, in particular, in Belgium. In addition to tolling services, it also noted that such staff provide other services that are essential to Cabot Switzerland, such as receiving raw materials, monitoring quality, preparing orders, packaging finished products and taking inventories. It also submitted that the structure made available to Cabot Switzerland by Cabot Plastics enables the former to receive and use the products resulting from the tolling, in order to carry out its own supply of goods in Belgium, from its fixed establishment, which has a sufficient degree of permanence.

The first question referred related to whether a taxable person receiving services whose business is established outside the EU has a fixed establishment in the Member State in which the provider of the services concerned is established. Where they are legally independent

entities, is a fixed establishment created where the service provider supplies to the service recipient, pursuant to an exclusive contractual undertaking, those services and a series of ancillary or additional services, contributing to the business of the service recipient in that Member State, and the human and technical resources of that possible fixed establishment belong to the service provider?

Under the general B2B rule, the place of supply is where the recipient is established unless those services are provided to a fixed establishment of the taxable person located somewhere other than the place of establishment, in which case the place of supply of those services is the place where that fixed establishment is located. By reference to the IR and earlier case law, the court stated that:

> "for a company to be considered as having a fixed establishment in a Member State in which the services concerned are provided to it, it must have in that Member State a sufficiently permanent and suitable structure to enable it to receive the services concerned there and to use them for its business".

It also clarified that the existence of a fixed establishment is to be determined by reference to the taxable person receiving the services, not the taxable person providing the services. The assessment to be made is whether the resources actually enable the person to receive and use those services in the relevant Member State. The following points were made by the court by reference to earlier case law:

> "Although it is not a requirement for a taxable person itself to own the human or technical resources in another Member State, it is however necessary for that taxable person to have the right to dispose of those human and technical resources in the same way as if they were its own...[T]he classification as a 'fixed establishment' [must] be assessed in the light of the economic and commercial reality [and] cannot depend solely on the legal status of the entity, and the fact that a subsidiary exists in another Member State does not, in itself, mean that it also has its fixed establishment there...[It is only if] it were established that...a company receiving services had the resources of its service provider at its disposal as if they were its own that it could be regarded as having a suitable structure with a sufficient degree of permanence, in terms of human and technical resources, in the Member State where its service provider has established its business...[T]he fact that the economic activities of companies which are linked contractually by an agreement on the provision of services form an economic whole and that the results of those activities are of benefit essentially to consumers in the Member State where the service provider has its place of business is not material for determining whether the recipient of those services possesses a fixed establishment in that Member State."

In this case Cabot Plastics agreed to use its own equipment exclusively for the production of the goods covered by the agreement concluded with Cabot Switzerland; that agreement has been in force since 2012; and those services constitute almost all of Cabot Plastics' turnover. The court noted that there is a difference between the tolling services provided and the sale of the goods manufactured, as these are distinct transactions that are subject to different VAT rules. To assess where Cabot Switzerland receives those services, the place where the human and technical resources that it uses for that purpose are situated is to be identified, rather than the place where the resources it uses for its sales activity are located.

The fact that the service provider also provides the service recipient with ancillary services, which facilitate the business of that recipient, such as the sale of goods resulting from the tolling, has no bearing on the question

of the existence of a fixed establishment of the service recipient. Subject to verification by the referring court, the court stated that it appears that Cabot Switzerland does not have a suitable structure in Belgium for the purpose of receiving and using the services provided by Cabot Plastics for its business of selling goods made as a result of the tolling services; instead, those services are received and used in Switzerland. This case is very helpful in clarifying the circumstances where a fixed establishment does or does not arise, particularly in the context of supplies between related entities.

04 Revised Pharmacy Scheme – Amended Returns

The Tax Appeals Commission (TAC) determination **82TACD2023** dealt with the submission of amended returns after revision of the VAT calculations using an updated version of the pharmacy scheme. The appellant is a pharmacy, and VAT returns had been submitted for ten VAT periods in 2011 and 2012 in 2013 and 2014 (total VAT payable €114,547 – this was calculated using the old chemist scheme). Subsequently, in 2015 and 2016, amended VAT returns were submitted for those periods (total VAT payable €25,027, which was calculated using the revised pharmacy scheme). Revenue raised assessments relating to the difference between the two sets of returns and disputed the use of the revised scheme retrospectively (the revised scheme had been approved for use from 1 September 2012).

The appellant indicated that Revenue had provided different reasons for rejecting the amended returns and, in the main, the reasons were that (1) the revised scheme applied only from 1 September 2012, (2) the revised scheme applied only to pharmacies with a turnover of less than €1.5m and/or (3) the calculations used by the appellant in calculating the amended returns were incorrect because a substantial VAT adjustment charge would have arisen on adopting the revised scheme. The appellant argued that there was no legal basis for Revenue's contentions in respect of the first two points, and with regard to the third point, it contended that there was no logical basis for the calculation of the adjustment that Revenue sought to make.

Revenue had also submitted that the amended returns were incorrect. The determination details the correspondence between the parties on the use of the schemes and the accuracy of the returns and the material findings of fact by the Commissioner. The determination indicates that the Commissioner was satisfied that the appellant failed to prove, on the balance of probabilities, that Revenue's notice of assessment was incorrect. He considered that it was necessary for the appellant to demonstrate that its original returns were wrong to justify the submission of the amended returns seeking a repayment of VAT, and this in his view had not been demonstrated – the original returns calculated on the basis of the old scheme were replaced with the amended returns calculated on the basis of the revised scheme.

The appellant's justification for this approach appeared to the Commissioner to be that the revised scheme had replaced the old scheme and that therefore, *ipso facto*, the old scheme was wrong and the new scheme was right. This was insufficient to demonstrate that the original returns did not satisfy s76 VATCA 2010 but the amended returns did.

The appellant had also argued that Revenue had raised the assessment outside the four-year time limit. The determination indicates that the appellant was on notice that the revised scheme was not appropriate for a pharmacy of its turnover and was not intended to apply retrospectively and that the appellant's agent was directly advised by Revenue that the revised scheme could not be used to

review the appellant's returns retrospectively. Nonetheless, it was noted that the appellant proceeded to submit amended returns based purely on calculations using the revised scheme. The Commissioner noted that as the appellant submitted incorrect returns based on a methodology that it was advised was unsuitable, he was satisfied that this behaviour constituted negligence on the part of the appellant. He found that Revenue was entitled to raise the assessments against the appellant and that the assessment should stand. The TAC has been requested to sign and state a case for the opinion of the High Court.

05 Vocational Training Services Exemption

The Tax Appeals Commission (TAC) determination **101TACD2023** dealt with the exemption provided for education, training and vocational training under paragraph 4(3) of Schedule 1, VATCA 2010. The appellant is a body established by statute and, as such, is a body governed by public law. It is an Irish-incorporated and Irish-tax-resident company that specialises in providing training. The appellant entered into an agreement with X (the determination is heavily redacted, so for the purposes of this summary the third party is referred to as X) to sub-contract the training services so that it would be provided with training and retraining services for its students and employees. The appellant had sought a ruling from Revenue in relation to whether the services that it provided qualified for the exemption relating to training/vocational training. Revenue had indicated that the services were liable to VAT as it considered the supply to be that of the provision of staff. The appellant charged VAT at the standard rate but continued its correspondence with Revenue, including a review under Revenue's Complaint and Review Procedures, submitting that its services were exempt from VAT. The reviewing officer upheld the view that the services were not exempt from VAT. The appellant, nonetheless, sought refunds of VAT charged by it on the grounds that its services were exempt from VAT. The refund request was refused.

The appellant submitted that as it is the only party that physically performs and delivers training, it is supplying vocational training services that are exempt from VAT. Its agreement with X was described as a comprehensive outsourcing arrangement under which it outsourced the delivery of its training to X, but X is obliged to sub-contract the performance and delivery of the training straight back to the appellant, as it is the only party legally authorised to provide the training. The appellant relied on the agreement entered into with X, indicating that it provides vocational training services to X and it does not provide personnel to X (as this is not permitted by the agreement).

At the oral hearing the appellant had sought to add another ground of appeal – the specific exemption also includes the "supply of services and of goods **closely related thereto**" (emphasis added). Revenue had objected to the addition of this ground of appeal, and this objection was upheld by the Commissioner, with the determination setting out the basis for this.

The submissions by Revenue included that the appellant is not a body providing vocational training services; rather, X is the body providing such services, and the appellant provides a suite of services to X to enable X to provide the vocational training services. It also submitted that a sub-contractor can qualify for the education exemption only where it can demonstrate that it has the necessary organisational framework to be considered to be a body providing vocational training services. It further submitted that X is acting as principal in relation to the provision of the training while the appellant provides the suite of services to enable X to deliver the overall training services to the students.

The Commissioner found as material facts that the appellant is the only body authorised to deliver the training; that it is legally permitted to provide the training services; and the effect of the agreement with X is that the appellant is delivering vocational training services to X and not simply providing personnel. The Commissioner therefore found that the appellant is a public body and thus a recognised body and is involved in the provision of vocational training or retraining and that the VAT repayments should be made. A request for a case stated was not received.

06 Evidentiary Requirements for Zero-Rated Supplies

The Tax Appeals Commission (TAC) determination **106TACD2023** resulted from the withdrawal of the zero rate of VAT that the appellant had applied to sales of goods to the UK as it had not retained the required documentary evidence to support the zero rate in the period 2015 to 2018 (i.e. it did not retain evidence to prove that the goods were removed from Ireland and transported to the UK). The appellant had declared intra-Community acquisitions from the UK and also declared intra-Community supplies to the UK. The goods were delivered by the managing director of the appellant personally to Northern Ireland by way of car and trailer, as this was more cost-effective than engaging a shipping agent, and therefore the paperwork relating to the transport of the goods would be non-existent.

Revenue submitted that there is a clear list of requirements in Regulation 29 of the VAT Regulations 2010 to be satisfied to qualify for the zero rate. Part of the determination deals with a further application by the appellant to have the hearing adjourned, but this was refused as, based on the chronology of events, there was no risk to the appellant's right to fair procedures.

With regard to the substantive issue, the Commissioner did not consider that the appellant had provided the necessary documentation to show that the zero rate of VAT should not have been withdrawn. The Commissioner found that, on the balance of probabilities, the appellant failed to adduce any evidence, whether oral or documentary, which tended to establish its claim. Therefore Revenue was correct to raise the assessments.

VAT News

Ireland

Revenue eBrief No. 167/23, published on 18 July 2023, related to VAT repayment offset. The Tax and Duty Manual (TDM) on this issue has been updated at section 1.2 to advise that a request to offset VAT repayments to debt warehouse periods is now available in ROS.

Revenue eBrief No. 161/23 was published on 13 July 2023 to highlight amendments to a number of TDMs, including:

- "VAT Treatment of Education and Vocational Training",
- "Union Scheme – One Stop Shop (OSS)" and
- "Non-Union Scheme – One Stop Shop" (OSS).

Revenue eBrief No. 136/23 was published on 2 June 2023 highlighting new TDMs that have been published covering the VAT treatment of clothing, human medicines and animal medicines.

EU

On 10 July 2023 the European Commission published the minutes of the VAT Committee meeting of 20 March 2023. The document can be accessed at https://circabc.europa.eu/. It outlines an update on proposals by the Commission in relation to vouchers; implementation of the SME scheme; electronic exemption certificate/procedure; VAT rules applicable to travel and tourism; the list of gold coins for 2023; and the VAT e-commerce package. The questions concerning the application of the EU VAT provisions included:

- importation of leased goods to be used for taxed activities – right to deduct VAT of the lessee,
- vouchers in the form of city cards,
- application of the VAT exemption to educational services,
- permanent address or habitual residence of non-EU travellers – further analysis and
- initial VAT reflections on non-fungible tokens.

UK

HMRC published Revenue and Customs Brief 6 (2023) on 8 June 2023, following on from Brief 3 (2021). The purpose of the new Brief is to provide an update on the VAT treatment of supplies of digital newspapers and other digital publications before 1 May 2020. This follows the Supreme Court decision in *News Corp UK and Ireland Ltd v HMRC* [2023] UKSC 7. The judgment of the Supreme Court confirms HMRC's policy that supplies of digital publications before 1 May 2020 are standard rated. The Brief indicates that HMRC will be writing to organisations that have submitted claims for overpaid VAT based on the Upper Tribunal decision in *News Corp* (UT/2018/0046) to confirm whether they intend to proceed with their appeals, given the Supreme Court decision.

Accounting Developments of Interest

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Updated Guidance Note on Reporting to the Corporate Enforcement Authority

The Irish Auditing and Accounting Supervisory Authority has published updated guidance on auditors reporting Category 1 and 2 offences to the Corporate Enforcement Authority. The updated guide reflects the Companies (Corporate Enforcement Authority) Act 2021, updated ISAs and other relevant legislation.

Fair-Value Measurement

The Financial Reporting Council has published its thematic review of fair value measurement. Fair-value measurements are problematic as they can involve judgement and matters such as the uncertain economic environment and climate change, and these increase the risk of inconsistent values being used. The review highlights the need to:

- use market rather than the company's own assumptions,
- improve disclosures of the methodologies and assumptions used and
- consider specialised advice.

Hyper-inflation

For most accountants, hyper-inflation is something that you read about but don't have to account for. However, Haiti has become hyper-inflationary as of 31 March 2023, and Ghana and Sierra Leone are projected to become hyper-inflationary during 2023. They will join Argentina, Ethiopia, Iran, Lebanon, South Sudan, Sudan, Suriname, Turkey, Venezuela, Yemen and Zimbabwe and will need to apply IAS 29, "Financial Reporting in Hyper-inflationary Economies".

Country-by-Country Tax Reporting

The European Union (Disclosure of Income Tax Information by Certain Undertakings and Branches) Regulations 2023 transpose Directive 2021/2101/EU into Irish law. The Regulations require multinational enterprises with turnover exceeding €750m in each of the last two consecutive financial years to disclose publicly corporate tax information separately for each Member State and each third country on the EU list of non-cooperative jurisdictions and an aggregate figure for all other third countries. The reporting obligations apply only where the net turnover of a branch

exceeded €12m for the last two consecutive financial years. The reporting will take place within 12 months of the date of the balance sheet for the financial year in question. The first reporting will be for accounting periods beginning on or after 22 June 2024, with 2025 the first potential year for reporting, to be published in 2026.

Commission for Regulation of Utilities

Updated guidance has been issued by the Commission for Regulation of Utilities (CRU) on certification of the PSO (public service obligations) levy/payment, including the role of auditors. The document is relevant to all RESS (Renewable Electricity Support Scheme) suppliers making submissions to the CRU for the 2023/24 PSO period. The updates reflect the revised ISRS 4400, "Engagements to Perform Agreed-Upon Procedures Regarding Financial Information". See https://www.cru.ie/publications/27473/.

Anti-Money Laundering

The UK National Crime Agency has issued its latest SARs in Action, Issue 20. This publication looks at money-laundering trends in the UK, and this issue concentrates on the most common types of fraud. Investment fraud is addressed, where it is noted that the public have been frequently caught when they chased higher potential returns on their funds, often involving crypto-assets. The newsletter notes that criminals will exploit social, political and economic events to target victims. Impersonation is also identified as a method to commit fraud, and although it is not specifically identified in this newsletter, there has been media reporting of artificial intelligence (AI) being used to impersonate an individual using video calls to enable fraud against that person's friends and business associates; previously, impersonation was only ever done using emails and SMS messages. The newsletter also discusses romance fraud, money mules and the accountancy sector as an attractive target for payment diversion fraud.

Green Mortgage Finance

The Central Bank of Ireland recently issued a financial stability note entitled "Going Green, The Growth in Green Mortgage Financing in Ireland". Content includes an overview of the market, the characteristics of green mortgages and a comparison of green and non-green market shares.

Green mortgages are a recent financial innovation offering lower interest rates for households and businesses that invest in energy-efficient buildings. Most banks consider buildings with a BER of B3 or higher as being "green". Discounts of up to 30 basis points are available, which is sometimes sufficient to encourage a borrower to upgrade a building's energy efficiency. A "green" building also attracts an "energy-efficiency premium", which protects the bank's security, and there is a link between high energy efficiency and reduced levels of default. The latter effect could be because borrowers with higher disposable incomes can afford more energy-efficient buildings or because energy-efficient buildings lead to higher disposable incomes via lower energy bills.

PPSNs for Directors on Certain CRO Filings

Guidance for accountants on the issues arising from the requirement to file directors' Personal Public Service Numbers with the Companies Registration Office is available at PPSN - FAQ (cro.ie)

Central Register of Beneficial Ownership of Trusts

Since October 2021 the Central Register of Beneficial Ownership of Trusts (CRBOT) is available for inspection to designated persons. A designated person can access the CRBOT where a trustee enters an occasional transaction with the designated person or forms a business relationship with the designated person, or where the designated person is undertaking customer due diligence in relation to a relevant trust. Revenue has produced an information booklet on accessing the CRBOT, available at this link. Note that designated persons have a duty to report discrepancies between the beneficial ownership of a trust and the information recorded on the CRBOT.

Fair Review of Business Disclosures

Section 327 of the Companies Act 2014 requires companies to publish annually a management report setting out a fair review of the development and performance of the business and the position of the company, along with a description of the principal risks and uncertainties that the company faces. The Irish Auditing and Accounting Supervisory Authority has reviewed some of the disclosures being made under this section and reported on its findings at this link. Matters identified include unsubstantiated net-zero plans and, in one case, an overemphasis on multiple performance measures without addressing the IFRS loss that the company made.

Checking Non-familiar Customer Identification Documents

Accounting practices and other designated persons are required to undertake customer due diligence for all clients. This involves checking a customer's photo identification documents such as their passport or driving licence. While most people are familiar with documents coming from Ireland and the UK, many are not as familiar with documents from other countries. The EU has a website with photographs of the identification documents used in most of the world's countries, along with tools to validate the documents' numbers. See Council of the European Union - PRADO - Home (europa.eu). As an alternative to manual authentication, there are many applications on the market that, for a fee, will validate a photo identification document.

Legal Monitor

Philip McQueston
Of Counsel, A&L Goodbody

Selected Acts Signed into Law 1 May – 31 July 2023

No. 11 of 2023: Finance Act 2023

This Act extends and amends in certain respects the Temporary Business Energy Support Scheme provided for by the Finance Act 2022; it extends six agricultural tax reliefs that were due to expire on 30 June 2023; it provides for certain amendments to mineral oil tax rates; and it extends certain VAT measures, being the extension of the 9% VAT rate on the supply of electricity and gas until 31 October 2023, the extension of the 9% VAT rate for the tourism and hospitality sector until 31 August 2023, and the continued application of the zero rate of VAT to the supply of Covid-19 testing kits.

No. 23 of 2023: Energy (Windfall Gains in the Energy Sector) (Temporary Solidarity Contribution) Act 2023

This Act aims to give effect to Council Regulation (EU) 2022/1854 of 6 October 2022, an emergency measure to address high energy prices. The Act provides for a charge, in the form of a 'temporary solidarity contribution', to be payable by certain energy companies based on their taxable profits for the years 2022 and 2023, where they are 20% higher than baseline profits determined by reference to profits in the years 2018 to 2021. The Revenue Commissioners will administer and collect this charge.

Selected Bills Initiated 1 May – 31 July 2023

No. 38 of 2023: Control of Exports Bill 2023

The purpose of this Bill is to control the export of items capable of use for civil or military purposes. The Bill aims to give effect to Council Regulation (EU) No. 2021/821 of 20 May 2021 which provides for common EU export controls on dual-use items to ensure that international commitments of EU Member States are complied with.

Selected Statutory Instruments from 1 May – 31 July 2023

No. 233: European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023

These Regulations transpose Directive (EU) 2019/2121 on cross-border conversions, mergers and divisions (known as the Mobility Directive) into Irish law. The Regulations (in line with the Mobility Directive) update the existing law and processes in Ireland relating to cross-border mergers,and also introduce novel procedures into Irish law known as cross-border conversions and cross-border divisions, thereby greatly expanding the legal toolkit that can be used for structuring migrations, separations, consolidations and re-organisations of limited liability companies across the European Economic Area.

No. 239: Finance Act 2023 (Section 7) (Commencement) Order 2023

This Order provides for the commencement of section 7 of the Finance Act 2023, which extends the 'specified period' for orders facilitating the Temporary Business Energy Support Scheme to 31 July 2023 and increases the eligible costs that can be claimed under the scheme to 50% for those costs incurred between 1 March 2023 and the end of the specified period.

No. 240: Finance Act 2022 (Section 68(1)) (Commencement) Order 2023

This Order provides for the commencement of section 68(1) of the Finance Act 2022, which inserts section 83DA into the Stamp Duties Consolidation Act 1999, providing for the repayment of stamp duty under affordable dwelling purchase arrangements.

No. 257: Finance Act 2022 (Temporary Business Energy Support Scheme) (Specified Period) (No. 2) Order 2023

This Order provides for the amendment of the expiry date of the specified period for the Temporary Business Energy Support Scheme under section 101 of the Finance Act 2022. The new expiry date is 31 July 2023.

No. 292: Companies (Corporate Enforcement Authority) Act 2021 (Section 35) (Commencement) Order 2023

This Order provides for the commencement of section 35 of the Companies (Corporate Enforcement Authority) Act which provides for a new section 888A of the Companies Act 2014. That provision requires directors to include their PPS number in any application made by them to incorporate a company, in any annual return made by a company of which they are a director, and in any notices regarding change of director or secretary by a company of which they are a director.

No. 293: Companies Act 2014 (Section 897) Order 2023

This Order provides for the mandatory electronic filing from of certain Companies Registration Office ("CRO") forms.

No. 294: Companies Act 2014 (Fees) Regulations 2023

These regulations provide for certain amended CRO fees.

No. 295: Companies Act 2014 (Forms) Regulations 2023

These regulations prescribe certain amended CRO forms.

No. 308: European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) (Amendment) Regulations 2023

These Regulations provide for the amendment of the European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 (SI 110/2019), which established the Register of Beneficial Ownership, to restrict the right of inspection of the register to persons engaged in the prevention, detection or investigation of money laundering or terrorist financing offences who are accessing the register for the purposes of an activity relating to the prevention, detection or investigation of such offences.

No. 322: European Union (Disclosure of Income Tax Information by Certain Undertakings and Branches) Regulations 2023

These Regulations provide for the implementation of Directive 2021/2101/EU regarding country-by-country reporting of income tax information by certain undertakings. The Regulations require the disclosure of certain corporate tax information relating to Member States, non-cooperative jurisdictions, and other third countries in a public report that must be published within 12 months of the end of a financial year. The reporting obligation generally applies to entities constituted under, or governed by, Irish law that are the ultimate parent undertaking of a multinational group or a standalone undertaking, with turnover exceeding €750 million in each of the last two financial years. A reporting obligation is also imposed on certain Irish medium and large subsidiaries of a non-EU ultimate parent entities and on certain Irish branches of

non-EU companies where the branch's turnover exceeds €12 million in each of the last two financial years.

No. 326: Finance Act 2022 (Section 92(1)) (Commencement) Order 2023

This Order provides for the commencement of section 92(1) of the Finance Act 2022 which provides for new subsections 1A, 1B and 1C of section 1041 of the Taxes Consolidation Act 1997 and imposes additional obligations on persons paying rent directly to a non-resident landlord, in respect of providing certain information regarding the landlord, the property, and the rental payment to the Revenue Commissioners.

Tax Appeals Commission Determinations

Catherine Dunne
Barrister-at-Law

Tax Appeals Commission Determinations Published from 1 May to 31 July 2023

Income Tax

73TACD2023

The Appellant entered into a partnership that dealt in the disposal of development sites. This partnership was registered for income tax, VAT and RCT. The Appellant was also a director of a company that was involved in the construction of properties on these development sites. Assessments were raised by Revenue in relation to the partnership's disposal of a site and the company's construction of a property on a relevant site. This appeal concerns the ownership of development sites and the question of liability to income tax if a partnership or a company sold the sites.

s18 TCA 1997, s65 TCA 1997, s1008 TCA 1997

Case stated requested: Unknown

74TACD2023

Request that the Commissioner determine the preliminary issue of whether an amended assessment was raised outside of the four-year statutory limitation period.

s955 TCA 1997, s956 TCA 1997

Case stated requested: Yes

75TACD2023

Appeal regarding the treatment of pension payment paid as arrears, whether it is chargeable to tax in the year it is actually paid or the year it is earned.

s112 TCA 1997

Case stated requested: Unknown

80TACD2023

Appeal regarding the accuracy of the declared income tax of the taxpayers where the lodgements to bank accounts of the Appellants were in excess of the trading income returned on their income tax return, and the disallowed of certain expenses deducted against trading income.

s906A TCA 1997, s886 TCA 1997, s81 TCA 1997, s 959Y TCA 1997

Case stated requested: Yes

84TACD2023

Appeal regarding the interpretation of the appellant's tax residence and availability of DTA relief.

s18 TCA 1997, s819 TCA 1997, s826 TCA 1997, Double Taxation Agreement between Ireland and other State.

Case stated requested: Yes

86TACD2023

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

s865 TCA 1997

Case stated requested: Unknown

90TACD2023

In September 2017, the Appellants made a claim under the "Help to Buy Scheme" for 5% of the agreed purchase price of their property. The claim was approved and the Appellants occupied the property in June 2018. The Appellants put the property on the market in February 2021. The Appellants submitted that they contacted the Revenue for assistance in relation to the Scheme's recoupment provisions but did not receive such assistance. This appeal concerns the sale of qualifying property after the receipt of a payment from the "Help to Buy scheme".

s477C TCA 1997

Case stated requested: Unknown

92TACD2023

Appeal regarding a claim for transborder workers' relief.

s472 TCA 1997

Case stated requested: Yes

98TACD2023

Appeal against the refusal by Revenue to grant relief under the Special Assignee Relief Programme (SARP).

s825C TCA 1997

Case stated requested: Unknown

102TACD2023

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

s865 TCA 1997

Case stated requested: Unknown

104TACD2023

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

s865 TCA 1997

Case stated requested: Unknown

107TACD2023

Appeal regarding Revenue's refusal to provide relief under the Special Assignee Relief Programme (SARP) outside the 90-day limit.

s825C TCA 1997

Case stated requested: Unknown

Corporation Tax

89TACD2023

Appeal regarding the tax treatment of recharge payments in connection with share options and the expenses of management.

s83 TCA 1997

Case stated requested: Yes

103TACD2023

Appeal regarding the tax treatment of the forgiveness of an outstanding loan facility.

s76A TCA 1997, s87 TCA 1997

Case stated requested: Yes

Capital Gains Tax

72TACD2023

Appeal regarding the treatment of the disposal of a loan portfolio as an "interest in land" and whether the disposal came within the charge to CGT imposed on non-residents.

s5 TCA 1997, s29(3) TCA 1997, s537 TCA 1997, s643 TCA 1997, s11 Land and Conveyancing Law Reform Act 2009.

Case stated requested: Unknown

94TACD2023

Appeal regarding whether certain loan notes disposed of by the appellant constituted a "debt on security" and therefore gave an entitlement to claim loss relief on their disposal.

s541 TCA 1997, s546 TCA 1997, s607 TCA 1997

Case stated requested: Unknown

100TACD2023

Appeal regarding CGT liability on the disposal of shares.

Part 19 TCA 1997, s538, TCA 1997, s540 TCA 1997, s541 TCA 1997, s546 TCA 1997, s585 TCA 1997,

Case stated requested: Unknown

108TACD2023

Appeal regarding the value of trees growing on land in relation to the CGT exemption on the disposal of woodland.

s564 TCA 1997

Case stated requested: Unknown

Capital Acquisitions Tax

85TACD2023

Appeal regarding the denial of business property relief in respect of a portion of deemed cash assets received by the appellant in the form of a gift.

s90 CATCA 2003, s92 CATCA 2003, s93 CATCA 2003, s99 CATCA 2003, s100 CATCA 2003, s101 CATCA 2003

Case stated requested: Unknown

Stamp Duty

78TACD2023

Appeal regarding liability to the non-residential stamp duty rate of 7.5% where property does not meet the definition of "residential property".

s1 SDCA 1999

Case stated requested: Unknown

VAT

71TACD2023

Appeal regarding the application of the auctioneer's margin scheme.

s89 VATCA 2010, Articles 333–341 EU Council Directive 2006/112/EC

Case stated requested: Unknown

82TACD2023

Appeal regarding amended VAT returns for revised pharmacy VAT schemes.

s76 VATCA 2010, s113 VATCA 2010

Case stated requested: Yes

93TACD2023

Appeal regarding the refusal of an application to register for VAT.

s5 VATCA 2010, s65 VATCA 2010

Case stated requested: Unknown

101TACD2023

Appeal regarding VAT chargeable on the provision of training services (many details are redacted)

Article 132(1)(i) VAT Directive, Schedule 1 VATCA 2010, s3 VATCA 2010.

Case stated requested: No

106TACD2023

Appeal regarding the withdrawal of the zero-rate provision for VAT applied by the appellant to sales in the United Kingdom as it failed to retain the requisite documentary evidence that the goods were removed from the State and transported to another Member State, namely, the UK.

s46 VATCA 2010, s59 VATCA 2010, VAT Regulations 2010

Case stated requested: Unknown

VAT and Corporation Tax

76TACD2023

Appeal regarding liability to tax as part of an audit following an unannounced compliance visit where undeclared sales were identified.

s886 TCA 1997, s84 VATCA 2010

Case stated requested: Yes

Income Tax, PAYE and USC

81TACD2023

Appeal regarding the underpayment of income tax due to the lack of recording part-time employment on the appellant's tax credit certificate.

s112 TCA 1997, s960C TCA 1997

Case stated requested: Unknown

Income Tax and PRSI

87TACD2023

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

s865 TCA 1997

Case stated requested: Unknown

PAYE and USC

97TACD2023

Appeal regarding the offset tax outstanding against tax owed in relation to payments received as part of the Pandemic Unemployment Payment scheme.

s960H(2)(i) TCA 1997

Case stated requested: Unknown

PAYE, PRSI and USC

99TACD2023

Appeal regarding the treatment of payments made to a shareholder, director and employee of a limited company as preferential loans.

s112 TCA 1997, s122 TCA 1997

Case stated requested: Unknown

PAYE

91TACD2023

Appeal regarding a deduction for radon remediation works on a residential property and place of work.

s114 TCA 1997

Case stated requested: Unknown

PREM

95TACD2023

Appeal regarding the treatment of expenses.

s81 TCA 1997, s112 TCA 1997, s114 TCA 1997, s117 TCA 1997

Case stated requested: Unknown

PREM and Corporation Tax

105TACD2023

Appeal regarding payments to a director as consideration for property.

s438 TCA 1997, s239 TCA 1997, s122 TCA 1997

Case stated requested: Unknown

VRT

88TACD2023

Appeal regarding the application of transfer-of-residence relief for VRT.

s134 Finance Act 1992, Vehicle Registration Tax (Permanent Reliefs) Regulations 1993.

Case stated requested: Unknown

96TACD2023

Appeal relating to the availability of VRT transfer-of-residence relief. s134(1)(a) Finance Act 1992, Vehicle Registration Tax (Permanent Reliefs) Regulations 1993.

Case stated requested: Yes

Covid Relief – Employment Wage Subsidy Scheme

83TACD2023

Appeal regarding the failure to demonstrate a 30% reduction in turnover or customer orders during the relevant period.

s28B Emergency Measures in the Public Interest (Covid-19) Act 2020

Case stated requested: Unknown

Mortgage Relief

77TACD2023

Appeal regarding the refusal to grant mortgage interest tax relief at source in respect of a portion of the mortgage taken out by the appellant for the purpose of providing a loan to her daughter's partner and, for years before 2018, on the ground that the repayment was sought outside the statutory timeframe.

s244 TCA 1997, s865 TCA 1997

Case stated requested: Unknown

Customs and Excise

79TACD2023

Appeal relating to excise duty due on the alleged sale of imported cigarettes by the appellant from a residence.

Tobacco Products (Tax Stamps) Amendment Regulations 1997

Case stated requested: Yes

Customs Update – Autumn 2023

Paul Rodgers
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Major Customs Reform at EU level: a proposed new Customs Code and radical new environmental measures

Introduction

Post-Brexit, the ever-changing customs and trade landscape continues to evolve. The last few months have seen significant statements of intent from the EU, with the publication of a proposed recast of its main customs legislation (the Union Customs Code, or UCC) and the introduction of a radical new environmental levy to equalise carbon emissions costs for imported goods via its Carbon Border Adjustment Mechanism (CBAM). This article explores the broader context behind the proposed customs reform and the increasing focus on using tax measures to address environmental concerns.

Proposed Recast of the UCC

Background

Despite the last significant recast of EU customs law having taken place as recently as 2016 (with the introduction of the UCC), the EU is of the view that it is already outdated, is no longer fit for purpose and needs further significant reform.

A shift in consumer behaviour has led to the rise of e-commerce over the last few years, in particular, during the Covid-19 pandemic. This has fundamentally altered the way in which cross-border goods are shipped and cleared (for example, goods of under €150 now make up 73% of all import declarations but only 0.5% of the customs value of imported goods). As the UCC was set up to deal with "traditional" customs clearances, the EU is concerned that it is no longer able to best protect its financial interests and believes that the rules need to be significantly adapted and streamlined both to protect the EU border and to make customs clearances easier for traders.

Furthermore, the UCC focused on the move by each EU customs authority to electronic data systems; however, this meant the uncoordinated introduction of 27 different systems over a period of years, leading to a lack of consistency of experience in different EU Member States. Also, advancements in the ways in which data is mined and utilised over the last decade have led to a belief in the EU that its capture and use of customs data are not being optimised.

Goals

Based on the above, the EU has proposed a full recast of the UCC with the following main ambitions:

- Centralisation and greater uniformity of the EU's customs function to create a more consistent experience for traders via:
  - the creation of a central EU Customs Authority as part of a move towards a more uniform application of EU rules,
  - the introduction of an EU Customs Data Hub for the central capture, consolidation, management and analysis of EU customs data and
  - new simplifications such as "Trust & Check" trader status to allow for self-clearances for highly trusted traders based on access to real-time data.

- An overhaul of customs law to take into account the rise of e-commerce:
  - to prevent loss of revenue but also to simplify customs clearances of multiple small-value consignments and
  - to align customs rules with VAT rules on distance sales.

Timelines

The EU envisages the new UCC to be introduced in stages, with the EU Customs Authority and the proposed e-commerce changes entering into force in 2028 and the gradual introduction of the EU Customs Data Hub over the next ten years until full implementation in 2038.

However, as always, "the devil is in the detail", and with the draft Delegated and Implementing Acts to the proposed recast UCC not expected until at least 2024, the full implications of the changes set out in the recast will not be established until then. Moreover, given the slow-moving nature of the EU and the wide-ranging changes being proposed, it is very possible that the 2028 initial timeline will not be met.

Key legislative changes

EU Customs Authority

The introduction of a single EU Customs Authority is a significant new development and suggests a move away from the reliance on national customs authorities to defend the EU border. It will have an autonomous budget paid out of central Union funds, and it is anticipated that its key roles will include:

- coordination and supervision of national customs authorities,
- development and management of IT systems and data to maximise customs risk analysis and customs controls,
- ensuring uniformity of application of EU law in national customs authorities and
- enforcement of non-customs law applied by national customs authorities.

Therefore, it appears that the EU Customs Authority will not replace national customs authorities but will act as a central management authority, with national customs authorities' becoming more akin to implementation bodies. Although this will improve EU-wide consistency, it will inevitably reduce the autonomy of local customs authorities to make decisions and take policy positions.

EU Customs Data Hub

The EU Customs Data Hub is anticipated to be a centralised IT system for the whole EU and allow for consistency of experience and integration with other, non-customs governmental authorities.

It will be a central repository for the collection, management and analysis of all of the EU's customs data to allow for a centralised view and consolidated risk analysis. Ultimately, the intention appears to be to replace traditional import/export declarations completed by declarants with a new concept of import/export data being imputed by various supply chain stakeholders to allow for more timely and accurate completion of necessary data sets. This is a radical vision, and it will be interesting to see how the EU sees this being implemented (via the Delegated and Implementing Acts).

e-Commerce/distance sales

The most significant developments in the recast UCC (and related proposed legislative changes) involve e-commerce and the twin aims of eliminating the revenue loss created by the low-value consignment relief while enabling distance sellers to use simplified clearance mechanisms. In particular, the proposed changes are:

- the removal of the €150 low-value consignment relief – i.e. all e-commerce goods will be subject to customs duty,
- a separate amendment to the EU Common Customs Tariff to introduce simplified "bucket" tariffs for e-commerce goods, allowing for clearances to be made without the usual data/tariff code requirements –

importers that wish to continue to clear e-commerce goods in the traditional way (e.g. to avail of preferential origin) can do so but must complete the usual data set.

To support the above changes, EU customs law, for the first time, defines the concept of "importer" (as opposed to declarant). This is the person established in the EU that has the power to determine and has determined that goods are to be imported to the EU. This simplifies the law and provides clarity on the person responsible for import/customs debt.

Also, the recast UCC introduces the concept of "deemed importer" to cover distance sales and ensure that the distance seller or platform responsible for bringing the goods to the EU is also responsible for importation/customs debt. This brings customs law into line with EU VAT law and allows customs and import VAT to be accounted for in the same manner.

Other proposed changes

There are a number of other significant changes:

- The introduction of Trust & Check status for traders is an augmentation of the existing AEO (authorised economic operator) authorisation, allowing traders that meet the criteria for AEO status **and** are able to give customs authorities access to their systems and real-time customs data to be given even greater autonomy for customs clearance, including:
  - fewer physical/documentary controls,
  - permission to move goods duty-suspended within the EU without the requirement for transit and
  - permission to self-release goods and pay customs debts periodically.
- To support uniform application of customs rules throughout the EU, the recast UCC introduces mandatory minimum/maximum limits for customs penalties to be implemented in all EU Member States (instead of national autonomy and inconsistent penalties).
- Greater clarity is provided on the obligations of indirect representatives. The recast UCC clarifies that they are jointly and severally liable not only for customs debts but also for all the compliance obligations of an importer/exporter.

In summary

The EU has determined that its core customs law is outdated and behind the curve on systems, data and dealing with the fundamental shift towards e-commerce. Therefore, the main body of EU customs law will be completely restructured, with a new emphasis on centralisation to promote uniformity of experience for traders and to consolidate customs systems and data in order to analyse compliance risks better, reduce tax leakage and streamline customs clearance. However, for traders, it is wise to take a wait-and-see approach until greater detail is provided on how the recast UCC will be implemented.

The EU's Environmental Focus: CBAM and Plastic Taxes

Background

Over the last few years the EU has significantly ramped up its focus on environmental issues, reflecting the broader public concern on this issue, as well as the increased representation of environmental representatives in the European Parliament.

In 2021 the EU introduced its "Fit for 55" package of environmental measures, a wide-ranging set of proposals aiming to reduce greenhouse gas emissions in the EU by 55% by 2030. These measures include emissions reduction targets, a social climate fund, reform of the EU's emissions trading system, reform of energy taxation and a new measure that we will focus on below, the Carbon Border Adjustment Mechanism.

In the same vein, also in 2021, the EU introduced a requirement that Member

States provide to the EU's own resources a contribution based on the amount of non-recycled plastic packaging waste generated in that country. This is an attempt to encourage Member States to increase recycling and reduce the amount of plastic packaging waste. As we will see below, different Member States have taken different measures to address this, with some taking radical action.

CBAM

The Carbon Border Adjustment Mechanism (CBAM) is an attempt by the EU to equalise the cost of carbon for imported goods with embedded emissions. The CBAM is aimed at addressing the risk of "carbon leakage": the potential shift of emissions and carbon-intensive production processes outside the EU, or the import of carbon-intensive products to the EU. To counteract this imbalance, EU importers of impacted goods will buy carbon certificates from their national CBAM authority, whereby the certificates will correspond to the carbon price applicable if the goods had been produced in the EU. It is not an import tax or levy per se but will place an obligation on importers to purchase carbon certificates and so will introduce an additional cost on impacted imported goods.

Timelines

The CBAM was originally due to enter into effect from 1 January 2023 but was delayed due to lack of agreement on the scope at EU level. The CBAM Regulation was eventually adopted on 10 May. Essentially, the CBAM is being introduced in two tranches, an initial transition phase from 1 October 2023 and full implementation from 1 January 2026:

- From 1 October 2023 importers of these goods will have an obligation to submit quarterly reports on their imports of products in scope and the embedded carbon emissions therein.
- From 1 January 2026 importers of carbon-heavy goods will have to register and purchase CBAM certificates to equalise the cost of embedded carbon emissions in imported goods.

Products in scope

The initial list of products is set out by tariff code but includes products in the following categories:

- aluminium,
- cement,
- electricity,
- fertilisers,
- iron and steel,
- hydrogen and
- certain downstream products, e.g. screws and bolts, and similar articles of iron or steel.

Organic chemicals and polymers (plastics) were removed from the initial list, but the expectation is that the scope will eventually be extended to include them (and, ultimately, **all products included in the EU's Emissions Trading System**). However, there is an exemption where such products are sourced from the EFTA countries (Norway, Switzerland, Liechtenstein and Iceland) or have a value under €150.

Implications for Irish Importers

The competent authority in Ireland for the CBAM will be the Environmental Protection Agency (EPA), with the operational support of Revenue. Further details on how the CBAM will be implemented (in particular, as it expands to include complex goods) have been published in the draft CBAM Implementing Act.

Irish traders that import products within the scope of the CBAM should act now to determine the extent of their imports of such goods and should start to assess the embedded emissions for the purposes of the new reporting obligations from October. The difficulty is that most companies do not have a specific resource with expertise in this area. Moreover, the full implementation of the CBAM from 2026 will introduce additional costs into the supply chain for such imported goods, which, although initially payable by the importers, will likely be passed on in the cost of goods to the ultimate consumers.

Plastic taxes

The own-resources requirement on EU Member States has led to different countries taking a range of actions to make up these additional costs. However, as there is no EU harmonisation, these actions can differ significantly.

Spain has taken the lead by introducing from 1 January 2023 a plastic packaging tax on plastic packaging manufactured in, imported to or brought intra-EU to Spain. A similar plastic packaging tax was due to be introduced on the same date in Italy but has been postponed until 1 January 2024, and Germany is expected to introduce its own single-use plastic tax in 2024, with first payments due in 2025. Outside the EU, the UK has introduced its own plastic tax, along similar lines.

In contrast, other EU countries have taken a less intrusive approach. Here, in Ireland, the long-standing plastic bag levy has not yet been added to. The Circular Economy and Miscellaneous Provisions Act 2022 legislates for Ireland to introduce a levy on retailers selling single-use plastic items – the intention was to limit this initially to single-use plastic cups for hot beverages (hence the witty title the "latte levy"). However, despite the draft Regulations for this levy having been published last December, the latte levy is yet to be introduced.

What is certain is that the public and political pressure on the EU and national governments to take action on environmental matters will only increase. Therefore, it is likely that Ireland – either on its own initiative or due to EU requirements – will introduce further taxes to influence consumer behaviour in order to reduce plastic (and other) waste.

Conclusion

The world is changing rapidly, and the EU has felt the need to take specific actions to address the changing nature of cross-border commerce and growing environmental concerns. It is likely that such interventions will continue in the customs and environmental spheres – and beyond. For example, in the area of export controls, the conflict in Ukraine has led to an increase in the EU's implementation of sanctions and to greater scrutiny of exports of dual-use items at both EU and national level. This is an era of EU legislative activism, and traders must be alert and prepared to adapt to the changes that will come.

Pat O'Brien
Senior Consultant, BDO

100 Years of "The Fullest Fiscal Freedom": The Creation of the Irish Tax System in 1923

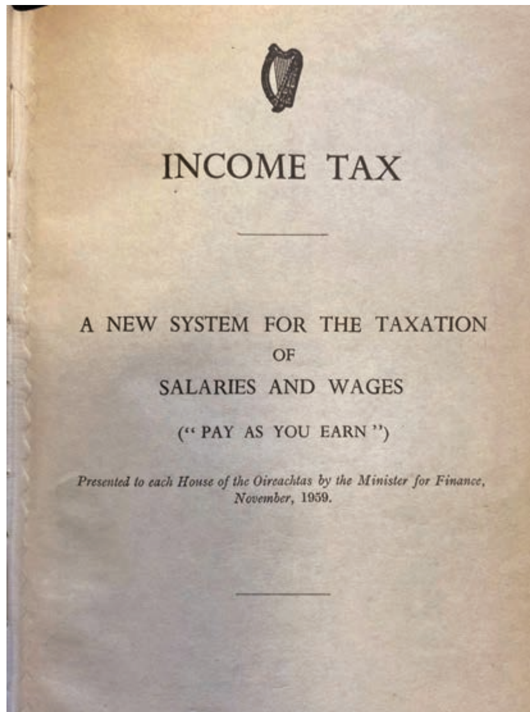
Introduction

On Saturday, 14 April 1923, a banner headline in the *Freeman's Journal* announced that the first Irish Free State Budget had been introduced in the Dáil. The paper noted that it was "[t]he first budget introduced in an Irish parliament for a century and a quarter".[1] It was a watershed in the process of building the Irish nation state. In addition to marking the transition to sovereign nationhood, it was the culmination of a complex sequence of events that led to the establishment of an autonomous Irish tax system. The Budget, which had been debated in the Dáil the previous day, would form the basis for the Finance Act 1923, the first piece of fiscal legislation passed by the new State. Continuity was the order of the day (the first section of the Act provided that income tax and sur-tax would apply at the same rates as had applied for the previous tax year). However, there was one significant change – the taxes provided for in the Act would be collected by, and under the care and management of, the recently created Office of the Revenue Commissioners. The "Irish tax man" was now in business.

Creating the Irish Tax State: Fiscal Independence and the Anglo-Irish Treaty

The process of creating an independent Irish tax system was closely aligned with the implementation of the Anglo-Irish Treaty, signed on 6 December 1921. Unlike any of the versions of Home Rule proposed between 1893 and 1912, or the provisions of the Government of Ireland Act of 1920, there was no provision in the treaty by

1 *Freeman's Journal*, 14 April 1923.


INCOME TAX

A NEW SYSTEM FOR THE TAXATION OF SALARIES AND WAGES

("PAY AS YOU EARN")

Presented to each House of the Oireachtas by the Minister for Finance, November, 1959.

which the British Government retained control of taxation or customs matters. Under Home Rule, that role would, have amounted to the Irish administration's collecting taxes imposed by British primary legislation, paying them over to the British Government and receiving a "block grant" in return, with virtually no input on taxation policy and little or no authority to impose or vary taxation. In the aftermath of the 1921 Anglo-Irish Treaty, however, the Irish State was free to levy taxes and customs duties entirely at its own discretion. Arthur Griffith, a long-time proponent of economic nationalism and one of the signatories of the Treaty, told the Dáil that "[w]e have brought back to Ireland her full rights and powers of fiscal control".[2] Kevin O'Higgins emphasised the complete control that Ireland would have over its internal affairs, pointing out that under the Treaty "Ireland is liable to no taxation from England, and has the fullest fiscal freedom".[3]

On 16 January 1922, the same day on which Dublin Castle was handed over by the British administration, the Provisional Government issued a decree directing that all civil and public servants 'hitherto under the authority of the British Government shall continue to carry out their functions unless and until otherwise ordered by us, pending the constitution of the Parliament and Government of Saorstát na hÉireann'. By these means, the Provisional Government retained the services of all existing civil servants, including those serving in the Irish branches of the British Inland Revenue and Customs, pending the establishment of the relevant Irish government departments.

The process of transferring full taxing powers to the new State began with the British Provisional Government (Transfer of Functions) Order 1922, which provided that, with effect from 1 April 1922, governmental functions in connection with the administration of taxation should be transferred to, and be exercisable by, the Provisional Government. The UK's Irish Free State Act, 1922 (Session 2)[4] provided that the establishment of the Free State would not affect "any liability to pay any tax or duty in respect of the current or any preceding financial year". The related Irish enactment – the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922 – gave legal effect to the provisions of the Constitution within the Free State. The Constitution contained two key "transitory provisions" in Articles 73 and 74. The former provided that existing laws in force in the Irish Free State at the date of the coming into operation of the Constitution were to continue to be of full force and effect, and the latter provided that nothing in the Constitution was to affect any liability to pay tax due in respect of any preceding financial year. Among the UK taxing Acts carried forward and adapted by the Free State under the Adaption of Enactments Act 1922 were the Income Tax Act 1918 and the British Finance Acts of 1919–21. The Provisional Government (Finance) Decree No. 5 of 1922, dated 4 May 1922, made provision for the continuance of income tax (at that time an annually imposed measure) and for the adaption of certain provisions of the UK

2 *Dáil Éireann Debates*, 19 December 1921.
3 *Dáil Éireann Debates*, 19 December 1921.
4 Irish Free State Act, 1922 (Session 2), 13 Geo. V.

1922 Finance Act.[5] This was necessary in order to keep the Irish position aligned with that of the UK during the transitional period spanning the 1922–3 tax year. The UK Finance Act 1922 was, consequently, the last fiscal enactment of a British parliament to have direct effect in Ireland.

As the Provisional Government did not have the administrative machinery to undertake the task of collecting taxes on its own behalf, pending the establishment of Irish Revenue, it was agreed that for the fiscal year 1922–3 the collection and assessment of taxes and customs duties were to be undertaken on an agency basis by the British Inland Revenue and Customs departments. As a result, notwithstanding independence, the whole of Great Britain and Ireland remained the same fiscal unit until 31 March 1923 (5 April 1923 in the case of income tax). Consequently, the tax year 1923–4 was the first year in which income tax was imposed and collected in an independent Ireland solely on the basis of Irish law.

"Three First Class Men"

Portraits of the first Board of the Revenue Commissioners 21 February 1923. William Denis Carey, Charles Joseph Flynn, and Chairman, William O'Brien

On 30 December 1922 the Government decided to set up a Board of Revenue Commissioners patterned on the UK's Commissioners of Customs and Excise and Commissioners of Inland Revenue. The creation of such a board was mentioned by Michael Collins in one of his last diary entries, before his death on 22 August 1922, when he referred to the need for "three first class men" to sort out problems with tax collection. The decision was given statutory effect by the Revenue Commissioners Order, 1923.[6] Under the terms of the order, there was to be a single, unified Board of Revenue Commissioners, consisting of three Commissioners, which would exercise all statutory functions in connection with inland revenue and customs and excise matters that had previously been carried out by the British Boards of Inland Revenue and Customs and Excise. The decision to have a single board dealing with all revenue matters was initially justified on the grounds of economy; however, it was to prove a far-sighted decision, which pre-dated a similar amalgamation of the two British revenue bodies by more than 80 years.

The Revenue Commissioners Order was approved by the Dáil on 20 February 1923. The individuals appointed as the first members of the board on 23 February were William O'Brien (chairman), Charles Flynn (customs and excise) and William Carey (inland revenue). All three came from the British service, where they had already had extensive careers. Flynn and Carey were initially loaned from the British civil service. The annual salaries of the board members were specified as £1,500 plus bonus in the case of the chairman and £1,300 plus bonus for the two other commissioners.[7]

The Government determined from the outset that the Revenue Commissioners would be independent in their administration of the tax system. Speaking in the Dáil on 20 February 1923, W.T. Cosgrave, President of the Executive Council (i.e. Taoiseach), explained that although the Commissioners would be subject to the control of the Minister for Finance in "Civil Service matters", this would not extend to "the computation of any individual as to his liability to any tax". In such matters "[t]he position of the new board of Revenue to the Minister for Finance is much the same as that of the Judiciary...to the Minister for Home Affairs

5 Provisional Government (Finance) Decree No. 5 of 1922, 4 May 1922 (*Irish Oifigiúil*, 1 August 1922).
6 Revenue Commissioners Order, 1923 (SI 2 of 1923), 20 February 1923.
7 Letter from Cornelius Gregg, Department of Finance, to William O'Brien, Revenue Chairman, 13 March 1923 (NAI 2018/10/650).

[i.e. Justice]."[8] This view of the independent status of the Revenue Commissioners was restated in a letter to William O'Brien shortly after his appointment as chairman, which specified that "the Commissioners will act independently of Ministerial control in exercising the statutory powers vested in them".[9] In the intervening century both Revenue and subsequent governments have adhered firmly to the tradition of Revenue's operational independence in administering the tax and customs Acts, a convention that was placed on a statutory basis only in 2011 by s101 of the Ministers and Secretaries (Amendment) Act 2011.

"A Very Strong Personality": William O'Brien, First Chairman of the Revenue Commissioners

William O'Brien was born in Limerick in 1872. He joined the Post Office at the age of 19 as a clerk and transferred in March 1896 to the Inland Revenue service. Most of his service seems to have been in Ireland, and he made steady progress through the ranks. By 1911, having transferred from Sligo, he had reached the rank of Surveyor (Inspector) and was based in Dublin. Ten years later, in 1921, he was the "Superintending Inspector of Taxes" in the Irish arm of the Inland Revenue. Recognised as one of the foremost experts in his field, he seems to have caught the eye of Michael Collins, who in January 1922 had asked him to transfer to the fledgling Irish civil service as "Secretary of the Treasury". So it was that O'Brien became the first person to hold the post of Secretary of the Department of Finance, a position that he retained until his appointment as Revenue Chairman in February 1923.

The Revenue Commissioners' historian (and former chairman) Seán Réamonn, who worked alongside O'Brien as a Junior Administrative Officer in the Revenue secretariat during the 1920s, diplomatically described O'Brien as "a very strong personality". Another contemporaneous observer described him far less diplomatically, as "a hard, ruthless, fearless, competent but utterly unimaginative person".[10] His surviving correspondence is full of the "terse and pungent" comments, which Réamonn mentions in his *History of the Revenue Commissioners.* He seems to have been quite untroubled by the usual niceties of civil service correspondence. On one occasion a Government Minister wrote to him suggesting an amnesty for undeclared income hidden in UK bank accounts. The Minister said that he personally knew of one with £30,000 held in it. O'Brien's response first set out in detail why such an amnesty could not be contemplated and then concluded by inviting the Minister to forward details of the aforementioned account "so that Revenue could investigate the matter further"[11]. The Minister's response is not recorded. O'Brien also clashed with the Customs Commissioner, Charles Flynn, as a result of O'Brien's autocratic management style. Flynn resigned in March 1925 and returned to his previous post as Assistant Secretary in the UK Board of Customs and Excise. Flynn's successor as Customs Commissioner was M.V. Nolan, father of the writer Brian Nolan (better known as "Myles na gCopaleen").

Although he may have done little to make himself popular, O'Brien was in many ways the ideal person to fill the role of Revenue Chairman in the early days of that organisation. At a time when the tax system had come close to collapse and many people flouted their obligations, his tough, no-nonsense approach undoubtedly "dislodged firmly from the public mind any lingering doubt over the purpose for which the government had founded the Revenue Commissioners".[12]

Revenue under Fire

The Civil War began with the shelling of the Four Courts on 28 June 1922. However, the slide

8 *Dáil Éireann Debates*, Vol. 2 No. 29, 20 February 1923.
9 Letter from Cornelius Gregg to William O'Brien, 13 March 1923 (NAI 2018/10/650).
10 Dermot Keogh, *The Vatican, the Bishops and Irish Politics 1919–39* (Cambridge: Cambridge University Press, 1986), p. 161.
11 Letter Wm. O'Brien to J.J Walsh, 23 January 1926 (Ernest Blythe papers UCD, P.24/397/6).
12 Seán Réamonn, *History of the Revenue Commissioners* (Dublin: Institute of Public Administration, 1981), p. 63.

into conflict had started some time before. From early April 1922, Inland Revenue and Customs offices began to be targeted by the anti-Treaty, or "Republican", side, and Revenue officials found themselves caught in the cross-fire. Bonded warehouses at the Custom House Docks in Dublin were raided on 6 April 1922, when 1,726 casks of spirits were broken open and destroyed.[13] The campaign accelerated after the occupation of the Four Courts by anti-Treaty forces on 14 April. The tax office in Ennis, Co. Clare, was raided on 26 April. Official books and forms were removed and cars belonging to officials seized.[14] Other raids included the armed robbery of £500 from the tax office at Beresford Place in Dublin[15] and a raid on the tax office in Dundalk, during which the District Inspector, a Mr Breen, was fired on and wounded.[16] Customs warehouses in Kilkenny, Galway, Clonmel and many other locations were seized by Republican forces on 28 April. Officials were told that they and their staff were now to report to the representatives of the self-declared Republican government.

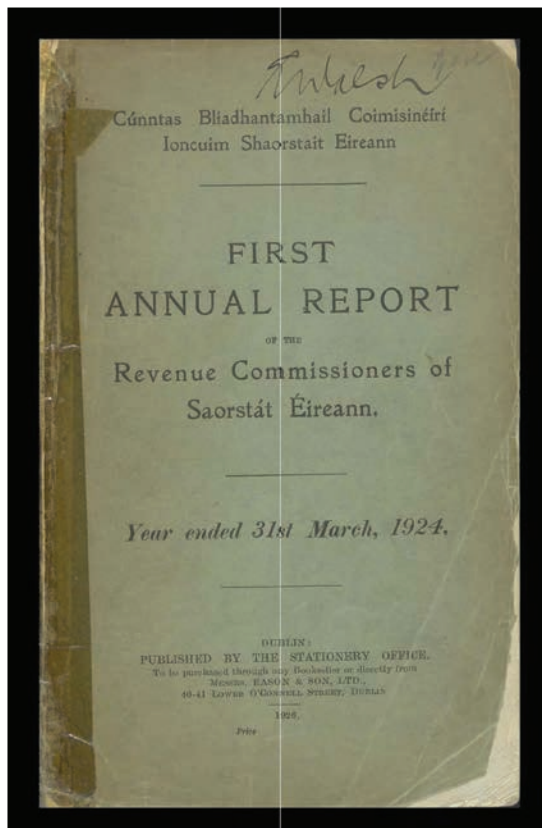
After the fighting in Dublin ended in early July 1922, large swathes of the south of the country came under the control of anti-Treaty forces in what was known as "The Munster Republic". Anti-Treaty forces took control of local tax and customs offices and began seizing tax revenues. The situation was particularly acute in Cork, where anti-Treaty forces seized £87,000 in tax and customs duties before the city was retaken by the National Army in August. A number of Revenue officials bravely defied the orders of the occupying forces. The Surveyor in Youghal had the income tax arrears list smuggled to England to prevent its being used by the Republicans.[17] However, when his colleague in Tralee refused to cooperate with directives issued by the local IRA commander, anti-Treaty forces seized the arrears list and forced his staff to go around collecting income tax accompanied by men armed with revolvers. Some senior officials found it necessary to go on the run to avoid being forced to pay over tax and duties to the irregular forces. Two of them were given sanctuary by the monks at Mount Mellary Abbey in Waterford. Reports from Revenue officials in the occupied areas, now held in the National Archives, provide a fascinating insight into the troubled and chaotic state of the country during July and August 1922.

Tax offices were targeted again during the subsequent guerrilla warfare stage of the Civil War, which lasted from late August 1922 until May 1923, with two large, coordinated raids taking place against multiple tax offices in Dublin in November 1922 and February 1923. During these raids, attempts were made to burn offices and records. The attack on Revenue's temporary head office in Jury's Hotel, College

13 Letter from Charles Flynn, Revenue Commissioner, to Secretary, Department of Finance, 8 November 1923 (NAI FIN 1/2695).
14 *Evening Echo*, 28 April 1922.
15 *Freeman's Journal*, 2 August 1922.
16 *Derry Journal*, 1 November 1922.
17 The collection of income tax arrears was a Customs and Excise function until 1925.

Green, Dublin, on 21 February 1923 was the largest and most serious of these. The attack failed when National Army troops stationed nearby quickly responded to the attempted intrusion. Other tax offices in Dublin city centre were raided at the same time. The office at Beresford Place was set on fire, but the Fire Brigade arrived in time to save the building. However, Patrick Carney, a Revenue official in the Beresford Place office, died days later from injuries received during the raid. In a tragic twist, his wife gave birth to a baby daughter just days after his death. Carney was the grandfather of the late distinguished High Court judge Paul Carney.

The last attack on Revenue offices, before the Civil War ended in May 1923, occurred on 7 March 1923, when raiders returned to place a bomb outside the Beresford Place office. An auxiliary policeman, Patrick Kelly, died in the explosion, which shattered the building.



Cúnntas Bliadhantamhail Coimisinéirí
Ioncuim Shaorstait Eireann

FIRST
ANNUAL REPORT
OF THE
Revenue Commissioners of
Saorstát Éireann.

Year ended 31st March, 1924.

DUBLIN:
PUBLISHED BY THE STATIONERY OFFICE.
To be purchased through any Bookseller or directly from
Messrs. EASON & SON, LTD.,
40-41 Lower O'Connell Street, Dublin

1926.

Price

"The Peculiar Circumstances of Recent Years": Tax Collection in the Early Days of the State

The ending of the Civil War in May 1923 brought an end to the violence; however, other serious challenges remained for Revenue. Among these were the problem of arrears and non-compliance – a legacy of the revolutionary period – and double taxation, an issue that had manifested itself in the aftermath of independence.

During the War of Independence non-payment of income tax was promoted as a form of civil resistance against British rule. By 1923 this had transmuted into a more general and widespread habit of non-compliance with tax laws. The Government denied that the First or Second Dáil had ever encouraged the complete non-payment of tax and said that non-payment was only ever suggested on the basis that the tax would be paid to the Dáil Government instead. As Seán Réamonn noted, "many persons abstained from the payment of income tax, for either patriotic or less worthy motives". The cash-strapped State was in no position to let these arrears go unpaid and used all of the powers at its disposal to enforce collection. Section 6 of the Finance Act 1923 introduced a form of attachment that allowed Revenue to direct employers to deduct income tax arrears from employees' wages. This measure, though effective, was hugely unpopular with both employees and employers (who could be made liable if they failed to deduct and pay over the tax when directed to do so). Other measures included the seizure of cattle and goods by sheriffs, the withholding of tax debts from compensation payments and, controversially, arrest and detention without trial until tax debts were paid. Section 165 of the Income Tax Act, 1918 gave absolute power to the Revenue Commissioners to issue warrants for the arrest and detention of defaulting taxpayers, the length of the detention being at the pleasure of the Commissioners, without any right of appeal. Cases were reported of individuals being arrested on the street and lodged in Mountjoy

Jail until they paid up.[18] Ernest Blythe, Minister for Finance, confirmed that such arrests took place but said that these powers were used sparingly. Others were not convinced; Jasper Wolfe, a Cork solicitor and TD, accused Revenue of jailing insolvent tax debtors in the hope that other family members would pay up to secure their freedom, an accusation that Revenue denied.

In an effort to resolve the problem of arrears, Revenue announced in October 1923 that "having regard to the peculiar circumstances of recent years", penalties would not be imposed on those who came forward and made a full disclosure by 20 November 1923. This "settlement opportunity" seems to have had some effect, but the widespread habit of non-compliance lingered well into the late 1920s and was the primary reason for the formation of Investigation Branch.

Collection of pre-Independence arrears provided a significant and much-needed supplement to the State's tax receipts for a considerable part of the 1920s.[19] In the fiscal year 1923–4 alone, receipts were "swollen to the extent of about £1,000,000 by the collection of abnormal arrears of income tax".[20] The pursuit of pre-1922 arrears was finally brought to a conclusion only in 1932, when the new Fianna Fáil Government announced a form of amnesty, under which taxpayers could settle such outstanding liabilities, without interest or penalties, for a sum not exceeding 75% of the arrears. Tax amnesties in various forms were thus a feature of the Irish tax system from its earliest days.

"Double Taxation in Its Most Acute Form"

The problem of double taxation manifested itself early in April 1923 when Irish-resident recipients of UK dividends found that they were subject to Free State encashment tax at

5 shillings in the pound (25%) on dividends that had already suffered UK income tax withholding at 4 shillings and 6 pence. The result was a combined withholding rate of 9 shillings and 6 pence in the pound (47.5%). This issue had been anticipated to some extent by a reciprocal arrangement with the UK (the Double Taxation Relief Order 1923), which allowed for a form of credit; however, this was granted only after the year-end. To deal with the immediate problem, the Government decided to allow the clearing banks to disapply withholding tax on encashment of British dividends and instead provide details to the Revenue Commissioners annually. Businesses with cross-border operations, previously no different from having a branch in the next town, found themselves struggling with the complexities of double taxation. It is striking when reading the files from a hundred years ago to see discussions of matters familiar to present-day practitioners, such as the "place of management" of a business and whether agents had the right to conclude contracts.[21]

Tied up with all of this was the contentious issue of the land annuities due to the British Government under the Land Acts, a liability that had been confirmed in talks on the implementation of the 1921 Anglo-Irish Treaty. The Free State viewed these obligations through the prism of tax legislation and considered the annuities to be income derived from land in the State. On this basis, the

18 *The Irish Times*, 15 September 1923.
19 Réamonn, *History of the Revenue Commissioners*, p. 106.
20 *The Irish Times*, 13 March 1925.
21 Notes of a meeting between the Northern Ireland Ministry of Finance and the Belfast Wholesale Merchants and Manufacturers Association, 12 November 1923 (PRONI, COM 62/1/52).

Free State Government claimed the right to withhold tax from the interest element of the annuities. This approach was anathema to the British Government, however, which viewed the payments strictly within the context of the Treaty and payment of anything less than the full amount due as a breach of its terms. When a financial settlement was eventually agreed with the UK in 1926, the terms specifically provided that the Irish Government would pay the land annuities "without any deduction whatsoever...on account of Income Tax" and that the Government would also reimburse Britain the amount of £550,000 in respect of tax previously deducted from the annuities. The controversial question of the land annuities was finally settled only after the "economic war" with Britain in the 1930s.

The 1926 settlement also provided that the two governments would agree to promote any legislation necessary to settle the question of double taxation. This led to the conclusion of one of the world's first double taxation agreements in 1926, pre-dating the drafting of the earliest "model agreement" by the League of Nations in 1928. The agreement was unusual in that it adopted residence as the sole basis for the allocation of taxing rights. Irish residents were exempt from UK tax on income arising in the UK, and vice versa. Dual residents were granted a form of credit to reduce or eliminate double taxation. The "residence agreement", as it was widely known, was amended on a number of occasions but remained in force until the present Ireland–UK agreement, based on the OECD Model Treaty, was signed in 1976.

Just as there were tax inspectors in 1923, so also there were tax consultants. Glancing through the newspapers of the time, one finds multiple advertisements for "tax recovery agencies". Many of these early practitioners were former employees of the Inland Revenue, such as Mr H.J. Friel of 9 Lower O'Connell Street, "Late examiner of the Estate Duty Office", who promised prospective clients "inside official experience", "the most up to date expert knowledge" and, most pleasingly of all, "[m]oderate fees". One of the more interesting early members of the profession was Joseph MacDonagh, brother of the executed 1916 leader Thomas MacDonagh. He had been forced out of his job in the British Revenue in the aftermath of the Rising and set up in business as "The Irish Income Tax Recovery Agency". He went on to become a TD, a minister in the Second Dáil Government and an informal adviser to Michael Collins on taxation matters. A bitter opponent of the Treaty, he was imprisoned during the Civil War and died on Christmas Day 1922 as a result of medical complications arising from a hunger strike.[22]

Conclusion

The Revenue Commissioners can rightly claim to have survived a baptism of fire at their inception. In the century that has passed since 1923, taxation policy has remained central to Ireland's economic development and success. The success of the State in establishing the principle of taxation by consent was one of the landmark achievements of the new nation, a factor that remains fundamental to our tax system as we face into the challenges of the next century.

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22 Lawrence White, "Joseph MacDonagh" in *Dictionary of Irish Biography* (Cambridge: Cambridge University Press, 2009), https://www.dib.ie/biography/macdonagh-joseph-a5162.

George Thompson
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New Transfer Pricing Documentation Requirements for Irish Branches

Introduction

New legislation was introduced in s28 of Finance Act 2021 adopting the "authorised OECD approach" (AOA) to the attribution of profits to branches of non-Irish-resident companies. In accordance with the OECD guidance, this codifies the requirement for an Irish branch to earn the profits that it would have earned at arm's length if it were treated as a legally distinct and separate enterprise performing the same or similar functions under the same or similar conditions. In addition, from 1 January 2022, new documentation requirements were enacted through s25A of TCA 1997, backed up by penalties for failing to comply with the legislation, requiring Irish branches of non-Irish-resident companies to prepare detailed documentation outlining the basis of the allocations of expenses, risks and assets between the head office and the Irish branch.

Before 1 January 2022, application of the AOA when determining the profitability of a branch was the best practice in this area; however, Irish transfer pricing documentation legislation did not apply to allocations between a branch and its head office because, together, a branch and its head office company were considered a "person" for Irish tax purposes.

Lastly, these changes under s25A do not apply to foreign branches of Irish legal entities. The requirements in jurisdictions in which the overseas branches are resident should be considered.[1]

Outline of New Legislation

As part of Finance Act 2021, a new s25A was added to the Taxes Consolidation Act 1997 (TCA 1997) to provide for the application of an OECD-developed mechanism for the attribution of income to a branch or agency of a non-resident company operating in the State, also known as the "authorised OECD approach", or AOA. As a consequence of these changes, Revenue published an update to its Tax Duty Manual, Part 02-02-04a, to provide detailed guidance on the operation and practical effect of the rules. The new legislation applies for accounting periods commencing on or after 1 January 2022 and therefore is relevant to Irish branches of overseas entities for financial years ended 31 December 2022.

The AOA gives guidance to help attribute profits to a branch or permanent establishment ("branch") that it would have earned at arm's length if it were treated as a legally distinct and separate enterprise performing the same or similar functions under the same or similar conditions. Furthermore, the AOA guidance as enacted applies to intra-company "dealings" (i.e. transactions between separate parts of a single enterprise) transfer pricing principles that currently apply to inter-company transactions (i.e. transactions between different, albeit associated, enterprises) and puts them on a similar footing from a transfer pricing documentation perspective.

As a result of these changes, there is additional documentation for relevant taxpayers to prepare outlining whether relevant branch income has been computed in accordance with the new legislation – these documents are known as "relevant branch records". Such records are outlined in detail below but are similar, in the most part, to the details that would be required in an OECD-compliant local file. In essence, they include a description of the headquarters entity and the branch itself, details of the transfer pricing method relied on and allocation schedules evidencing the application of the transfer pricing methodology.

The new legislation provides for proportionate penalties for taxpayers who fail to comply with a request to provide relevant branch records to Revenue. These penalties are consistent with those that apply to failure to submit a local file on a request from Revenue within 30 days of that request. Preparation of such documentation gives an entitlement to protection from tax-geared penalties to a "careless behaviour" level where a taxpayer prepares the documentation and provides it to Revenue on a timely basis and the documentation demonstrates reasonable efforts to comply with the new legislation.

Applying the AOA for the Attribution of Income to a Branch

In the normal course of events, corporation tax applies to the income of the branch and any income from property or rights used by the branch. The AOA sets out the mechanism to determine the arm's-length revenues and expenses (i.e. profit) that should be attributed or allocated to the branch to which corporate tax will ultimately be applied.

The AOA Guidance[2] seeks to achieve this by applying a two-step approach:

- The first step requires a functional and factual analysis to be conducted, which involves "hypothesising" the branch as a distinct and separate enterprise. Consideration should be given to what the branch does, what functions it performs,

1 However, it is important to note that transactions between an overseas branch of an Irish entity and other group entities entered into before 1 January 2022, continue to be within the scope of existing transfer pricing documentation rules because the branch of the Irish entity and other group entities are considered to be two separate persons.

2 OECD, "2010 Report on the Attribution of Profits to Permanent Establishments" (July 2010).

what employees it has, what assets it uses and what risks it bears. That functional and factual analysis provides the basis for attributing or allocating assets, risks and "free" capital[3] from the overseas head office entity to its Irish branch.

- Under the second step, the remuneration of any dealings recognised between the branch and the head office entity of which it is a part is determined by applying the standard transfer pricing tools (as set out in the OECD Transfer Pricing Guidelines) that are applied under the Irish transfer pricing legislation in relation to transactions between associated persons (i.e. a head office entity and its subsidiary). This may involve comparing dealings between the branch and the enterprise of which it is a part with transactions between independent enterprises.

The OECD Guidelines offer several transfer pricing methods (comparable uncontrolled price method, resale price method, cost-plus method, profit-split method and transactional net margin method) for testing the arm's-length nature of inter-company transactions that can also be relied on for testing the arm's-length nature of the attribution of profit in respect of any intra-company dealings.

Therefore, after hypothesising the branch as a distinct and separate enterprise, the rules align with the guidance and testing applied when determining or reviewing the arm's-length nature of pricing of transactions between related parties (e.g. a parent entity and its subsidiary).

Documenting the Application of the AOA

Documenting the intra-company dealings from the outset of the arrangement

From a legal perspective, a head office entity and its branch are considered the same legal enterprise. Therefore there is no benefit to be gained from the preparation of an intra-company legal agreement with respect to the intra-company dealing. However, although a legal agreement would not be put in place, we would recommend having a memorandum of understanding to document the intention of the head office entity and the branch at the outset of the dealing, noting the branch's role and proposed remuneration.

Documenting the intra-group dealings annually – "relevant branch records"

Transfer pricing documentation requirements for Irish branches of non-Irish-resident companies have been enacted, ensuring that the profit allocated to the branch is determined in accordance with the AOA. These documents are known as "relevant branch records", and the content required to be included is detailed below.

Content required to be considered "relevant branch records"

As detailed in s25A(7) TCA 1997 and section 6.2 of the Tax and Duty Manual, Part 02-02-04a, "relevant branch records" must include:

- a description of the company, i.e. the non-resident company as a whole, and of its business, organisational structure, business strategy and key competitors;
- a description of the branch itself, and of its business, organisational structure, business strategy and competitors;
- a functional and factual analysis that contains such information as may reasonably be required for the purposes of determining:
  - the existence, characterisation and terms of any dealings between the branch and other parts of the company and
  - 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 that support the existence of

3 Free capital is funding that does not give rise to a tax-deductible return in the nature of interest to the branch for tax purposes.

dealings between the branch and other parts of the company;

- information on the transfer pricing method used by the company relating to dealings between the branch and other parts of the company; there is also a requirement to record the reason for selecting the transfer pricing method employed;
- details of the tested party, if applicable, and the reasons for selecting that party to a dealing as being the tested party;
- details of selected comparable uncontrolled transactions (internal or external), if any, and information on relevant financial indicators for independent enterprises relied on in attributing the relevant branch income to the branch, including a description of the comparable search methodology and the source of such information; and
- for each of the dealings between the branch and other parts of the company, information and allocation schedules showing how the transfer pricing method has been used to determine the relevant branch income attributable to the branch.

Differences between relevant branch records and OECD-style local files

Since 2020, Irish taxpayers that are a part of a group with consolidated revenue of €50m or more and have transactions with related parties have been required to prepare local file documentation. As the AOA hypothesises the head office entity and the branch as two separate legal entities, there are many similarities between the relevant branch records and the OECD local file requirements. However, the main differences are:

- The financial reconciliation in the "relevant branch records" will differ from that provided in an OECD local file. The records should show the financials of the head office entity and identify the basis on which the income and expenses were attributed to the branch.
- Capital will be required to be attributed to the branch. The basis on which to attribute capital to the branch will depend on the facts of the case. This is of particular importance to the financial services industry. Capital does not need to be attributed to a subsidiary or related party that is a legal entity with a separate legal personality in its own right.

Deadline for preparation and penalties for failure to prepare/submit on request

The "relevant branch records" should be prepared contemporaneously with the branch corporation tax return and provided to Revenue within 30 days of a request. If a taxpayer fails to provide them within 30 days, there is a fixed penalty of €25,000 (and €100 per day until the documentation is provided) for large taxpayers (i.e. taxpayers that are part of a group with consolidated revenue of €50m or more) and €4,000 for other taxpayers.

It is also worth noting that taxpayers can avail of protection from tax-geared penalties to a "careless behaviour" level in the event of a review and subsequent transfer pricing adjustment by Revenue if:

- the relevant branch records are prepared contemporaneously (i.e. prepared by the time that the tax return is filed);
- the relevant branch records are provided within 30 days of a request; and
- the relevant branch records demonstrate that the taxpayer has made reasonable efforts to comply with the requirements in this legislation in determining the relevant branch income that is attributable to the branch.

Exemptions

The new legislation does not currently apply to a company for an accounting period where the company is a small or medium-sized enterprise (SME) for that accounting period.

AOA Documentation Requirements Overseas

Many overseas jurisdictions have endorsed the AOA and provide for its application in their domestic legislation. Although overseas

jurisdictions endorse the AOA, with respect to documentation, an OECD local file has been acceptable to date. Irish taxpayers with overseas branches should review the local requirements in their branch jurisdictions to consider whether AOA-style documentation is required.

Conclusion

New legislation applying the AOA to the attribution of profits to branches of non-Irish-resident companies that is in accordance with the OECD guidance has been introduced in Ireland, bringing additional documentation requirements for Irish branches of overseas head office entities. Irish branches of overseas head office entities with a 31 December 2022 financial year-end should have "relevant branch records" prepared by the tax return deadline (23 September 2023) to avoid fixed and potentially tax-geared penalties in the event of a review and subsequent adjustment by Revenue. Given that this is the first year of preparing such documentation, relevant taxpayers should consider the availability of the information required, as set out above, and the time and resources required to collate it and prepare the relevant branch records.

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Revenue Guidance on Foreign-Entity Classifications

Introduction

As many members will know, HM Revenue & Customs (HMRC) has had a foreign-entity classification list for UK tax purposes for a number of years, which has provided relative certainty on how the UK views certain entities. For example, the UK guidance notes that Irish limited partnerships, Irish investment limited partnerships and common contractual funds will be viewed as transparent for UK tax purposes.[1] Many Irish practitioners and taxpayers had been hoping for a number of years for Revenue to take a similar approach to that of HMRC, and guidance on this topic was published for the first time in May 2023.

Unlike the guidance published by HMRC, which provides a degree of certainty on how certain vehicles will be treated for UK tax purposes, the Revenue guidance provides a two-stage test to assist in determining the entity classification for Irish tax purposes. The tests essentially require consideration of the nature and characteristics of a foreign entity and a comparison to the

1 See https://www.gov.uk/hmrc-internal-manuals/international-manual/intm180030.

characteristics of Irish companies (tax opaque) or partnerships (tax transparent) to determine the Irish tax treatment. For additional context, the tax treatment applied to companies and partnerships is outlined below.

Taxation of Irish Companies

The definition of a company is contained in s4(1) of the Taxes Consolidation Act 1997 (TCA 1997), which sets out that "except where the context otherwise requires – 'company' means any body corporate...". A "body corporate" is a succession or collection of persons having in the estimation of the law an existence and rights and duties distinct from the individual persons who form it from time to time.[2]

An Irish-tax-resident company is, generally, chargeable to corporation tax on its profits, income or gains, wherever arising (subject to certain specific exemptions). Members (i.e. shareholders) of the company are not taxed on the company's profits and gains but on distributions that they receive from the company.

It is noted that the tax treatment applicable to more complex entity types (such as collective investment vehicles) is not covered in the guidance. Readers are referred to the guidance on Part 27-01A-02 for details on this.[3]

Taxation of Irish Partnerships

Broadly, all persons carrying on a business in common with a view to a profit, apart from those bodies that are registered/formed with a separate legal personality, are generally considered a partnership for Irish tax purposes.

In contrast to a company, a partnership is treated as transparent for tax purposes. The profits and gains arising to a partnership are not taxed on the partnership itself but are allocated to (according to the terms of the partnership agreement) and taxed directly on the members.

As noted in the Revenue guidance,[4] foreign entities can have structures that do not neatly fit within the concept of an Irish company or an Irish partnership. Therefore, Revenue has noted that the correct approach to foreign-entity classification is to look at each foreign entity on its own merits, based on the principles established in case law, and determine whether it is more akin to a company (tax opaque) or to a partnership (tax transparent).[5]

Case Law

The leading Irish case for the classification of foreign entities is *Quigley v Harris* [2008] ITR 153. The case concerned a limited partnership (LP) established in the Cook Islands and whether the Irish taxpayer was entitled to offset against his general liability to income tax expenditure incurred in his capacity as a partner in the LP. In reaching her decision, Laffoy J stated that:

> "it is a two-stage process. The first stage is to determine the characteristics, rights and obligations of the taxpayer *qua* partner under the Partnership by reference to the law of the Cook Islands... The second stage is to determine whether, applying Irish law, the characteristics, rights and obligations of the taxpayer *qua* partner match the characteristics, rights and obligations of a general partner within the meaning of para (d) in the context of s 1013."

The outcome of the two-stage test in this case was that the characteristics, rights and obligations of the taxpayer in his capacity as a partner in the LP (primarily, that his liability was not unlimited) meant that for Irish tax purposes he was not a general partner within the meaning of s1013(1)(d) TCA 1997.

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2 Brian Hunt, *Murdoch and Hunt's Dictionary of Irish Law* (Dublin: Bloomsbury Professional, 6th ed., 2016).
3 See https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-27/27-01a-02.pdf.
4 See https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-35c/35C-00-02.pdf.
5 See https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-35c/35C-00-02.pdf.

In addition to the above, the guidance refers to two UK cases.

Memec Plc v CIR

In the *Memec Plc v CIR* [1998] STC 754 case, Memec Plc had entered into a silent partnership with a German holding company, which in turn held two German trading subsidiaries. Under the terms of the silent partnership, Memec Plc was entitled to the majority of the income of the partnership, which related to dividends from the subsidiaries. Memec Plc had claimed tax relief in the UK on a trade tax levied in Germany on the profits of the subsidiaries.

For the appeal to succeed, Memec Plc had to show that either:

- the dividends paid by the subsidiaries could be treated as paid directly to Memec Plc (i.e. that the silent partnership was tax transparent) or
- the share of profits of the silent partnership paid to Memec Plc could be treated as a dividend paid by the German holding company.

The latter argument failed based on the meaning of the term "dividend" under the relevant double taxation agreement (DTA).

In considering the former argument, Walker J stated:

> "when an English tribunal has to apply the provisions of [a] United Kingdom taxing statute to some transaction, arrangement or entity which is governed by a foreign system of law, the tribunal must take account of the rules of that foreign system (properly proved if not admitted) in order to determine the nature and characteristics of the transaction, arrangement or entity. But having informed itself in this way, the tribunal must then apply the taxing statute as part of English law."

On appeal, Gibson LJ stated:

> "what in my judgment we have to do in the present case is to consider the characteristics of an English or Scottish partnership which make it transparent and then to see to what extent those characteristics are shared or not by the silent partnership in order to determine whether the silent partnership should be treated for corporation tax purposes in the same way".

The outcome of the *Memec* case was that, based on the examination of the facts and circumstances of the silent partnership, it was not akin to an English or Scottish partnership and, as such, it could not be considered transparent for UK tax purposes.

The tests applied by the UK courts in this case are in line with the two-stage test outlined in the Revenue guidance.

Anson v HMRC

The focus of the case of *Anson v HMRC* [2015] UKSC 44 was profit entitlement in a US LLC. Lord Reed, in his judgment, concluded that on the basis that Mr Anson was entitled to a share of the profits of the LLC as they arose, he was entitled to relief under the UK–US DTA, as the income that was taxed in the US was the same as the income subject to tax in the UK.

An interesting point to note in this regard is that Revenue in its commentary has said:

> "The approach of the UK Supreme Court in this case was to focus almost exclusively on the particular question of whether members are entitled to a share of the profits as they arise...Although profit entitlement is an important factor, the overall pattern of a foreign entity's characteristics should be examined."

Therefore, from an Irish context, it is clear that Revenue does not view profit entitlement as a decisive factor in foreign-entity classification.

The Test

The principles established in the above cases act as the basis of the two-stage test:

- The first stage is to determine the characteristics, rights and obligations of the foreign entity by reference to the laws of the territory in which it is established.
- The second stage is to determine whether, applying Irish law, the characteristics, rights and obligations of the entity match the characteristics, rights and obligations of an Irish company or Irish partnership or are more aligned to one versus the other.

Revenue has also highlighted that the factors that would indicate that a foreign entity should be treated as opaque for Irish tax purposes include:

> "i. The foreign entity has a legal existence separate from that of the persons who have an interest in it.
>
> ii. The foreign entity issues share capital or something else, which serves the same function as share capital.
>
> iii. The business is carried on by the foreign entity itself rather than jointly by the persons who have an interest in it.
>
> iv. The persons who have an interest in the foreign entity are not entitled to share in its profits as they arise, the amount of profits to which they are entitled depends on a decision of the entity or its members, after the period in which the profits have arisen, to make a distribution of its profits.
>
> v. The foreign entity is responsible for debts incurred as a result of the carrying on of the business.
>
> vi. The assets used for carrying on the business belong beneficially to the foreign entity and can be owned or transferred by the entity in its own right.
>
> vii. The foreign entity is capable of perpetual succession, its existence remains unaffected by the incapacity or death of its members."

Overall, although the above guidance is helpful in providing a clear approach to be adopted for foreign-entity classification, it does not provide a list of foreign-entity classifications, which many taxpayers and practitioners would have welcomed. The principles outlined in the Revenue guidance are those that practitioners have been applying for some time, and therefore the guidance is unlikely to result in any significant change in approach.

Conclusion

Understanding the Irish treatment of foreign entities, such as foreign partnerships, can be of particular importance when it comes to considering many provisions in tax law, e.g. the EU Anti-Tax Avoidance Directive, such as anti-hybrid rules or interest limitation and the availability of withholding tax exemptions, and also when applying the future provisions of Pillar Two.

Foreign-entity classifications can be complex, and the Revenue guidance notes that "decisive importance cannot be attributed to any single characteristic". Therefore there is, and will continue to be, a level of subjectivity involved in such reviews. However, it is helpful that Revenue has noted that where there is uncertainty in relation to a foreign-entity classification, it is possible to submit a request concerning the classification to the Revenue Technical Service. Therefore, where practitioners or their clients require more certainty, it may be possible to obtain a ruling confirming the classification of a particular entity.

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Considerations for Investors and Withdrawal of Investor Relief under the Employment Investment Incentive Scheme

Overview of EII Relief for Investors

Chapter 4 of Part 16 TCA 1997 provides for income tax relief of up to 40% for investment by individuals in a qualifying company for the purposes of using the funds for a qualifying trade and the creation and maintenance of employment. The Employment Investment Incentive (EII) provides the only form of "all income" tax relief currently available to individual taxpayers. For an investment to qualify for EII relief, it needs to be for "eligible shares" by a "qualifying investor" in a "qualifying company". At a high level:

- Eligible shares for the purposes of the EII relief are newly issued shares and can now be redeemable and have preferential rights to dividends on a winding-up. The characteristics that an EII share could have

were more restricted in the past, e.g. they could not have preferential rights.

- Subject to certain exclusions and other conditions, a qualifying company is an unquoted micro, small or medium-sized trading company falling within the meaning of a RICT (relief for investment in corporate trades) group in the SME category of Annex 1 of the General Block Exemption Rules (GBER). The company must also be unlisted and must not be an undertaking in difficulty.
- A qualifying investor is an investor who is not connected with the company and is not partaking in a tax-avoidance scheme. The investor must retain the EII shares for a minimum period of four years from the date of issue to remain a qualifying investor.

Essentially, the relief is intended to offer an alternative source of finance to start-up companies or existing companies that wish to branch into a new product or market where they may not meet the parameters for regular bank financing or bank finance is too expensive.

This article is intended to cover certain key tax considerations for investors, as well as some practical issues that may arise where there is a clawback of EII relief from a compliance point of view. It is not intended to provide an overview of the EII legislation as a whole.

Investing in an Individual Company Versus Investing Via a Designated Investment Fund or Qualifying Investment Fund

A designated investment fund (DIF) is a fund that has been designated by the Revenue Commissioners under s506 TCA 1997. A DIF comprises the subscriptions of a number of investors and is likely to invest in a number of companies. Broadly, each investor will get a share in each company in proportion to the value that their subscription bears in relation to the total size of the fund. The individual companies will issue Statements of Qualification (SOQs) to the fund, and the fund will, in turn, issue a Manager's Certificate to the investors. Full relief cannot be claimed until all Manager's Certificates have been received in respect of each investment made by the fund. The relief for investment through a DIF may therefore be issued on a piecemeal basis as the investments are made in individual companies. This may be a drawback from a timing and administrative point of view for the individual investor when compared to investing in an individual company, which will issue the SOQs for the full amount of the investment to the investor directly to claim full relief.

A prior benefit to an investment via a DIF was that the investor could choose whether relief would be claimed in the year when the investment was made in the fund or the year when the fund subscribed for shares in a company. From 1 January 2020 this option is no longer available, and relief can be claimed only in the year when the investment is made in the DIF. From a commercial point of view the investor can, however, get the benefit of diversification and spreading of risk by investing through a DIF.

Investments can also be made through a qualifying investment fund (QIF). A QIF is similar to a DIF, with the main difference being that a QIF is not required to invest only in EII companies and may also invest in other companies – for example, those listed on the stock exchange.

Claiming EII Relief

The relief, which is subject to maximum limits, is claimed by the individual investor on receipt of a Statement of Qualification from the qualifying company (or a Manager's Certificate if the investment was made via a DIF). The mechanism for claiming the tax relief depends on whether the individual investor is a PAYE or self-assessed taxpayer:

- PAYE taxpayers can claim the relief by selecting "Employment Investment Incentive" from the "Other Credits" section of the income tax return in their Revenue myAccount.

- Relief in respect of self-assessed taxpayers is claimed under “Employment Investment Incentive” in the “Personal Tax Credits” section of the Form 11.

It is worth noting that the particular boxes in which relief is claimed are different depending on whether the shares are to be held for less than or a minimum of seven years. As outlined in Revenue’s Tax and Duty Manual “Relief for Investment in Corporate Trades” (Part 16-00-02), the amount of relief claimed in a particular tax year depends on the rules in place in the year in which the investment was made.

Relief in respect of investments on or before 8 October 2019

Relief is granted in two tranches in respect of individual investors who made an investment on or before 8 October 2019. At this time, the maximum investment on which relief could be claimed was €150,000. Thirty-fortieths (30/40ths) of the EII investment qualified for relief in the year in which the investment was made, with relief on the remaining 10/40ths available in the fourth year after the EII investment was made. For example, an investor who made a qualifying investment of €100,000 in 2018 would have received relief in respect of €75,000 (30/40ths) in 2018 and will receive relief on the remaining €25,000 (10/40ths) in the 2022 Form 11 (or via an income tax return through myAccount if not required to file a Form 11).

Relief in respect of investments on or after 9 October 2019

A change in legislation resulted in the ability to claim relief on the full amount invested on or after 9 October 2019, subject to a maximum amount of €150,000. The maximum amount on which relief can be claimed increased to €250,000 in respect of investments made on or after 1 January 2020. This limit can be further increased to €500,000 where an investor elects at the time of share issue to retain the shares for a period of seven years.

As you will note, the rules in relation to the amount of investment that could be claimed changed from 30/40ths to 40/40ths (i.e. 100% of the investment) during the 2019 tax year (from 9 October 2019 onwards). It is therefore important to take note of the date on which the EII shares issued for a 2019 investment to ensure that the correct treatment is applied. The date of share issue should be clear from the Statement of Qualification received in relation to the investment.

Events that Give Rise to a Clawback of EII Relief

EII relief may be clawed back where:

- an investor does not retain his or her shares for the required period (minimum four years, or seven years in certain circumstances),
- an incorrect Statement of Qualification was issued to investors,
- the company ceases to be a qualifying company for the purposes of the relief,
- the investment is not a relevant investment,
- the investor ceases to be a qualifying investor,
- the company fails to create and maintain employment in the specified period,
- the funds were raised as part of a tax-avoidance scheme or
- persons other than the EII investors receive value from any company in the RICT group during the relevant period outside of the capital redemption window.

Before 1 January 2019 the clawback of relief could be assessed only on the EII investor; therefore, EII investors were in the precarious position whereby they could suffer a clawback of their EII relief owing to an action taken by the company, over which they had no control. As a result of the changes to the EII legislation introduced from 1 January 2019, there are now a number of specific circumstances whereby the clawback will be assessed on the company as opposed to the EII investor. The table below outlines the clawback position before and after 2019 when assessed on both the company and the individual investor.

	Before 1 January 2019	On or after 1 January 2019
Withdrawal of relief assessed on the company	Withdrawals of relief not assessed against the company.	Where "the company is responsible for an event for which the investor is not and could not be a party to the transaction, the withdrawal of the excess relief granted will be made by raising an assessment against the company". Such instances include: • an incorrect Statement of Qualification issued, • the company ceases to be a qualifying company within the relevant period, • the investment ceases or partially ceases to be a qualifying investment within the relevant period and • persons other than the EII investors receive value from any company in the RICT group during the relevant period outside of the capital redemption window. The withdrawal will be made by means of raising a Case IV assessment for corporation tax of 1.2 times the amount of the relief claimed by the investor in respect of shares issued up to and including 31 December 2022. Per Finance Act 2022, a Case IV assessment will be raised for corporation tax of 1.6 times the amount of relief claimed by the investor in cases of withdrawal of relief in respect of shares issued on or after 1 January 2023. The company cannot offset any loss or deficit against the Case IV amount, and the Case IV amount should not be subject to the close company surcharge.
Withdrawal of relief assessed on the individual investor	Withdrawals of relief in respect of shares issued before 1 January 2019 are made from the investor and not the company. This may happen where: • the investment is no longer a qualifying investment, • there is a disposal of shares within the required holding period that results in a clawback event or	Withdrawals of relief are made from the investor where it is identified that the withdrawal is not to be made from the company. This may happen where: • the investor ceases to be a qualifying investor within the relevant period (e.g. becomes connected with the company), • the investor receives value from the company during the compliance period or • there are arrangements, agreements or understandings to substantially reduce the risk for an investor.

(Continued)

	Before 1 January 2019	On or after 1 January 2019
	• the risk finance is raised for reasons that are not bona fide commercial reasons. The withdrawal will be made by means of raising a Case IV, Schedule D, assessment for income tax for the year of assessment for which the relief was given.	The withdrawal will be made by means of raising a Case IV, Schedule D, assessment for income tax for the year of assessment for which the relief was given.

Although the recording of a withdrawal of relief from a company can be easily achieved via an amendment to the Form CT1, the mechanism by which the clawback of relief from the individual investor is to be recorded is somewhat more cumbersome.

Amending the Form 11 – or income tax return in myAccount, as a PAYE taxpayer – to include Case IV income in the amount of the investment from which relief is to be withdrawn results in income tax, USC and PRSI being chargeable on the amount of the investment to be withdrawn. This obviously gives an incorrect result, as the tax relief on the investment will have been granted only in respect of income tax at the investor's marginal rate of 20% or 40%. There is no USC or PRSI relief in respect of a qualifying EII investment.

As an alternative to amending the Form 11 or income tax return in myAccount, Revenue will, if provided with the details of the withdrawal of relief, manually amend the Form 11 in the year in which the relief was claimed and issue a notice of amended assessment to account for the clawback of the relief at the correct amount actually claimed by the investor.

Interest

Interest on an underpayment of tax by virtue of a withdrawal of EII relief tends to run from the date of the event that triggered the clawback. Section 508V TCA 1997 expands on this, outlining that:

- where relief is withdrawn due to anti-avoidance, interest runs from the date on which the agreements, arrangements or understandings were entered into; and
- where value is received by persons other than qualifying investors, interest runs from the date on which value was received.

Other Tax Considerations

Capital gains tax

Any gain arising on a sale of shares in an EII company is generally subject to capital gains tax (CGT), similar to any other investment. Section 508K TCA 1997 provides that for the purposes of calculating CGT the full acquisition cost (indexed for inflation, if applicable) may be deducted from the sales proceeds.

In the event of a loss, the amount of the deduction allowable will be reduced by the lower of:

- the amount of the income tax relief obtained (that is, the amount of relief allowed, not the tax saved) and
- the amount by which the deduction exceeds the consideration.

The effect of this restriction is that the result for CGT will normally be no gain/no loss.

Care should be taken in cases where the exit is effected as a buyback of the EII shares by the EII company itself, as a buyback of shares is

prima facie subject to income tax as opposed to CGT because it is treated as a deemed distribution unless certain conditions are met that facilitate CGT treatment's applying.

High-earners' restriction

Tax relief on EII investments is not subject to the high-earners' restriction. A married couple can each obtain individual relief on an investment of €250,000/€500,000 provided each spouse has sufficient taxable income.

Impact on preliminary tax

Self-assessed taxpayers must make a preliminary tax payment calculated on the basis of:

- 90% of the tax due for the current tax year,
- 100% of the tax due for the immediately previous tax year or
- 105% of the tax due for the pre-preceding tax year (if paying by direct debit).

If making a preliminary tax payment based on 100% of the immediately previous tax year, then the EII relief must be ignored and the preliminary tax due must be calculated as though the EII investment was not made in the previous tax year.

If basing a preliminary tax payment on 90% of the current-year liability, then account may be taken of the income tax relief applicable from the current-year EII investment, providing the EII investment is made in the tax year.

Individuals making multiple year-on-year EII investments in the same company

Companies may raise their EII funding in different tranches, and investors, in turn, may invest in each individual tranche (subject to the annual limits applicable). If an individual investor has multiple EII investments year on year in the same company, each will have its own compliance period, and care must be taken when any of that investor's shares are being redeemed to avoid triggering a clawback of relief. Section 508P TCA 1997 allows a company to redeem shares from an investor when some of the investor's EII investments are still within their compliance period and some are no longer within their compliance period, provided certain conditions are met:

- the most recent EII, Start-up Capital Incentive (SCI) or Start-Up Relief for Entrepreneurs (SURE) fundraising by the RICT group was 18 months before the return of capital;
- the RICT group will not seek to raise EII/SCI/SURE funding for 12 months after the return of capital; and
- the qualifying investor from whom the investment is redeemed will not be allowed to make another qualifying investment in that company for a period of five years after a redemption of their investments.

Taxpayers who invest in individual companies can mitigate exposure to this potential clawback of EII relief by choosing not to make year-on-year investments in the same company. Taxpayers who invest under the EII via a DIF may not have the same ability to mitigate this risk.

Conclusion

EII relief remains a very important tax relief for companies in the SME sector. The fact that the EII legislation must comply with the EU GBER has, however, resulted in the rules' being quite complex in certain areas, and this leads to issues from a practical point of view in some cases. As mentioned above, the main points to note from a practical perspective are:

- Withdrawals of relief in respect of shares issued before 1 January 2019 will always be made from the investor. In the author's experience, to avoid any issues with USC or PRSI arising on the amount of relief withdrawn, Revenue should be notified of such withdrawals of relief via MyEnquiries to enable it to issue a notice of amended assessment in respect of the tax year in which the relief was claimed. This will also apply if the withdrawal of EII relief is in respect of shares issued on or after 1 January 2019 and it has been confirmed

that the withdrawal is not to be made from the company.

- Where relief is to be withdrawn in respect of shares issued on or after 1 January 2019 and it is identified that the withdrawal is to be made from the company, the company will suffer the clawback through an increase in corporation tax and the individual investor will not need to pay any monies to Revenue in respect of a clawback of income tax relief.
- Any gain on a successful EII investment is generally subject to CGT. A loss on an EII investment is not allowable, as the CGT restrictions on the CGT calculation generally provide for a no gain/no loss result.
- Taxpayers should consider the basis on which they wish to have their preliminary tax calculated, as no account of an EII investment may be made if basing the preliminary tax payment on 100% of the tax due in the previous tax year.
- Taxpayers should also consider the implications of making multiple year-on-year investments in the same company due to the potential clawback of relief on a redemption of capital where specific conditions are not met.

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Remote Working and Global Mobility Tax Updates

Remote Working

One of the enduring legacies of the Covid-19 pandemic is that it resulted in the most fundamental change in working practices since Henry Ford introduced the five-day working week. Remote working rapidly accelerated from being the aspirational "future of work" to becoming an enforced way of life during the various lockdowns and is now very much here to stay. The benefits from a talent attraction and retention and employee experience perspective are undeniable, but employers need to be mindful of the compliance risks associated with remote working when facilitating such arrangements. This is particularly relevant where an employee is working in a different jurisdiction from where their employer is established. In this scenario there are a myriad of factors to consider:

- Corporate tax: The activities of the individual could trigger a permanent establishment in an overseas jurisdiction, depending on the nature of the role, seniority of the individual, duration of the overseas working arrangement etc. This could lead to overseas corporate tax filing obligations, potentially in a jurisdiction with a higher corporate tax rate than Ireland's 12.5%.
- Payroll: The employer may have payroll withholding and filing obligations, depending on the local rules in the overseas location. The impact of the foreign working arrangement on Irish payroll withholding obligations would also need to be considered.
- Social security: This can become a very complex area where an employee is working remotely overseas. During the pandemic, the social security authorities of all EEA counties and Switzerland adopted a "no-impact" position where there was a change in working patterns. This arrangement was in place up to 30 June 2022, and therefore a change in work location after this date may mean a change in social security obligations. It is important to remember that this has an impact for both the employee and the employer, and many jurisdictions have significantly higher employer social security contribution rates than Ireland.
- Immigration: Does the employee have a right to work in the overseas location and will there be visa and/or work permit requirements?
- Employment law: Employers will need to understand local employment rights and entitlements and assess whether any additional employer obligations arise.

Employers will need to implement robust remote worker tracking systems to monitor where their employees are working, the nature of the work they are doing and the length of time they are spending in these locations. To attempt to mitigate risk, many employers are imposing a limit on the number of days that they will allow an employee to work in a foreign jurisdiction – typically, a threshold of 20 or 30 working days per annum.

Even where employees are not working outside of their employer jurisdiction, the move to remote working has created some domestic tax complexities, such as in the application of the "lesser of" rule for reimbursing costs of business travel. Under Revenue guidance, where an employee begins a business journey directly from home or returns directly to home, the expenses of travel and subsistence that may be reimbursed tax-free are the lesser of those incurred on the journey between:

- the employee's home and the temporary place of work and
- the employee's normal place of work and the temporary place of work.

This leads to the question of whether the employee's home can constitute the normal place of work in situations where he or she is working remotely on a full-time basis.

Different circumstances may have led to the remote working arrangement. For example, the employer's physical office may have closed, so that employees must work remotely full-time, or the employer may have implemented hybrid working arrangements because it has downsized its office space, so that employees do not have access to a desk in the office every day.

Many employees now live further away from the office and are travelling much further distances to client premises and incurring the costs of such travel. Employers are under pressure from employees to reimburse these costs, especially in light of increasing fuel prices.

In its Tax and Duty Manual "Remote Working Relief" Revenue states that if an employee works part-time in the office and part-time at home, the normal place of work is the office, but it does not address the situation where an employee is working fully remotely. The manual also states that in no circumstances may expenses be reimbursed tax-free in relation to

travel between an employee's home and his or her place of work.

The question of the normal place of work was raised at a TALC Direct and Capital Taxes Sub-Committee meeting in September 2022 TALC Direct and Capital Taxes Sub-Committee (revenue.ie). Revenue acknowledged that where the employer's office has closed such that the employee has to work from home, the home would be regarded as the normal place of work. Where the employee "chooses" to work from home, the office would be normal place of work. Revenue acknowledged that it is mindful of the changes in working practices, but there are no immediate plans to implement a change in policy. It will be interesting to watch international developments in this area to see how tax laws evolve in other jurisdictions to adapt to the new ways of working.

In relation to globally mobile employees generally, there have been a number of updates in Revenue guidance over the last year or so, as outlined below.

Tax Equalisation Arrangements

In February 2023 Revenue published a new Tax and Duty Manual outlining the treatment of tax equalisation arrangements that apply to employees who are assigned from abroad to carry out duties of a foreign employment in Ireland. A "tax equalisation arrangement" is an agreement between an employer and an employee whereby an employee on an international assignment will pay no more and no less tax than if they had remained in their home country.

Revenue's new guidance outlines the key features of a standard tax equalisation policy and provides an overview of the practical aspects of a tax equalisation arrangement, i.e. the operation of a shadow payroll to account for host-country taxes, the withholding of hypothetical tax from the employee in their home country (where the home country has issued the equivalent of a PAYE exclusion order), the preparation of annual tax returns in both home and host country and the year-end reconciliation by the employer of the hypothetical tax withheld during the year with the employee's stay-at-home position.

Tax arising on an assignee's personal income and gains will be a matter for agreement between the employer and employee. If the employer is funding any Irish tax liabilities, the payment of the tax is also an emolument for Irish PAYE purposes.

The guidance sets out a useful summary of the steps involved in operating a shadow payroll in Ireland. It is notable that in this summary Revenue does not comment on situations where the assignee remains on actual tax withholding in the home country and therefore hypothetical taxes are not withheld (for example, this is often the case for commuters from the UK who do not break UK tax residence). Further clarity would be welcomed on the shadow payroll interaction where there is a foreign tax credit claim for Irish taxes being made in the home country.

An example is provided of an assignee who was granted a share option from his employer before arriving in Ireland. The Irish liability arising on the gain, pro-rated for the period during which the employment is exercised in Ireland, exceeds the hypothetical taxes withheld from the assignee. The guidance states that this excess should be reported via Irish payroll. This approach appears out of line with the self-assessment system for share options and is likely to create an additional administrative burden for employers, as a shadow payroll would be required after an Irish assignment has ended owing to trailing share option liabilities.

The manual states that for a tax-equalised assignee who has been included on an Irish shadow payroll the final Irish tax liability for the year is determined through the preparation of an Irish income tax return. Where the operation of the shadow payroll was based on an estimate of Irish workdays that differs from the final Irish workday position, an adjustment will be required to the assignee's taxable income. The manner of the adjustment will depend on

whether the Irish workdays are higher or lower than those reported via payroll.

If the Irish workdays are higher, there has been an under-reporting of PAYE, which should be rectified by making a self-correction of the relevant payroll submission. Remember that to qualify as a self-correction without penalty, the following conditions must be met:

- Revenue must be notified, within the applicable time limit (either in writing or through ROS), of the adjustments being made.
- A computation of the correct tax and statutory interest payable must be provided.
- Payment, in full, must accompany the submission.

If the Irish workdays are lower than reported through the shadow payroll, the adjusted employment income should be reported on the tax return. As the tax return figure will differ from the payroll submission, a supporting calculation of the re-calculated final taxable employment income figure will likely be sought by Revenue for verification purposes before any refund is processed.

The manual also highlights potential risk areas for employers that may be reviewed in PAYE compliance interventions where employers have employees on assignment in Ireland, which include the treatment of relocation expenses, taxation of locally provided benefits, tracking of Irish workdays, inclusion of all components of home-country remuneration and adherence to the guidance on the Irish tax treatment of bonuses and share remuneration.

Double Deduction of Tax at Source

The “Tax Equalisation Arrangements” manual deals with individuals who are Irish tax resident, employed by an Irish employer under an Irish contract of employment and exercise some of the duties of the employment abroad in such circumstances that they are subject to a simultaneous deduction of both Irish and foreign tax.

Where the employment is exercised in a country with which a double taxation agreement (DTA) is in force, Revenue is prepared to consider, on a case-by-case basis, granting tax relief in “real time” through the PAYE system in respect of non-refundable foreign tax deducted.

For non-DTA countries, there is no legislative basis for double taxation credit relief. Under previous versions of this guidance, unilateral relief could be granted by giving a deduction in respect of the non-refundable foreign tax, which could be reflected as a tax credit through the PAYE system. The updated version of the guidance caveats that this is subject to agreement by the Revenue caseworker.

The most significant update in the manual relates to situations where the employer funds the foreign payroll liability. It is common practice that, where an employee is sent on assignment to a foreign DTA country, the employer funds the foreign payroll withholding tax liability, the employee files an income tax return to claim a credit for the foreign tax suffered and the refund of tax is repaid to the employer by the employee. The manual states that, with effect from 1 January 2023, an employee who enters into such an arrangement with his or her employer is considered to be in receipt of a preferential loan until such time as the amount is repaid to the employer. Revenue’s view is that this preferential loan is a taxable benefit, which must be reported through payroll.

Special Assignee Relief Programme

The Special Assignee Relief Programme (SARP) is a relief aimed at reducing the cost to employers of assigning skilled individuals from abroad to take up positions in Ireland, thereby creating more jobs and facilitating the development and expansion of businesses in Ireland.

In July 2022 Revenue made a number of important updates to its SARP manual. The changes reflected a clarification of Revenue’s approach to dealing with SARP applications

for employees who have spent time in Ireland or carried out duties abroad for the Irish entity before and after the employee moved to Ireland to take up the role in respect of which he or she will claim SARP relief.

One of the conditions to avail of the SARP is that for the six-month period before arrival in Ireland the individual must be in full-time employment with his or her overseas employer and exercise the duties of that employment outside of Ireland.

The first change in the guidance provided that employees who commence their Irish role before arriving in Ireland will not be entitled to claim SARP relief unless both of the following conditions are met:

- The employee is prevented from travelling to Ireland to take up their role in Ireland due to unforeseen circumstances outside their control (e.g. delays with the issuing of an employment permit); and
- The Irish duties that the employee carries out abroad do not exceed five workdays in the six months before their arrival in Ireland.

The second change related to visits to Ireland by a foreign employee in the six months before their arrival to Ireland to take up a role in Ireland. The new guidance provides that foreign employees can visit Ireland in this six-month period for a brief holiday or a look–see visit, or to work in Ireland under their foreign employment contract, provided the Irish work duties that they carry out do not exceed five workdays in this six-month period. It is worth noting that "brief" is not defined in the updated guidance.

The third change related to circumstances where an employee performs the duties of their Irish employment in respect of which they are claiming SARP relief outside Ireland during the first 12 months after their arrival in Ireland. The new guidance provides that an employee must perform some duties in Ireland each month for a minimum period of 12 consecutive months from the date on which they begin working in Ireland. The guidance does not specify a *de minimus* number of Irish workdays per month; however, based on the example provided in the guidance, an employee who performs no work duties in Ireland at all in one of the first 12 months of the employment will cease to qualify for the relief. There is a heavy price to pay for failure to comply with this provision, as it means that SARP relief is denied for the entirety of the five-year period, not just the initial 12 months.

Finally, the July 2022 manual also provided that employees must have a PPS number and must have registered their employment with Revenue through myAccount before approval for the SARP will be issued. The SARP manual was further updated in January 2023 to reflect the fact that, after the enactment of Finance Act 2022, the requirements to have a PPS number/register the employment are now legislative conditions for the relief for new arrivals on or after 1 January 2023. The latest version of the manual also references the increase in the base salary that an employee must earn to be eligible for the SARP. For individuals arriving in Ireland on or after 1 January 2023, this threshold has increased from €75,000 to €100,000.

Conclusion

As can be seen from the above updates, global mobility tax is a fast-changing and challenging environment for employers to keep up to date with. This is particularly relevant in the Irish context, given the increased focus being given to various global mobility tax issues by Revenue. It is vital that employers are aware of the various personal tax, social security, corporate tax, employment law and immigration considerations before entering into arrangements with employees with regard to a transfer into and out of Ireland, and indeed remote working arrangements. Lack of such awareness is likely to result in multiple compliance risks and poor employee satisfaction.

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Tax Research Skills for Newly Qualified CTAs

Why Is Tax Research Such an Important Skill for Any CTA?

As US attorney, Jerome Lewis,[1] discovered the cost of failing to undertake "adequate research" can be high – USD100,000, in his case, to be precise! In finding him guilty of legal malpractice, the Californian Supreme Court noted that "had [Lewis] conducted minimal research" on the authorities and case law, he would not have given his client incorrect advice.

Lewis was representing his client, Rosemary Smith, in a divorce proceeding; he incorrectly advised Smith that her husband's state and federal retirement benefits, which were earned during the marriage, were not community property. Consequently, in the divorce proceedings no claim was made by Smith

1 *Smith v Lewis* 530 P.2d 589 [1975], https://law.justia.com/cases/california/supreme-court/3d/13/349.html.

for an interest in the retirement benefits. Subsequently, after a request from Smith, Lewis filed a motion to amend the divorce decree to include a claim for the retirement benefits, but this was denied on the grounds of untimeliness. In a case taken by Smith against Lewis, the court concluded that:

> "had defendant conducted minimal research into either hornbook or case law, he would have discovered with modest effort that General Smith's state retirement benefits were likely to be treated as community property and that his federal benefits at least arguably belonged to the community as well".

The court also noted that:

> "an attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques."

In addition to the financial cost, Jerome Lewis was unlikely to have been inundated with new business after the reputational damage suffered in the case.

As any CTA will appreciate, Irish tax law is complex, and it is becoming only more so. It is impossible to memorise the entire Irish tax code, and even if one had a photographic memory, uncertainties and doubt often arise when interpreting and applying tax law in practice. Indeed, the diverging views of taxpayers and the Revenue Commissioners on tax law are clear from the continued rise in tax disputes. Thus, CTAs owe a duty of care to their clients to undertake thorough research "in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem".[2]

From a career standpoint, a CTA who invests in the development of his or her tax research skills will build a strong professional reputation. There is no doubt that CTAs who can navigate the legislation and possess strong research skills are in high demand.

Purpose of this Article

This article provides a basic framework that newly qualified CTAs can use to assist them when undertaking tax research and resolving tax issues. Although the article offers a high-level methodological approach to structure tax research comprising six steps, it is not possible to give an exact formula for undertaking tax research. The approach taken to tax research in a particular case will be influenced by various factors, including:

- the nature of the query,
- the budget for the work,
- the timeline in which the work must be completed,
- whether there is previous research on the same/a similar issue that can be leveraged and
- whether the research is being conducted before or after the event/transaction (if the event or transaction has not occurred and the research results in an unfavourable outcome, there may be time to explore alternative options).

Notwithstanding this, adopting the framework below should ensure that the tax research is thorough and the conclusions and recommendations are well supported in law.

Although the steps below are set out in a linear manner, the tax research process is generally not linear but an iterative process; thus, researching and addressing a problem or query

2 *Smith v Lewis* 530 P.2d 589 [1975], https://law.justia.com/cases/california/supreme-court/3d/13/349.html.

may require moving back and forth between Steps 1 to 4 below before moving to Step 5. Also, when undertaking tax research, one must always be mindful of non-tax considerations that could result in certain courses of action being impractical or unworkable. For example, in succession situations, gifting business assets to a child may result in a good tax answer, but if that child is not ready to take over the business and is likely to make poor business decisions, then this would not be an appropriate course of action.

Step 1: Define the Problem and Establish the Relevant Facts

The first step in the research process is to clearly define the problem, issue or query. After this, it is important to obtain a comprehensive picture of all relevant facts and background information in relation to the issue. Advice that is based on limited information or incorrect facts may be irrelevant or incorrect and could result in the researcher's "going down rabbit holes".

As part of this process, review the client's file and consider whether any previous advice and/or tax positions taken might be relevant to the current matter. For example, the client may have already claimed CGT retirement relief under s598 TCA 1997 and the current transaction might trigger a clawback of that relief.

Establishing the facts can be challenging. Asking the most appropriate questions and quickly getting to the nub of the issue is a skill that comes with experience. When gathering information from clients, be mindful that they may gloss over facts that they consider to be unimportant, omit relevant information and/or make incorrect assumptions.

Tips when gathering the facts and background information:

- Review the client's file and consider previous advice given.
- Talk to the client about any professional advice received from other advisers.
- Ask open-ended and probing questions.
- Don't be afraid to delve deeper into any point that the client raises.

- Listen attentively and take notes.
- Clarify your understanding.
- Consider whether there might be other important information that the client has not shared.
- Where applicable, substantiate information, e.g. verify against filings with the Companies Registration Office.
- Document the information and any assumptions that need to be made in a file note and agree same with the client.

In the case of a proposed transaction, as part of Step 1, it is worth taking the time to speak with the client and possibly their other professional advisers (e.g. their lawyers and auditors) to explore whether the proposal is reasonable. If, for example, a client wants to undertake a share buyback to remove a problematic shareholder, it would be wise to confirm with the legal team/ auditors whether the company has sufficient distributable reserves to undertake the buyback and can generate sufficient cash to fund the transaction. A tax adviser might come to the conclusion that the troublesome shareholder should be subject to capital gains tax rather than income tax on the proposed buyback (a good tax answer!), but unfortunately the tax research would be purely an academic exercise if the company is not in a legal or financial position to undertake the buyback. Although the CTA may not be a lawyer or qualified accountant, he or she is often a client's trusted business adviser and, with time and experience, will develop a high-level awareness of potential non-tax roadblocks to look out for.

Step 2: Identify the Tax Issues/All Relevant Tax Heads and Clarify the Scope of Work

Once the problem or issue is understood and the relevant facts and assumptions have been clarified, it is necessary to identify all of the potentially relevant tax heads and any possible tax issues. The ability to quickly identify the pertinent tax issues is a skill that takes time to develop.

Depending on the complexity of the matter, the adviser may have the knowledge required to answer the question without the need to undertake any detailed research, or, indeed, the law on the matter may be clear. However, in many cases, it will be necessary to undertake research in order to identify, analyse and interpret complex and technical tax rules and apply them to the client's fact pattern.

Once all relevant tax issues and tax heads have been identified, the scope of work should be agreed with the client. As the research progresses, "scope creep" can arise and should be carefully monitored and addressed with the client in a timely manner.

Step 3: Identify, Analyse, Interpret and Apply the Relevant Statutory Provisions and Any Applicable Case Law and TAC Determinations

Tax advice should be supported by the tax code (including case law), but questions of interpretation commonly arise when applying tax provisions to a client's specific fact pattern. Thus, once the applicable tax heads and pertinent tax issues have been established, the tax adviser will generally:

- identify the relevant statutory provisions and any applicable case law and Tax Appeals Commission (TAC) determinations and
- analyse and interpret the law and apply it to the client's scenario.

In addition, it would be important to consult relevant Revenue guidance, which might contain important administrative practices.

Identify the relevant statutory provisions and applicable case law and TAC determinations

The current legislation (primary and secondary) is always the starting point when undertaking tax research; this can be found on research resources such as TaxFind.[3]

3 Research resources are set out at the end of this article.

It is advisable to consider each tax head separately and remember that a transaction or event could fall within the scope of more than one tax head – for example, the transfer of an asset at undervalue to the sibling of a shareholder of a close company could give rise to CGT, CAT and income tax implications for the parties concerned. If there is a transaction or series of transactions, consider the tax implications of each step separately.

Although CTAs are engaged by their client and that is the party to whom they owe a duty of care, it can be worth also giving some thought to the tax implications for other parties to the transaction. For example, if a client (a sole trader) wished to gift his business to his niece, he might engage his tax adviser to set out the tax implications of this proposal for him. After completing the tax research, the CTA might conclude that the client should have no CGT liability on the transaction as retirement relief under s599 TCA 1997 should apply. However, the client might not proceed with the transaction or might explore alternative options if he were aware that the transaction could create a capital acquisitions tax and/or stamp duty liability for his niece. Furthermore, the client may not have been aware that his niece's intention to incorporate the business immediately after the gift could trigger a clawback of the retirement relief previously claimed by him (with that clawback falling on the niece rather than the client, thereby meaning that the niece might need to sell the business to fund the tax).

It is also important to be mindful of the agreed scope of work – for example, there might be stamp duty implications of a transaction, but the client may have requested their legal adviser (rather than their tax adviser) to consider that tax head.

Questions to consider in respect of each relevant tax head:

- Is there a potential tax exposure?
- Is there a tax relief or exemption that might apply to alleviate the tax exposure?
  - Each condition will need to be carefully analysed and applied to the specific facts of the case.
  - Are there any specific anti-avoidance provisions that need to be considered?
  - Are there any potential clawbacks that need to be considered?
  - Where more than one relief or exemption is potentially relevant, what is the interaction between the reliefs? For example, if an inheritance of agricultural property qualifies for both CAT agricultural relief and CAT business property relief, agricultural relief must be claimed.
  - Does it make sense to avail of the relief or exemption? As part of this, it may be necessary to get an understanding of the client's future plans. For example, transferring a business to a child and claiming CGT retirement relief under s599 TCA 1997 on same may not make sense if the child plans to sell the business within six years. In such circumstances, it may be more tax-efficient for the client to sell the business to a third party, claim retirement relief under s598 TCA 1997 on the disposal and transfer the cash in euro to the child (cash denominated in euro is not an asset for CGT purposes).
  - What claims need to be made to access the tax relief or exemption, and what is the deadline for making those claims? For example, if a client wishes to claim the R&D tax credit, it must be claimed within 12 months of the end of the accounting period in which the expenditure was incurred.
- Could the general anti-avoidance rule in s811C TCA 1997 apply to set aside any tax benefits?
- Is there a need to consider making a protective notification under s811D?
- Is there any potentially relevant case law and/or TAC determinations that could be of assistance in interpreting and applying the tax provisions?

- It can be difficult to locate these decisions; reviewing the footnotes in the ITI legislation titles is always a good starting point.
- Online research platforms[4] such as vLex and TaxFind have made it easier to find case law and TAC determinations that have a similar fact pattern and consider the same legal issues.
- See below a note on case law and TAC determinations.

- Is it necessary to consider the terms of any double taxation agreement (DTA) and, if so, is that DTA modified by the OECD's multilateral instrument?
- Is foreign tax advice required?
- Are the domestic and/or EU mandatory disclosure rules potentially applicable?

Points to note in relation to case law and TAC determinations

Courts are required to interpret and apply the law; they are not permitted to substitute their own views for what the legislation intended.

Ireland and several other countries (including the UK and Australia) are common law jurisdictions. Common law is based on the legal doctrine *stare decisis*, which essentially means that courts and judges should honour precedent. Thus, case law is an important component of our legal framework. When conducting tax research, locating relevant case law can be essential to success.

In Ireland, lower courts must generally follow the decisions of higher courts, and courts at the same level must follow earlier decisions at that level. A higher court can adopt the decision of a lower court (i.e. it may be of persuasive authority). A precedent can be overruled either by statute or by a higher court (occasionally it can be overruled by a court of the same standing). If a court distinguishes the case at hand from a previous case, it can avoid following the decision in the previous case (i.e. the two cases are different, and so the precedent need not be followed).

As Ireland is a member of the EU, Irish courts are bound by decisions of the Court of Justice of the European Union (CJEU).

Case law in other common law jurisdictions is not binding on an Irish court but may be of persuasive authority (i.e. the decision may be followed at the option of the court in Ireland). Owing to the similarities of the Irish and UK tax systems, decisions of the UK courts can be very helpful when interpreting corresponding Irish tax provisions.

Although TAC determinations can be beneficial in interpreting and applying the Irish tax code, they do not create a precedent in relation to the operation of tax law. Such determinations can, however, be of persuasive authority where the underlying facts are similar if not identical.

A more detailed overview on the interpretation of case law can be found in Part 2 of Revenue's Tax and Duty Manual 01-00-06 – Guide to Interpreting Legislation.

Analyse, interpret and apply the relevant statutory provisions and any applicable case law and TAC determinations

Tax law can be difficult to comprehend and apply. This was highlighted by the Irish Supreme Court in *Revenue Commissioners v O'Flynn Construction Company Limited & ors* [2011] IESC 47, where O'Donnell J described s811 TCA 1997 as "a provision of almost mind-numbing complexity".

Doubt can and does arise when interpreting legislation for various reasons, including:

- It is not possible for the legislation to address all possible scenarios.
- Some provisions may be poorly drafted.
- Rules may be ambiguous or highly complex.

4 Research resources are set out at the end of this article.

Consequently, the application of a tax provision to a particular scenario may require a degree of judgement.

Example: Complexities that can arise when applying the trade-benefit test in s176 TCA 1997

The trade-benefit test contained in s176 TCA 1997 is an example of a provision that can be difficult to apply in practice. The legislation does not stipulate how this test should be applied. In relation to the test, Tom Maguire[5] states:

> "As to how it may be established in individual cases whether or to what extent a trade of a company will be benefited by a purchase of its shares could present difficulties. In the narrowest sense, it seems possible to argue that a purchase of shares cannot benefit a trade at all. The legislation provides no assistance on this aspect."

There is no Irish case law of assistance in applying the trade-benefit test in s176 TCA 1997, but TAC determination 22TACD2017 sets out the approach of the TAC in applying that test. Thus, it would be advisable to consider that TAC decision when applying the test in practice.

The UK equivalent trade-benefit test in s1033 Corporation Tax Act 2010 is almost identical to the test in s176 TCA 1997. The two UK decisions discussed below are worth considering when applying the trade-benefit test in s176.

In the UK case of *Moody v Tyler* [2000] BTC 128, upon the taxpayer's resignation as a director, the company advanced a loan to him. A number of years later the company bought back his shares for an amount equal to the loan previously advanced to him. The payment on the share buyback was offset against the loan. The court agreed with the General Commissioner's finding that there was no evidence that the main purpose, or one of the main purposes, of the company in purchasing the shares was to benefit its trade.

In *Allum & Allum v Marsh* [2004] Sp C 446 the UK Special Commissioner found that payments made to a husband and wife by a trading company on the purchase of its own shares from them did not satisfy the UK trade-benefit test. In that case, the company sold its premises, and the proceeds were essentially paid to the taxpayers by way of a combination of a share buyback, voluntary payments on their retirement as directors in appreciation of their services to the company and the repayment of their loan to the company. The Special Commissioner stated:

> "That did not benefit the trade in any way. The trade was left without permanent premises from which it could be carried on, without the financing previously provided by a substantial loan from the taxpayers and without their services as directors. These were considerable disadvantages to the trade and there was no immediate intention to remedy these difficulties. In all the circumstances, the purchase of the shares was not made wholly or mainly for the purpose of benefiting the trade but to facilitate the retirement of the taxpayers."

Tax and Duty Manual 06-09-01 – Acquisition by a Company of Its Own Shares sets out Revenue's guidance on the application of the trade-benefit test contained in s176 TCA 1997. The manual includes examples of situations in which the test would normally be regarded as satisfied. When providing tax advice, an appreciation of the stated views of the Revenue Commissioners is important. and tax advisers can and do rely on Revenue's guidance. The Revenue Commissioners update their guidance from time to time; thus, if reliance is being placed on Revenue's guidance, it would be important to ensure that the guidance is current and a copy of same should be saved on the client's file for future reference.

5 Tom Maguire, *The Taxation of Companies: 2022* (Bloomsbury: London, 2023), section 11.305, "Conditions for relief: the company".

It would also be advisable to review HMRC's guidance on the UK equivalent test in its Capital Gains Manual when applying the test in an Irish context.

Rules on and principles of legislative interpretation

The courts apply certain rules and principles when interpreting legislation, and a good understanding of these enables a tax adviser to comprehend the true intent of tax laws and form compelling arguments to defend tax positions taken. Detailed guidance on legislative interpretation – including the rules of interpretation, Latin maxims (rules of language that are adopted by courts) and presumptions that may be applicable – is contained in Part 1, "Interpreting legislation", of Revenue's Tax and Duty Manual 01-00-06 – Guide to Interpreting Legislation.

When reading the legislation, be mindful that certain words and phrases will be defined in the legislation, perhaps in the particular section or in the chapter or part in which the section sits. Alternatively, the word or phrase might be defined in Part 1 of the legislation. If there is no definition in the legislation itself, the word or phrase may be defined in the Interpretation Act 2005.

If a word or phrase is not defined in the legislation, it may have been considered in a TAC determination and/or court case. The recent judgment of the Irish High Court in *Cintra Infraestructureas Internacional SLU v Revenue Commissioners* [2023] IEHC 72 considered the meaning of the phrase "land in the State" in s29(3)(a) TCA 1997 and, more specifically, the meaning of the word "land" for the purposes of s29. This is a very significant judgment that brings an element of clarity to the meaning of "land" and the determination of whether shares derive their value directly or indirectly from Irish land, terms that give rise to challenges in applying various provisions in the tax legislation (e.g. s29, s626B and s980 TCA 1997). The *Cintra* case also contains a summary of the principles of statutory interpretation.

Generally, if a provision is not obscure or ambiguous, the courts will apply a literal interpretation; this simply means that the words and phrases are given their ordinary and natural meaning. It can often be worthwhile to consult a dictionary, corporate law definitions and accounting standards to determine the meaning of words and phrases that have no particular legal meaning. Notwithstanding this, common law stipulates that the words contained in a provision that is directed at a particular trade, business or transaction should be read as having the meaning that they have in that particular context, even if that may differ from their ordinary meaning. Where a provision is obscure or ambiguous or a literal interpretation would lead to an absurdity or fail to reflect the plain intention of the legislature, the court should adopt a purposive approach, if discernible (i.e. seek to determine the purpose of the law before interpreting the words and interpret them in a manner that reflects the intention of the legislator).

When interpreting tax law, it is important to read around the legislation and consult various research platforms including:

- Revenue guidance,
- commentary books,
- journal articles and
- HMRC manuals and toolkits.

The Revenue Commissioners, commentators, tax professionals and HMRC may express their opinions on how a particular provision should be interpreted and applied. As previously noted, it is important to be aware of any views that have been expressed by Revenue in relation to the interpretation and application of a particular provision. However, Revenue's views may be subject to a different interpretation by the courts/TAC. As part of the research, alternative views should be explored and considered. Also, reading around the legislation may lead to the identification of additional potentially relevant case law and TAC determinations.

Given the volume of information available to tax advisers across a multitude of research platforms, possessing the ability to navigate and perform effective searches and mine through pages of results to obtain the most relevant information is a skill in and of itself.

When reading different perspectives on the legislation, the tax adviser may need to get to grips with opposing points of view and, in doing so, keep an open mind. It would also be important to identify what might be regarded as unhelpful judicial decisions and seek to distinguish them where possible by reference to different facts, different legislative provisions, etc.

Having conducted thorough research, the tax adviser may need to consult a subject matter expert. A conversation with a colleague who has extensive knowledge and experience on a particular area of tax law can be invaluable in helping an adviser to understand better the results of their research and how the rules might apply to the client's fact pattern.

After completion of this step, the tax adviser should have:

- A clear understanding of the tax heads and legislative provisions that are applicable to the issue/problem/query.
- A good appreciation of any doubt/complexity that exists with respect to the interpretation of certain provisions.
- Reviewed relevant case law and TAC determinations, including, in particular, any decisions that provide insights into the courts' view or the Appeal Commissioners' previous determinations (where facts similar) position on areas where there are questions of interpretation and how to apply specific rules to the client's fact pattern.
- Examined any stated views of Revenue and commentators on the interpretation of the relevant rules, focusing, in particular, on areas where there is uncertainty around the interpretation and application of the law.
- Considered the application of the rules to the client's particular situation.

Step 4: Identify Potential Options/Solutions and Form a Conclusion

After completion of Step 3, tax advisers will be in a position to formulate their thoughts on the research and reach their own considered view on the tax implications of the problem, issue or query.

As part of the process, the tax adviser may identify more than one potential option, solution or course of action that the client could take. In reaching a conclusion on the best course of action to recommend to the client, the tax adviser must assess the level of risk and the strengths and weaknesses associated with each potential option".

If there is no clear solution to the client's problem/query, the tax adviser should come to a reasonable conclusion based on a logical analysis of the research findings.

In coming to a conclusion on the most appropriate course of action, the tax adviser might consider questions such as:

- Might a particular solution have any negative impact in the future, e.g. on a future sale of the asset(s)?
- Is there an alternative course of action that may give rise to a better outcome for the client?
- In the case of a proposed transaction, might there be a cash-flow advantage to changing the timing of the transaction?
- Does the proposed solution make commercial sense?

Depending on the situation, the tax professional might also consider the following as part of concluding on the best course of action:

- Whether to recommend that the client file an expression of doubt with Revenue. Further information can be found in:
  - Revenue Tax and Duty Manual 41A-03-00 – Expression of Doubt (Full Self-

Assessment) IT/CT/CGT (the expression of doubt must be made in accordance with requisite legislation. This is an area that has been the subject of case law and TAC determinations).

- If it would be appropriate for the client to request a Revenue ruling. Further information is contained in:
  - Revenue Tax and Duty Manual 37-00-00a – The Revenue Technical Service and
  - Revenue Tax and Duty Manual 37-00-40 – Large Corporates Division: Opinions/ Confirmations on Tax/Duty Consequences of a Proposed Course of Action.
- Whether it would be advisable to seek a Counsel opinion on the matter

Step 5: Communicate the Advice to the Client

Once a conclusion is reached, the advice and recommendations should be communicated to the client clearly and succinctly in an appropriate format. The language used and level of detail provided in the communication will depend on the client and their level of tax knowledge, as well as the engagement terms. Although a comprehensive research memo with supporting documents should be retained on the client's file, it is unlikely to be necessary to communicate all of this information to the client (the importance of documenting tax research and conclusions is discussed below). Striking the right balance between brevity, which is an art in itself, and adequately explaining the risks to the client is important.

The advice should be communicated to the client in a manner that allows them to fully understand the potential benefits and risks of any recommendations, as well as any potential alternative course of action/option; ultimately, it will be up to the client to decide what course of action to take. Where appropriate, the communication should set out the next steps to be taken, including decisions that need to be made in order to proceed, compliance obligations and claims that need to be made. If it is within the scope of work, prepare a step plan of the actions required to implement the advice and assign responsibilities and timelines for each step.

Points to note when setting out tax advice in a written format:

- Communicate the advice in a manner that the client can comprehend and implement.
- State the facts and assumptions at the outset.
- Include an executive summary in reports and memos. This should contain:
  - a brief but comprehensive summary of the document,
  - the key issues and
  - recommendations.
- A table format can be useful to set out the conditions attaching to a particular tax relief or exemption and the application of same to the client's fact pattern.
- If possible, use visual aids to make information more digestible, for example:
  - graphs,
  - charts and
  - comparison tables.
- Include appropriate caveats.
- Include technical detail and tax computations in appendices.
- Arrange a follow-up meeting with the client to discuss the advice.

Step 6: Review/Refresh the Advice as Appropriate

Generally, tax advice is provided based on the legislation at a particular point in time, with no obligation on the tax adviser to update same for future developments such as legislative changes. However, there may be times when it is necessary to review and, as appropriate, refresh tax advice. This might arise where, for example, as part of the corporation tax (CT) compliance process for a particular accounting period, a tax adviser researches and advises a client on the tax treatment of an item; if the adviser is engaged to prepare the CT

computations for the following accounting period, the advice previously provided should be reviewed and, if appropriate, updated.

Document Research and Conclusions and Save All Relevant Information on the Client File

The tax adviser's research, conclusions and recommendations should be documented and saved on the client file, typically in the form of a comprehensive tax research record or memo to the client file.

When undertaking tax research and formalising tax advice, contemporaneous documentation of such research/advice is vital for various reasons. It allows for the consolidation of research and, in the event of a Revenue challenge down the line, will be the primary evidence underpinning the conclusions reached and the solution that is recommended to the client.

Where a client wishes to appeal a Revenue assessment (or any other appealable action by Revenue, such as a determination or a decision), the burden of proof rests on the taxpayer. Thus, it is imperative to have contemporaneous documentation to support any tax positions taken. The more contemporaneous the documentation, the more useful it may be as evidence. Furthermore, there is a tight timeframe in which to prepare the following for the TAC:

- notice of appeal, which requires the grounds of appeal to be set out in detail,
- pre-hearing appeal documents and
- hearing bundles.

Thus, to enable the litigation team to efficiently assemble the various time-sensitive deliverables required in connection with the appeal, it is important that the CTA who advised the taxpayer in the first instance is in a position to promptly provide his or her research and any relevant supporting documents.

Artificial Intelligence

Artificial intelligence (AI) chatbots, through machine learning, have the capability to look up tax law and assist with complex questions in mere seconds. Access to the right generative AI (GenAI) tools may allow tax advisers to spend considerably less time conducting research, thereby paving the way to providing higher levels of client service and deeper insights faster than ever before; but – for now, at least – it does not replace the need for the tax adviser's professional judgement and critical thinking skills. Indeed section 2.1.4 of the ITI's Code of Professional Conduct states as follows:

> "If a Member delegates work to a colleague or a more junior member of staff, the Member remains primarily responsible for the work so should exercise sufficient supervision to confirm that the work performed is adequate and that it is undertaken by staff who have been adequately trained to carry out the work involved...".

It is reasonable to assume that the above requirement applies equally to work delegated to AI chatbots. Thus, it is imperative that humans review the output of AI tools and leverage the information to provide holistic, relevant, timely tax advice and appropriate solutions to clients based on their unique business needs and requirements. As Steven Schwartz[6] recently discovered, AI hallucination is one of a number of limitations of AI chatbots. Although it is not the subject of this article, it is worth noting that GenAI also cannot replace the role of a human in connecting with clients, building trust and managing client relationships.

Some of the key sources are:

- The ITI's TaxFind database (subscription required, includes access to annotated legislation, commentary books, TAC determinations and certain Irish, UK and EU cases, Irish Tax Review and international tax articles).

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6 US lawyer who used ChatGPT to prepare a legal brief for a court case that contained fictitious case law references, https://www.reuters.com/legal/new-york-lawyers-sanctioned-using-fake-chatgpt-cases-legal-brief-2023-06-22/.

- Case law:
  - British and Irish Legal Information Institute, BAILLI (free access to more recent Irish and UK case law and selected older cases),
  - the Courts Service of Ireland website,
  - vLex (subscription required),
  - Australian Legal Information Institute (AustLII),
  - Canadian Legal Information Institute (CanLII) and
  - New Zealand Legal Information Institute (NZLII).
- Tax Appeals Commission (TAC) website:
  - Searchable database of all published determinations can be downloaded.
- Revenue website:
  - Tax and Duty Professionals area contains lots of free resources.
- HMRC website:
  - Tax Agent Toolkits and_
  - HMRC Manuals.

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Code of Practice for Revenue Compliance Interventions: Much to Consider for Tax Practitioners

Introduction

Some good advice is set out in the early parts of the Safe Cross Code: "one, look for a safe place; two, don't hurry, stop and wait; three, look all around and listen...". As tax practitioners look to navigate their clients safely through a Revenue intervention, a crucial part of this is understanding the Code of Practice for Revenue Compliance Interventions ("the Code"). At the time of writing, Revenue is currently evaluating the impact of the new Compliance Intervention Framework ("the Framework"), which sits within the Code, as it is now over a year since the Framework was launched on 1 May 2022.

Levels of Intervention and Escalation Between Them

Given that the Code contained a significant departure from established habits, it must be acknowledged that the changes presented a challenge, for all concerned. A key principle underpinning the Code is Revenue's

proportionate response to risk and behaviour, as clearly represented by the levels of intervention and escalation between them. In addition, the range of opportunities to correct mistakes voluntarily is of note. A tax policy of proactive governance aligns itself with these opportunities. The diagram in section 1.1 of the Code sets out the approach of the new Framework, whereby it captures the alignment of intervention with Revenue's core purpose – supporting compliance (which sits over Level 1) and confronting non-compliance (which sits over Levels 2 and 3).

Setting opinion aside, it is clear what those holding the pen had in mind when drafting the revised Code. However, it is another thing trying to ensure that the Code is used as intended, in every instance, across every Division and Branch within Revenue. For context here, consider that the total number of interventions in 2022 was 428,316 (as per Revenue's annual report for 2022). The challenge for Revenue is to limit "off label" use of intervention levels. To date, lengthy, granular Level 1 intervention notifications have issued, challenging the view that they are broad based with no detailed examination of the issues undertaken. In Safe Cross Code speak, if you wait long enough, traffic is likely to pass. It would be important that level labelling follows as intended, especially at Level 1, as it falls under the theme of supporting compliance. In summary, taxpayers should expect that a Level 1 intervention is not used as a tracker device for prescribing Level 2.

The "carrot" of Level 1 is preserving the right to furnish an unprompted qualifying disclosure, avail of reduced tax-geared penalties and remain distant from tax defaulter publication. This protects both pocket and reputation and should feature heavily in any conversation between a tax practitioner and their client when considering any potential tax implications under a Level 1 intervention. The same conversation should also address potential escalation to Level 2 (be it risk review or audit). In practice, the concern for tax practitioners and taxpayers is the automatic escalation to Level 2 at the first hint of perceived risk. This places great importance on a mixture of Revenue's appetite to engage/seek clarification, its risk tolerance level and the management of the process by tax practitioners. Save for the clear and obvious cases, tax practitioners would seek that Revenue preserve the initial choice of intervention, as it reflects the most cost-effective approach for both taxpayer and Revenue in addressing the perceived risk and/or taxpayer behaviour. That said, the importance of preparation for Level 1 interventions must not be underestimated, and neither should the messaging of all responses to Revenue – in particular, on any areas of risk – as this is a key factor in the decision by Revenue on whether to escalate. In short, when it comes to escalation, prevention is better than the cure.

Another practical issue that tax practitioners and taxpayers are facing under the Framework is linked to the preceding paragraph. It is the practice of Revenue's examining a Level 1 output (typically, a self-review or unprompted qualifying disclosure) by way of a Level 2 risk review. The Code is clear in its support for voluntary compliance and affording taxpayers the opportunity to regularise errors that may have arisen. This aligns with a proactive mindset as regards tax governance. Take the example of a taxpayer who undertakes a self-review that unearths certain defaults, which are then included in an unprompted qualifying disclosure. A key motivation for that taxpayer in taking a proactive approach is to avoid the implications of being under a Level 2 intervention and, in doing so, demonstrate good governance. However, where the review undertaken by Revenue on that disclosure is at Level 2, this moves the goal posts, to another pitch. The taxpayer is faced with a confronting non-compliance lens, the very circumstance that they sought to avoid in the first place. This in turn brings additional considerations (addressed below).

As set out above, Level 2 is a game changer. The ability to make an unprompted qualifying disclosure is not afforded under Level 2 – only a prompted qualifying disclosure is available. This

is irrespective of graduating to Level 2 from Level 1 or initial entry at Level 2. This places any disclosure made under Level 2 in a higher tax-geared penalty bracket (where a penalty applies). For context here, in the "careless behaviour with significant consequences" category, the penalty increases from 5% to 20%, if it is a first qualifying disclosure and full cooperation is given by the taxpayer/their agent. This is a significant increase in penalty quantum. It also moves the taxpayer closer to potential tax defaulter publication.

Level 2 Risk Reviews

The reaction that greeted the Code on publication centred on Level 2 risk reviews. A risk review is described as a focused intervention to examine a risk or a small number of risks on a return. Undoubtedly, the reason for the concern was that many non-audit interventions under the previous Code were recast and placed under Level 2 risk review status; hence, a taxpayer can make only a prompted qualifying disclosure (whereas before, an unprompted disclosure could have been made). Taxpayers and tax practitioners need to be fully aware of the connection between the risk matter(s) in focus, any circumstances that could trigger additional tax on the risk matter(s) and what a qualifying disclosure is. The important point here is that it is the last opportunity for a taxpayer to make a prompted qualifying disclosure; and, crucially, a prompted qualifying disclosure is not risk specific – it is tax head specific. This creates a clear mismatch between an exposure on the risk matter(s) that Revenue identified and the actions required by the taxpayer to protect against higher tax-geared penalties and tax defaulter publication (i.e. making a qualifying disclosure for an entire tax head).

For example, under the recent Level 2 risk review that focused on professional subscriptions only, a prudent taxpayer must now consider every single circumstance that could trigger a liability to tax under PAYE/PRSI/USC to make a prompted qualifying disclosure. Let that sink in. The risk identified is very narrow, the choice of intervention level reflects the perceived level of risk identified, and the intervention is likely to be desk based; however, the taxpayer must still undertake a review of the entire tax head to protect the "qualifying" nature of any disclosure being made. To add to this, all defaults identified will be treated as prompted, notwithstanding that the specific focus is only on the risk matter(s) set out by Revenue in its notification. This key point here is that this is very much a difficult area for tax practitioners to advise on. Consideration should be given by tax practitioners to what, specifically, they are being engaged to review and to setting out clearly the tax implications of being under intervention. The importance of having clear engagement terms and an appropriate letter of advice in relation to the implications of being under intervention for all levels of interventions cannot be overstated.

Timing

The Code has also reworked timing provisions. Tax practitioners must be very aware of the various deadlines that are now in place and how these deadlines impact significantly on overall case management. The implications of missing a deadline can be damaging. For example, Level 2 risk reviews are deemed commenced where no response is provided within 28 days. This moves the taxpayer into "no qualifying disclosure" territory, which, of course, increases penalty exposure and removes one of the statutory exclusions from tax defaulter publication (the one that the taxpayer has most control over). So ignoring the intervention is not advisable. Furthermore, the language of the Code sets the bar high for attempting to arrange an alternative commencement date for Level 2 risk reviews – the height of the bar is captured by the terms "exceptional circumstances" and "legitimate and reasonable". The final point on timing is applying a 28-day window to what was set out above in relation to Level 2 risk reviews. To recap, a prudent taxpayer should consider the entire tax head and not just the risk area(s) in focus. Concluding on an entire tax head within 28 days is very often not going to be possible. This is likely to lead to an increase in the number of notices of intention to make

a qualifying disclosure to afford the taxpayer and tax practitioner more time to conduct their review. It would not be surprising if this led in turn to "the chicken or the egg" debate with Revenue – does a taxpayer require a default to have an intention to disclose, or can the taxpayer have an intention without necessarily having identified a default to disclosure, at the 21-day deadline date for arranging an extension?

Revenue's Right to Enquire

In dealing with any Revenue intervention the onus is on the taxpayer to satisfy Revenue of the accuracy of the return/claim made. Revenue intervention notifications are typically supplemented with certain requests for information and supporting documentation, and additional queries can follow while the intervention remains open. The purpose of information requests is, obviously, to facilitate Revenue's review. Revenue's right to enquire is given its statutory footing in s959Z of the Taxes Consolidation Act 1997. Section 959Z is better known for circumstances requiring the interpretation of "4 years" or "reasonable grounds for believing". However, s959Z(1) sets out the circumstances where Revenue may make enquiries, those being to determine whether a person is chargeable to tax; whether they are a chargeable person; the amount of income, profits or gains on which they are chargeable; or their entitlement to reliefs, credits or deductions.

At times, in practice, there can be a tension between what the statute permits and the use of the Code. For example, enquiries into control and governance procedures do not readily align themselves with the wording in s959Z(1). Revenue must operate according to statute. In *Gaffney v The Revenue Commissioners* [2013] IEHC 651 the High Court stated that "the Code of Practice does not prevail over the provisions of the section and it is to the section itself one must look to find the intention of the Oireachtas" in reference to the application of penalties under s1077E. The very presence of a taxpayer's right of appeal outside of the four-year time limit (s959AJ) demonstrates that the authority of Revenue to ask questions is not absolute. Broadly, although tax practitioners looking to test the right to enquire should not conflict with Revenue powers, question marks over cooperation and/or intervention escalation, it is another aspect that requires managing in the intervention lifecycle.

Conclusion

In summary, there are multiple checkpoints for tax practitioners to get through and many twists in the road to navigate in any intervention scenario. The key points for tax practitioners to consider are:

- Provide a letter of advice on the implications of the new Code on receipt of an intervention notification.
- Provide clear terms of engagement defining what tax heads/areas within tax heads and periods are within scope of the review.
- Consider each response to Revenue from the perspective of whether it deals with the query.
- Engage with Revenue to manage the intervention process – on suitability of timings/deadlines, meeting arrangements, submissions of records, considerations around requests for certain records, explanation of all queries, the basis for any particulars contained in a qualifying disclosure, any limitations that may have existed and any assumptions that had to be made in coming to a position.

Safe crossing.

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No CGT on Shares Deriving Value from Licence over Land? Review of the *Cintra* Decision

Introduction

The case of *Cintra Infraestructureas Internacional SLU v The Revenue Commissioners* [2023] IEHC 72 arose as a result of a disputed liability of a non-resident company to pay Irish capital gains tax (CGT) on profits accruing on the disposal of shares in Eurolink Motorway Operations Limited ("Eurolink"), an Irish-tax-resident company. That liability turned on whether the shares in Eurolink derived "their value or the greater part of their value directly or indirectly" from land in the State (s29(1A)(b) of the Taxes Consolidation Act 1997 (TCA 1997)), with the court noting that the case was essentially a question of interpretation.

The starting point for a non-resident company in Ireland is that it is not generally subject to CGT. However, an exception to this is contained in s29(3) TCA 1997, which states:

> *"Subject to any exceptions in the Capital Gains Tax Acts, a person who is neither resident nor ordinarily resident in the*

> *State shall be chargeable to capital gains tax for a year of assessment in respect of chargeable gains accruing to such person in that year on the disposal of –*
>
> *(a) land in the State...".*

Under s980 TCA 1997 the purchaser of certain assets where the disposal is chargeable to CGT is obliged to deduct withholding tax of 15% of the purchase price (where the consideration exceeds €500,000) and pay this to Revenue. However, if a Revenue Inspector is satisfied that no CGT is in fact payable in respect of the disposal, a certificate, known as a CG50 clearance certificate, is issued by the Revenue Inspector with the effect that withholding tax does not have to be deducted by the purchaser from the proceeds of the sale. This matter became contentious when Cintra Infraestructureas Internacional was refused such a CG50.

Background

Cintra is a Spanish-incorporated company that constructs, maintains and manages road infrastructure. Until 2016, it was the majority shareholder in Eurolink.

In 2003 Eurolink entered into a public–private partnership (PPP) contract with the National Roads Authority (now Transport Infrastructure Ireland (TII)) to design, construct, operate, maintain and finance an approximately 37km stretch of motorway between Kilcock and Kinnegad, forming part of the M4/M6 road scheme ("the project"). The PPP allowed for Eurolink to recoup its investment and make a profit over the course of the 30-year contract by entitling it to retain a proportion of the toll charges that it was obliged to collect on behalf of TII.

Before the sale of its shares in Eurolink, Cintra sought a CG50 from Revenue on the basis that no CGT was payable on the disposal. Over the course of correspondence, Revenue refused this request, taking the view that the transaction was subject to CGT on the basis that the shares being sold derived the greater part of their value directly or indirectly from Irish land. Cintra initiated judicial review proceedings to seek a declaration that this was not the case. These proceedings were disposed of on the ground that the letters forming the opinion of Revenue were non-binding and thus it was not a justiciable issue.

In October 2016 Revenue served a notice of assessment to CGT on Cintra for approximately €868,000 on the basis that, Revenue contended, Cintra had made a chargeable gain of *c*. €2.6m on the sale of the shares in Eurolink. In November 2016 Cintra appealed against Revenue's assessment. The Appeal Commissioner found that Cintra did not come within the charge to Irish CGT on the basis that the shares in Eurolink did not derive their value, directly or indirectly, from Irish land and allowed the appeal. Revenue then requested, under s949AQ TCA 1997, that the Appeal Commissioner state the case for the opinion of the High Court on points of law. The judgment of Ms Justice Butler of the High Court was delivered on 14 February 2023.

High Court Decision

The Appeal Commissioner set out six questions of law for the opinion of the High Court. Butler J reformulated these into three distinct issues:

- the correct construction of the word "land" in s29(3)(a) TCA 1997,
- the nature of Eurolink's rights under the PPP contract and
- the meaning of the phrase "directly or indirectly" in s29(1A)(b) TCA 1997.

Meaning of "land"

The court noted the central dispute between the parties related to the correct interpretation of the word "land" in s29(3) TCA 1997. As noted above, this provision states that a non-resident company shall be chargeable to CGT for a year of assessment in respect of chargeable gains accruing in that year on the disposal of "relevant assets" (defined in s29(1A)(a) TCA 1997), being land or minerals in the State or

any rights, interests or other assets in relation to mining or minerals or the searching for minerals, and shares deriving the greater part of their value directly or indirectly from those assets.

Revenue presented a number of arguments to support its interpretation of the word "land".

Lack of proprietorial interest does not negate value's being derived directly or indirectly from land

Revenue first argued that s29(3)(a) should be approached through the prism of s29(1A), in that the requirement that shares in a company derive their value directly or indirectly from land is not, of itself, limited to value derived directly or indirectly from an estate or interest in land. Revenue argued that the use of land in which a company has no proprietorial interest is capable of coming within s29(1A)(b). The court observed that this argument was an "unattractive" and "unlikely" basis for the imposition of a liability to tax.

Interpretation of "land" under TCA 1997 should be informed by definition of "land" in the Interpretation Act 2005

Secondly, Revenue argued that the interpretation of land should be informed by the definition of land in s5 TCA 1997 – "land" includes any interest in land – and by the definition of land in the Interpretation Act 2005 (Part 1 of the Schedule) – "land" includes tenements, hereditaments, houses and buildings, land covered by water and any estate, right or interest in or over land. Revenue characterised the definitions as being open-ended and deliberately framed in a non-prescriptive way. The court instead agreed with the counter-argument put forward by Cintra that the internal dictionary of an Act should not be displaced by the general dictionary of the Interpretation Act. The court approved this analysis, noting at para. 48 of the judgment that it:

> "would lead to significant legal uncertainty if a word or phrase, defined for the purposes of a particular piece of legislation, could be regarded as having an additional or alternate definition applied to it by virtue of the same word or phrase being defined differently in the Interpretation Act. This is so even where the definitions are both framed as ones which 'include' certain matters in the meaning of a core concept which is otherwise undefined."

In consideration of the term, the Court noted that given that revenue statutes generally deal with the taxation of income and property, the sense in which "land" is used in a revenue statute will necessarily be linked to real property or, more indirectly, to the generation of income from property. The limits of this concept, the court noted, are not especially well defined by TCA 1997. These limits range across a spectrum from absolute ownership to more peripheral rights. In determining where on the spectrum the Oireachtas intended to fix "land" for the purposes of CGT, the court considered estates in land, on the one hand, as at the core of the concept and "the greatest expression of a person's potential ownership of land" (para. 50). On the other hand, rights over land that do not amount to an estate or interest necessarily connote a weaker connection to the land to which they relate. Butler J considered where along the spectrum to place a licence. Butler J noted that the terms of an individual licence would need to be examined to determine the extent to which it might create an interest in, rather than merely a right over, land. Where the contract can be assigned only with the consent of the other party, as was the case under the PPP contract, the rights of access necessarily lie at the opposite end of the spectrum to an estate in land. Butler J held that, when viewed in this way, it is evident that the intention of the Oireachtas was to "[terminate] the scope of the concept of land at a point on the spectrum where it includes interests in but does not include rights in or over the land" (para. 53).

The definition of "land" should include "licence"

The third argument advanced by Revenue was based on the definition of "lease" in s5 TCA 1997, which expressly includes "licences".

Revenue argued that as land indisputably includes leasehold estates and as the definition of lease includes a licence, by extension the definition of "land" must include a licence by reference to the same internal dictionary. Butler J concluded that although the simplicity of Revenue's argument was attractive, if it was intended that the definition of land was to be extended to include licences, that would require it to be done expressly in the definition itself, or by express cross-reference to the extended definition of lease. The court was satisfied that the definition of land should not be altered.

In conclusion, Butler J found the Appeal Commissioner had been correct in finding that in construing "land" for the purposes of s29(3)(a) the meaning should be confined to that of the word in s5 TCA 1997 and in finding that "land" for that purpose means a freehold or leasehold estate or one of the lesser interests in land formally recognised by the common law and now codified in s11(4) of the Land and Conveyancing Law Reform Act 2009.

Nature of Eurolink's rights under the PPP contract

The second issue to be determined was whether the Appeal Commissioner was correct in deciding that Eurolink's rights under the PPP contract are a limited and non-exclusive contractual licence to use the lands and that the PPP contract did not confer on or grant to Eurolink an estate in land and was not an interest in land. The Court disposed of the exclusivity aspect of the contract, noting that the PPP contract expressly sets out the rights of other parties, including the general public, to which the rights conferred on Eurolink are subject.

With respect to the limited nature of the rights, the court noted although the value of the contract was such that the rights conferred thereunder would not in normal terms be regarded as "limited", they are indeed limited in two ways. First, the rights are limited to the duration of the contract. Secondly, they are limited in that they subsist for the purposes of carrying out the project and for no other purpose. In addition, the rights of access to the land granted by the PPP contract were not freely assignable by Eurolink. For the same reasons, the Court was satisfied that the PPP contract did not confer on or grant to Eurolink an estate in land and was not an interest in land.

Meaning of the phrase "directly or indirectly"

The final issue to be considered was whether the Appeal Commissioner's finding under s29(1A) TCA 1997 that the value of the shares in Eurolink derived from Eurolink's rights under the PPP contract and not directly or indirectly from land in the State.

Butler J noted that it was undoubtedly correct for the Appeal Commissioner to conclude that the value of Eurolink's shares was derived from its interest in the PPP contract. However, Butler J further noted (para. 71) that it did not necessarily follow that the value was not also at least indirectly attributable to "land in the State". The court noted that Revenue made the somewhat discrete argument to the effect that the payment of tolls by motorists is linked to the use by motorists of the motorway and, thus, the use of land. This argument brought into focus the correct interpretation of the phrase "directly or indirectly" in s29(1A). The court found a number of difficulties with this. Such an interpretation would necessitate the addition of the words "the use of" to s29(1A)(b) (para. 73). As well as this, the use that Revenue identified was that of a third party, not the party selling the shares.

Although the phrase "directly or indirectly" meant that the connection between the company's shares and the land did not have to be immediate, there was a point at which the connection became too remote. The court considered that almost all businesses in the State "use" land in the sense proposed by Revenue, by being physically based in a premises on land or passing over land, including over or through infrastructure on land. In Butler J's view, the reading of "use of" into s29(1A) rendered the section completely

open-ended. There must be some greater proximity between the land in question and the company whose shares are being valued than the ability to generate an income from the use of that land by members of the public through a contractual licence. The value of Eurolink's shares was found to derive from the provision of toll services and the payment to which it was entitled for providing those services.

In light of the court's analysis of the issues posed by the Appeal Commissioner, Butler J found that the Commissioner's assessment had been correct and dismissed the appeal.

Commentary

This case has highlighted the complexity of s29 TCA 1997 and will undoubtedly pose challenges for certain non-resident sellers of shares when assessing whether they are liable to CGT on a disposal of shares in an Irish-tax-resident company.

Butler J, after an evaluation of the terms of the licence held by Eurolink, found that it did not amount to an interest in land for the purposes of s29. However, the Court was clear that such an evaluation would be necessary on a case-by-case basis. As a result, Although the *Cintra* case gives some welcome clarity on the meaning of land for CGT purposes and how one assesses whether shares in an Irish company could be regarded as directly or indirectly deriving the greater part of their value from Irish land, sellers may need to conduct a deeper analysis of the terms of licences and other agreements held by a company when assessing whether the company does in fact derive the greater part of its value directly or indirectly from Irish land or buildings. Going even further, Butler J noted that it was not necessary to conclude definitively that there must in all circumstances be a proprietary interest in land before a company can derive its value indirectly from land. As Butler J did not opine on this the absence of a judgment on the point still leaves a degree of uncertainty.

Although Butler J made an *obiter* comment to the effect that the word "indirectly" does not extend the statutory definition of land for the purposes of s29(1A), the court did not delineate fully the limits of its meaning.

On the other side, Cintra argued that the phrase "directly or indirectly" was included by the Oireachtas primarily to ensure that CGT could not be avoided by a company's holding land through a subsidiary company. Butler J, while accepting this, did not rule out the possibility of the term "indirect" extending to other circumstances, noting at para. 76 that:

> "this does not mean that the possibility of share value deriving 'indirectly' from land in the State is limited to circumstances where there is a subsidiary company in being. That said, in my view there must be some greater proximity between the land in question and the company whose shares are being valued than the ability to generate an income from the use of that land by members of the public through a contractual licence."

For this reason, the phrase "indirectly" may yet prove to be the subject matter of future case law, as the court left open to some extent the degree of connection required between the land in question and the company whose shares are being valued.

The judgment in *Cintra* provides some helpful clarity on how one assesses whether shares derive the greater part of their value directly or indirectly from Irish land or buildings. However it does not conclude definitively that when assessing the phrase "indirectly" there must in all circumstances be a proprietary interest in land before a company can derive the greater part of its value indirectly from land.

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Disclaimers: Recent Case Law Issues

Introduction

The law is not so absurd as to force a man to take an estate against his will (*Townson v Tickell* [1819] 3 B. & Ald. 31) is a well-known judicial pronouncement from the 19th century. This principle underpins the legal operation of disclaimers, which, along with deeds of family arrangements, are regularly encountered by advisers dealing with testate and intestate estates and their beneficiaries.

Although the taxation consequences of disclaimers have a statutory footing, the legal consequences are largely rooted in historical English case law and academic commentary. The recent decision of Twomey J in *Kieran Egan and Michael Egan Junior v Helen Egan and Alan Egan* [2023] IEHC 259 is therefore to be welcomed in that, for the first time in this jurisdiction, the High Court has considered the legal effect of a disclaimer in favour of a third party.[1]

1 There is a dearth of Irish case law on disclaimers generally. In *MIBI v Stanbridge & Ors* [2008] IEHC 389 Laffoy J does consider whether a disclaiming beneficiary had a benefit or right before the moment of disclaimer in the context of a claim by MIBI against monies in an estate to which certain beneficiaries were entitled before disclaiming to put them out of reach of creditors.

Facts of the Egan Case

Under the terms of a will dated 25 September 1975 Thomas Egan bequeathed a 36-acre family farm in Shannonbridge, Co. Offaly ("the farm"), to his nephew, Michael Egan Senior, for his life, with remainder to Michael Egan Senior's two oldest sons, Michael Egan Junior and Kieran Egan.

Michael Egan Senior was appointed sole executor and trustee of Thomas Egan's estate.

Thomas Egan died on 13 December 1984.

Under the terms of a will dated 4 February 2014 Michael Egan Senior bequeathed the farm to his youngest son, Alan Egan, absolutely. Alan Egan and Michael Egan Senior's wife, Helen Egan, were appointed executors of Michael Egan Senior's estate.

Michael Egan Senior died on 22 January 2015.

Notwithstanding that Michael Egan Senior only had a life interest in the farm, Alan Egan, as executor of his late father's estate, assented to the registration of the farm in his own name as absolute freehold owner on foot of the bequest contained in his father's will.

Alan Egan's justification for accepting a bequest of the full freehold interest in the farm from his father's estate was the existence of a one-sentence document, which the court in its judgment described as "the release", which Michael Egan Junior and Kieran Egan had signed, it was claimed, back in 1990.

The release signed by Michael Egan Junior, which is reproduced here in full, read as follows:

"Thomas Egan Deceased

I, MICHAEL EGAN of Currnavarna, Banagher, County Offaly hereby **release my claim to a remainder share in the residue of the estate of the above deceased, in favour** of my father Michael Egan.

Dated the day of **1990**

Signed......MCIHAEL (sic) EGAN [emphasis added by Twomey J]."

The same form of release was also signed by Kieran Egan.

Michael Egan Junior and Kieran Egan brought proceedings shortly after their father's death and the registration of their brother as owner of the farm.

They claimed that they became aware of the terms of their uncle's will, in which they were left the remainder interest in the farm, only shortly after their father's death in 2015, which was more than 30 years after their uncle's death. They also denied that they signed the release or, if they had, argued that the release was invalid and of no legal effect.

Much of Twomey J's judgment focussed on the curious nature of the release. He scrutinised its form and content, and his comments in this regard should make salutary reading for advisers when it comes to ensuring that certain basic formalities are always complied with when drafting legal documents.

Some of the curious features of the release that Twomey J highlighted in his judgment were:

- No recitals were included in such a significant document.
- A one-sentence document only was being used to achieve a significant release and a transfer.
- The document did not include the language that one would expect in such a document.
- The document included no direct reference to the transfer of the farm, which was the purpose of the release.
- The release was not dated or witnessed.
- The release was not stated to be a deed or stamped or sealed even though dealing with land.

After considering these issues Twomey J moved on in his judgment to deal with the substantive legal effect of the release on the basis that the determining factor in the case was the substance of what the release was purporting to achieve as a matter of law.

Before we consider this part of the decision it is worthwhile reviewing the tax effect of a disclaimer, which is what the court concluded that the release was.

Tax Effect of a Disclaimer

Disclaimers, and deeds of family arrangement, are the main post-death planning tools in an adviser's armoury when it comes to dealing with testate or intestate estates. The tax issues associated with disclaimers have a statutory footing and, it would seem fair to say, are generally well known and understood. Section 12 CATCA 2003, which deals with disclaimers, confirms two important things.

- If a benefit under a will or an intestacy is disclaimed, any liability to tax in respect of such benefit ceases as if the benefit had not existed.
- The disclaimer is itself not a disposition for gift or inheritance tax purposes.

The provision serves two purposes. It absolves the person disclaiming from any liability to gift tax or inheritance tax while making clear that the act of disclaiming, in and of itself, is not a gift or inheritance.

Section 12 goes on to clarify one more scenario. Sub-section (3) makes an exception to the general rule that no tax arises for the original beneficiary where they receive consideration for the disclaimer. In such a case the consideration received is taxable as a gift or an inheritance received by the original beneficiary and is treated as having been received from the disponer who provided the property being disclaimed.

In such a case the second, or subsequent, beneficiary who ends up receiving the benefit as a result of the original beneficiary's act of disclaiming is also liable to tax thereon but as if they had received the benefit from the original disponer. Two instances of tax therefore arise, with each beneficiary deemed to have received the benefit from the original disponer and not from anyone else.

What s12 does not expressly address is the tax treatment that should apply where a person disclaims a benefit in favour of a third party (whether for consideration or not). Up until this point, before the *Egan* decision, first principles have been applied to treat such an act as, in effect, not being a disclaimer, so that for CAT purposes two benefits arise, first on the gift or inheritance received by the original beneficiary, who is the person disclaiming (from the original disponer), and then on the onward gift from the original beneficiary in favour of the third party (from the person disclaiming, not the original disponer). Section 12 does not apply to determine the tax treatment of what is occurring in this scenario as, in practice, what the beneficiary is doing is not recognised as a disclaimer regardless of how they describe it.

The Revenue Tax and Duty Manual "Disclaimers of Benefits"[2] gives the following example to illustrate the above scenario:

> "Paula inherits a house under her aunt Nora's will but disclaims the inheritance of the house in favour of her brother Tom. As it is not possible to disclaim a benefit in favour of somebody else, this is an inheritance taken by Paula from Nora and then a separate gift of the house by Paula to Tom. Both the inheritance and the later gift are taxable."

Any tax on the inheritance and the subsequent gift is not relieved by s12 as in this scenario it is generally understood that whatever Paula may be doing, it is not disclaiming in the legal sense, based on general principles.

Of note is that the tax consequences that we apply where one person disclaims in favour of another are predicated on our understanding of what is, and what is not, a disclaimer under general principles, without any legal precedent to rely on. It is therefore welcome that this issue has now been considered by Twomey J in the *Egan* case, and it is helpful to look in closer detail at what he said on the legal effect of a disclaimer in favour of a third party.

2 See https://www.revenue.ie/en/tax-professionals/tdm/capital-acquisitions-tax/cat-part06.pdf.

Legal Effect of the Disclaimer in the Egan case

Twomey J considered the substantive effect of the release in his judgment insofar as it affected Michael Egan Junior, as Kieran Egan ceased to have an involvement in the proceedings in 2019. He pointed out that Michael Egan Junior was a beneficiary of his great uncle's will and thus entitled to a 50% share of the farm, subject to his father's life interest.

However, rather than his becoming registered owner of the farm (subject to a life interest) and dealing with it as he chose, the court determined that the only conclusion that could be drawn from the release that was entered into by Michael Egan Junior and his brother was that it purported to be a disclaimer by them of their 50% share in the farm in favour of their father.

Having concluded that the release was a disclaimer, Twomey J went on to consider what Brian E. Spierin and Dr Albert J. Keating each has to say on the subject in their respective textbooks. This is in circumstances where Twomey J states in his judgment that no Irish case law was opened to the court on the issue.

Twomey J referred to Brian E. Spierin's *Succession Act 1965 and Related Legislation: A Commentary* (London: Bloomsbury, 5th ed., 2017) and his statement at para. 512 that:

> "A disclaimer will give rise to an effect by operation of law. In other words certain unavoidable consequences flow from disclaimer, the consequences cannot be dictated...It is not possible to disclaim 'in favour' of someone else as is sometimes thought."

While noting that the above statement was made in relation to disclaimers on intestacy, Twomey J found that the "unavoidable consequences" of a disclaimer are equally applicable to a disclaimer of a testate bequest.

When considering the unavoidable consequences further, Twomey J turned to Dr Albert J. Keating's *Succession Law in Ireland* (Dublin: Clarus, 2015), which states at para. 10.44 that:

> "Where a beneficiary of a will disclaims a gift it automatically falls into the residue (and so is not available for the beneficiary to re-direct to someone else)."

Based on these unavoidable consequences, the court found that it was not open to Michael Egan Junior to disclaim his bequest and at the same time decide that his bequest should go instead to his father Michael Egan Senior. Instead, the bequest reverted to the residue of the estate. On the basis of first principles, the court was satisfied that it is not possible to disclaim in favour of someone else.

Going further, Twomey J stated in his judgment that any decision other than voiding the release would "in effect, **re-write a testator's will, after his death** [emphasis added]". This is because if a disclaimer such as the one in the case were to be valid, Twomey J was of the view that this is exactly what would happen, because it would have the effect of thwarting the intention of a testator to leave an asset to a beneficiary by permitting that beneficiary, after the testator's death, to decide that the testator should instead have bequeathed that very same asset to another person.

Twomey J in his judgment stated:

> "If what occurred in this case were lawful, it would mean that a parent could get a child to sign a one sentence document and thereby have a bequest intended for that child, from say a grandparent or an uncle/aunt, re-directed to the parent and thereby have the will, in effect, changed. This cannot be correct.
>
> For all these reasons, it seems clear to this Court that a beneficiary of an asset

> under a will cannot disclaim that asset in favour of someone else. For this reason, the Release in this case is not valid as a matter of law and so is void *ab initio*."

The fundamental issue that Twomey J seems to have with the release in the case is that it changes the will. An after-death variation of this kind is not acceptable to the court.

The fact that a disclaimer (not in favour of anyone) also changes a will is not considered by Twomey J. Although a beneficiary in such a case does not direct the benefit to a particular person, they will have full knowledge of who will benefit as a result of their action. In practice, beneficiaries do not enter into disclaimers unless they understand the legal consequences of their actions and are satisfied regarding the identity of the person who, by operation of law, will ultimately benefit by their act of disclaiming, which may be tantamount to the same result that Twomey J was looking to nullify in the *Egan* case.

The reluctance of the court in the *Egan* case to countenance a "re-writing of a deceased's will after his death" appears to be consistent with the thinking of Stack J in another recent High Court decision (*In the Estate of William John Murphy* [2023] IEHC 383), in which she was asked to consider conflicting clauses in a template will that had been downloaded from the internet. In that case Stack J determined that she could come to a decision on the issue of the correct interpretation of the conflicting clauses in the template will "**without doing any violence to the language of the Will** [emphasis added]".[3]

Conclusion

The decision in the *Egan* case is helpful in that it confirms the up-to-now generally understood legal principle that a disclaimer in favour of a third party is not valid owing to the unavoidable consequences that flow from a disclaimer. Advisers looking to implement post-death variations need to take care with the language and form of the documentation that they use.

At the same time, it is hoped that the *Egan* case does not have a chilling effect when it comes to implementing post-death variations. Although the primacy of the testator's will goes without saying, this should not preclude beneficiaries from taking actions after a deceased's death where the legal and taxation effects of same are clear to all and all are fully and independently advised.

UK authorities on this issue are helpful in that they make clear that any post-death variations are not a writing-back of a testator's will. Such mis categorisations seem to stem from the tax treatment of such variations in the UK, which does not change the underlying legal position. In the UK a variation does not and cannot operate to alter the rules applying to the devolution of assets when an individual dies; to be able to make a variation, the original beneficiary must have some interest in the estate initially, and that interest can have come to them only by the operation of those rules, whether they derive from the terms of the will or rules governing intestacy, nomination or survivorship.[4]

After the decision in the *Egan* case it may now be time to update the 19th-century legal maxim that applies to disclaimers to the present day, as follows:

> *"The law is not so absurd as to force a person to take an estate against their will, nor is the law so absurd as to allow that same person to decide who shall take the estate in their place."*

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3 This decision is also of note in that Stack J seems to confirm that "no contest" type clauses, if included in an Irish will, would likely be void as contrary to public policy.

4 See *Wells and Another (Personal representatives of Mrs Glowacki deceased) v HMRC* [2007] Sp C 631.

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The "Principal Purpose Test" Tested in Court: *Burlington Loan Management*

Background

On 22 August 2022 the First-tier Tribunal in the United Kingdom published a judgment in relation to the principal purpose test (PPT), as it applies to the exemption for interest arising from debt claims provided for in Article 12(1) of the double taxation treaty between the UK and Ireland. This judgment is important for several reasons:

- It marks the first occasion on which the PPT was, itself, "tested" in court.
- The court established that the PPT can apply to entities and individuals who are not resident in a contracting state.
- The court established that "artificial steps or arrangements" are not required for a transaction to be considered abusive under the PPT.
- The court found that treaty abuse requires specific intent, thus establishing a practical barrier to establishing whether the PPT applies.

The case related to a debt claim on the administration of Lehman Brothers International (Europe) (LBIE), a company registered in the UK. The original creditor, SAAD Investments Company Limited ("SICL"), was incorporated and tax resident in the Cayman Islands and had been in liquidation since 2009. The principal amount on the loan was fully repaid in 2016, but the interest owing remained outstanding. In December 2017 the LBIE administrators issued a progress report to their creditors indicating that interest owing on proved debt claims would likely be paid in full. The SICL liquidators, aware that they would suffer an irrecoverable withholding tax at the rate of 20% on the interest owing, sought to sell the debt claim to a third party. The debt claim was ultimately sold to Burlington Loan Management DAC (BLM), an Irish-tax-resident s110 TCA 1997 company, in a back-to-back transaction via a broker.

In July 2018 LBIE repaid all of the interest on the debt claim but withheld 20% withholding tax. An application for a refund by BLM under Article 12(1) of the UK–Ireland treaty was denied "in accordance with Article 12(5)…because [HMRC considers] that the main purpose, or one of the main purposes, of the assignment of this debt claim by SICL to BLM was to take advantage of Article 12 of the Treaty". SICL had sold the debt claim to the broker for 92% of its face value, and the broker had on-sold it to BLM for 93% on the same day. Given the central role that withholding tax played in the economics of the deal, HMRC claimed that it fell foul of the principal purpose test in the UK–Ireland treaty.

Points of Law

BLM appealed this decision to the First-tier Tribunal (FTT), the sole issue of disagreement between the parties being whether the "main purpose" or "one of the main purposes" of "any person concerned" with the assignment of the debt claim was to "take advantage" of Article 12. Helpfully for the taxpayer, the FTT, agreeing with the *obiter dicta* of the Upper Tribunal in *HMRC v BlackRock* [2022] UKUT 199 (TCC), found that the inevitable and inextricable consequences of an action should not be regarded as the sole benchmark for determining the subjective purposes. Rather, the consequences should be treated as part of an overall factual matrix to be considered when determining the subjective purpose.

The first argument advanced by BLM was that only its purposes were relevant in determining whether the PPT applied to the transaction. This argument was based on the fact that SICL was not resident in a contracting state, and therefore its purposes were not relevant. Given that BLM frequently acquired debt claims as part of its portfolio of qualifying assets and none of its previous UK withholding tax refund claims had been disputed by HMRC, a favourable decision on this point of law would have been to its significant benefit. However, the court agreed with HMRC that the PPT applied to every party to a relevant transaction, reasoning that one of the PPT's raisons d'être was to prevent persons who were not resident in a contracting state taking advantage of the provisions of the treaty.

BLM further argued that the words "take advantage" necessarily required taking artificial steps or making artificial arrangements to obtain a treaty benefit and that both artifice and abuse were needed for this element of Article 12(5) to be met. Although the court agreed that the phrase "take advantage" has a negative connotation, it rejected this argument, ruling that the test requires that the main purpose of entering into an arrangement is to secure a more favourable tax position under a treaty. However, the FTT also ruled in favour of BLM that the intention to take advantage of the treaty must be specific. Therefore, there must be an awareness on the part of the taxpayer that the tax advantage derives from the treaty. A general understanding that a tax advantage exists would therefore not be sufficient on its own to trigger the provisions of Article 12(5).

The FTT's Analysis

In its analysis the FTT first addressed the question of whether BLM's main purpose was to take advantage of Article 12(1). It found that although BLM had a general understanding that UK withholding tax would not be a permanent cost due to its tax residence, its sole purpose was to profit from the debt claim. The availability of relief under Article 12(1) of the treaty was

merely part of the “scenery” against which BLM made its offer to buy the debt claim from SICL.

Given the above, it was perhaps unsurprising that the FTT’s answer to the question of whether BLM’s main purpose was to enable SICL to take advantage of the treaty was also in the negative. Again, the FTT found that BLM’s main purpose was to make a profit on the debt claim. Although BLM was aware of the tax position of SICL, this was relevant only insofar as it helped to establish the value of the debt claim to SICL and hence the price that it would be willing to accept.

The more finely balanced question for the FTT was whether SICL intended to take advantage of the treaty. Here the court acknowledged that the commercials of the deal were strongly driven by the withholding tax cost that SICL would suffer if it did not assign the debt claim. However, it accepted that the price agreed reflected the fact that most potential purchasers in the market for the debt claim did not expect to suffer withholding tax as a permanent cost. Furthermore, SICL did not know the identity of the end purchaser at the time that the final price was agreed. Therefore SICL could not have known that the reason why the end-purchaser was prepared to offer the price that it had offered was its ability to benefit from Article 12(1) of the treaty. The tax position of the end-purchase was relevant only insofar as it enabled SICL to obtain the best possible price for the debt claim. From SICL’s point of view, the end-purchaser might have been:

- a UK resident who was exempt from UK tax altogether or who was able to receive the interest without UK withholding tax and who had significant losses against which to offset the interest or
- a person resident in a jurisdiction other than Ireland with which the UK had concluded a treaty conferring on residents in the relevant jurisdiction a full exemption from UK withholding tax.

Although SICL learned of the identity of the end-purchaser before the deal was finalised, the FTT accepted that it sought these details for corporate governance reasons and only after the price was agreed; therefore this knowledge did not affect the commercial terms of the deal. The FTT therefore concluded that SICL could not have formed the intention of taking advantage of Article 12(1) of the treaty. Its only purpose was to obtain a price for the debt claim that better reflected its market value. Once the deal was finalised, SICL had no interest in whether or not BLM was successful in obtaining the withholding tax refund.

Finally, the FTT considered the question of whether SICL’s main purpose was to enable BLM to take advantage of Article 12(1) of the treaty. Unsurprisingly, given the foregoing, the FTT decided this question also in the negative.

Conclusion

The FTT’s decision in this case is significant for several reasons. Notably, the FTT looked past the email evidence presented that the debt claim was disposed of for “withholding tax reasons” and focused on the fact that the parties were transacting at arm’s length. It also placed a great deal of weight on the fact that BLM was long established in Ireland and had a history of acquiring similar debt claims (including other LBIE debt claims) for commercial reasons. Most significantly, the FTT concluded that a party must have awareness of the treaty benefit arising in order for the PPT to apply. It would appear, then, that as long as both parties transact at arm’s length through a broker and the price agreed reflects market conditions, the PPT should not apply. Interestingly, had there been a deferred element to the purchase price, that may have swayed the FTT the other way. What the case shows is that phrases such as principal purpose are not easy to interpret, and using a teleological method to try to make sense of the phrase did not gain much traction. HMRC have appealed the FTT’s decision to to the Upper Tribunal, and we will be awaiting the outcome with interest. Given that the Burlington succeeded on the facts, while HMRC won most of the points of law, we expect that the Upper Tribunal will uphold the FTT’s decision. However, all we can say with certainty is that this is not the last we will hear of this case.

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Tax Appeals: Facts, Proven Facts and Expert Evidence

Introduction

The Tax Appeals Commission (TAC) had a busy 2022, resolving more than 2,600 tax disputes and publishing 166 determinations. What is particularly interesting from its annual report is that more than 90% of cases are settled before the hearing.

Excluding the tax repayment type of appeals whereby a claim must be made within four years, most cases before the TAC deal with issues of evidence. In 80% of cases there was a failure to provide evidence, or provision of the wrong type of evidence, resulting in the inability of the Appeal Commissioner to overturn the tax assessment and leading to a finalisation of the taxes due.

Failure to provide the necessary documentation and explanations to Revenue and a clear explanation of the technical legal basis to be provided by the professional adviser are the primary reasons in my experience for a dispute to end up before the TAC.

In some instances, the matter will proceed to hearing before the TAC where the dispute involves a nuanced application of law or the interpretation of complex provisions that requires some precedential value. In those type

of situations it is inevitable that the matter will end up in the TAC or the courts.

This article considers how practitioners should prepare for hearings, in particular, the fundamental requirement to ensure that all evidence is made available to an Appeal Commissioner, thereby giving clients every opportunity to have tax assessments reduced or overturned.

Evidence

The role of a decision maker involves the interpretation and understanding of the legislation and relevant case law and applying the law to the presented facts. As considered above, in my experience most of the cases before the TAC involve disagreements over facts rather than the interpretation of the law.

Matters in dispute

It is essential for practitioners to identify the issues, the goal to be achieved and the steps required to achieve that goal. Before any litigation, a barrister will normally prepare the advice on proofs, the roadmap that identifies all of the facts to be proven and the way that they must be proven with reference to the rules of evidence. That process involves establishing all of the relevant facts, proving those facts either by direct evidence from the person concerned or, indeed, through documents that are not in contention or disputed. Where those documents are disputed, it will be necessary to give oral evidence supporting the veracity and integrity of the documents. Therefore, the advice on proofs is a very useful and productive exercise and should be adopted by everyone attempting to resolve a tax dispute.

Hearsay

Care is needed in the case of hearsay documents. Hearsay comprises unverified documents, evidence or unofficial information gained or acquired from another and not part of one's direct knowledge. Usually in a judicial context, hearsay evidence is an out-of-court statement that is being offered for the truth of what was asserted. To overcome that difficulty, any third-party document needs to be verified by the originator of that document. In other words, a witness should be available to give evidence that he or she produced or created the document, thereby standing over its authenticity and legitimacy. A witness's giving evidence reduces Revenue's opportunity to undermine the credibility or legitimacy of such evidence unless there is proven evidence to the contrary.

Identification of relevant facts

On many occasions there will be facts that undermine a taxpayer's position, and it is best to address them head on and thereafter attempt to ameliorate their effect. Doing so enhances credibility and the appearance of honesty and integrity and reduces the potency of the unfavourable evidence.

Time Limits

Revenue may raise an assessment within four years after the filing of a complete and accurate tax return. Where Revenue asserts that a tax return was prepared fraudulently or negligently, there is no time restriction preventing the making of enquiries. It is therefore possible that the request for documentary evidence and explanations could be many years after the relevant events transpired. Any uncertainty or gaps in evidence or facts can undermine a taxpayer's credibility and diminish the legitimacy of the evidence. Therefore, proper documentation and contemporaneous file notes should record all relevant transactions, events, discussions and agreements.

Expert Evidence

As recently observed by Noonan J in *Duffy v McGee T/A McGee Insulation and GMS Insulations Limited* [2022] IECA 254 at paragraph 78:

"Expert witnesses enjoy a special position in the law of evidence. Unlike non-experts, experts are not confined to giving purely factual evidence but may give opinion evidence where certain criteria are

> satisfied. The proliferation of the expert witness is an ever-present feature of almost all spheres of litigation."

The court confirmed that the evidence of the expert can be "decisive to the outcome" and that "[s]ome of the most high-profile miscarriage of justice cases have arisen from serious failures on the part of experts". Furthermore, the role of the expert is to assist the court, not to decide the case, and there is no obligation on a court to accept the evidence of any particular expert.

The court cautioned against the use of an expert as a "hired gun", as this may lead to a miscarriage of justice whereby:

> "there is nothing to prevent litigants with deep pockets consulting any number of experts until one is found who will support the case being made. As matters stand, there is no obligation to disclose such information to an opponent."

In a corresponding judgment, Collins J discussed the responsibilities of those instructing experts, noting that the evidence should be relevant and likely to assist the court. Also, experts should have the necessary expertise and confine their evidence to issues properly within their area of expertise. Furthermore, a failure by experts to comply with their duties could result in the exclusion of their evidence and even an adverse order for costs. There is also a risk of reputational damage not only for the expert but also for the instructing practitioner.

Share and property valuations, transfer pricing disputes and specialised areas of law such as aviation and foreign law usually require expert evidence, as Appeal Commissioners and judges would have limited, if any, experience in such matters. As observed by Noonan J in the Court of Appeal, expert evidence can be "decisive to the outcome" of a hearing, and the selection of the appropriate expert is crucial, as in many cases it is the difference between winning and losing an appeal.

Hearings

As confirmed in *Bookfinders v Revenue Commissioners* [2020] IESC 60, any doubt regarding the imposition of a tax should be resolved in favour of the taxpayer, O'Donnell J (as he was then) stating at paragraph 54:

> "The general principles of statutory interpretation are tools used to achieve a clear understanding of a statutory provision. It is only if, after that process has been concluded, a court is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text construed given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language."

However, it is the relieving provisions and factual circumstances that cause many of the difficulties for tax authorities, taxpayers, tribunals and the courts.

According to the supporting narrative on s81 TCA 1997 in David Fennell's *Direct Tax Acts: Finance Act 2022* (Dublin: Irish Tax Institute, 2023), the issue of determining the entitlement to deduct a business expense is consistently before the courts and tax tribunals. That section governs the deductions permitted when computing income within the charge to tax under Cases I and II of Schedule D and states:

> *"in computing the amount of the profits or gains to be charged…no sum shall be deducted in respect of any disbursement or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade or profession".*

The entitlement to a deduction for the expense of business is framed as a double negative. With a positive reformulation, a deduction is permitted if the expense is for the purpose of enabling a person to carry on and earn profits in the trade or profession.

To prove that an expense was incurred wholly and exclusively for the purpose of a trade, it must be established that the expense was incurred for a genuine business purpose related to the trade and did not have any other purpose or benefit. Supporting invoices, receipts, contracts and other documentation are required to prove the direct link between the expense and the operation of the trade. Personal expenses should be clearly identified and separated from the business expenses. Finally, the taxpayer should give direct evidence to support the purpose of the expenditure, to authenticate and legitimise the documents and to confirm the rationale for incurring the business expense.

Entitlement to a relief depends on the specific relief claimed. Understanding eligibility requires a consideration of income level, occupation, industry, investment type and other qualifying conditions. As with all types of proof, documentation must be maintained and available to produce at the hearing. The obligation to give direct witness evidence is also crucial.

Tax incentives and exemptions are enacted for specific purposes, and a common approach taken by some leading practitioners is to outline the purpose of the relief as discerned from the words used in the statute and illustrate, based on the evidence adduced, how their client organised their spending patterns and behaviours to secure the relief while demonstrating the absence of an intention to misuse or abuse the relief.

Proof of occupation of a principal private residence where relief from capital gains tax is claimed on the disposal of the property requires evidence of occupation such as correspondence, bills, photographs and third-party witnesses such as neighbours who can independently verify the occupation of the property. Similarly, in a claim for non-residency in the State, there is a requirement to demonstrate the location of the individuals' foreign residence, proof that the accommodation was available for their use, reasons for the non-residency, utility bills, and bank and credit card statements reflecting consistent transactions in the country of residence, supported by oral evidence.

It is not uncommon for Revenue to question the source of funds used in the acquisition of an asset. In such a situation, the proofs outlined below should be provided.

Asset acquisition

- Filed tax returns reflecting income sufficiency.
- Evidence of excess income over reasonable living expenditure.
- Previous years' bank account statements reflecting an accumulation of savings.
- Loan agreements.
- Evidence of receipt of insurance compensation.

Receipt of a gift

- Documents showing the transfer of the acquired asset.
- Circumstances of the gift and reasons for it – usually natural love and affection.
- Disponer's CGT return and evidence of tax paid, if any.
- Gift tax return, if any.
- Documentation proving that the donor was entitled to and had capacity to dispose of the asset.

Receipt of an inheritance

- Testator's schedule of assets and grant of probate.
- Evidence of the relationship between the beneficiary and the testator.
- Death certificate.
- Documentation confirming the beneficiary's receipt of the inherited funds.
- Evidence of payment of inheritance tax, if any.
- Evidence tracing funds from the estate of the testator to the beneficiary.

The evidential requirements to support the accumulation of funds derived from property disposals are as outlined below.

Sale of property

- Contract for sale.
- Supporting documentation such as communications with solicitors.
- Evidence of funds transfer.
- CG50 certificate.
- Income tax returns confirming the source of funds that financed the disposed asset.

Purchase of stock

- Purchase invoices from a recognised trader.
- Confirmation that payment was made to that trader.

Investment financed by a loan

- Loan agreement.
- Documents showing the transfer of funds from the lender.
- The borrower's business/personal records, bank statements, income tax returns.

All such documentary evidence should be confirmed by the direct evidence of the taxpayers or witnesses appearing on their behalf at the actual hearing.

Conclusion

The general principle of "he who asserts must prove" is the civil burden of proof, imposing an obligation to sustain an assertion or proposition by positive argument. The burden of proof determines the viability of a claim based on the factual evidence. Failure to satisfy the burden of proof is consistently cited by the TAC as the reason for many taxpayers' failure to have the assessments to tax overturned or reduced.

Evidence is essential to the validation of legal argument as it establishes the facts of a case and provides information and documentation that support the assertions made by the parties involved. Without evidence, legal arguments would be based solely on speculation and assumptions.

The presentation of compelling evidence convinces the TAC and Revenue of the validity of the arguments, increasing the chances of a favourable outcome and reducing the likelihood of the disappointing and possibly avoidable finding that the burden of proof was not satisfied.

News & Moves

EY Strengthens Partnership Across Ireland with 22 New Equity Partners as the Firm Continues to Expand

EY Ireland is strengthening its partnership with 22 new equity partners, two of whom are in Tax, as the firm continues to make significant investments in top talent to meet growing client demand and to support the strong growth of the business. These new partners, representing a mix of internal promotions and external hires, will bring the total number of EY equity partners to 148 across the island of Ireland.

In the past 5 years alone, EY Ireland has welcomed 89 new Equity Partners across all areas of its business, including Assurance, Tax & Law, Consulting and Strategy and Transactions. Today EY Ireland's total headcount stands at over 4,800 (up from 2,083 in 2018) with teams spread across 10 offices in 6 locations on the island of Ireland - Dublin, Belfast, Cork, Galway, Limerick and Waterford.

Rachel Dillon (CTA) has been admitted as an Equity Partner in Tax and Law and is Head of Mobility Services at EY Ireland. Rachel has extensive experience advising leading businesses across a range of sectors in relation to reward, global mobility, employment tax and wider policy issues.

22 New Equity Partners pictured with Frank O'Keeffe, Managing Partner, EY Ireland

Josh McKenna from McKenna Creative Marketing Consultants, April Cowman CTA and Joanne Costello, President of Network Ireland Wicklow Branch

April Cowman, CTA announced as Emerging Businesswoman of the Year 2023 by Network Ireland Wicklow Branch

Network Ireland Wicklow Branch has announced the winners of the Wicklow Businesswoman of the Year Awards 2023. The Emerging Businesswoman category was awarded to April Cowman of April Cowman and Associates Ltd. – taxconsultancy.ie. April specialises in personal tax which includes registrations and returns, along with tax advice under all tax heads relevant to individuals such as Income Tax, Gift & Inheritance Tax, Capital Gains Tax etc. She has a special interest in Succession and Estate Planning. April will now go forward to compete in the Network Ireland National Awards taking place on the 29th of September.

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