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Irish Tax Institute

Irish Tax **Review**

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ALSO IN THIS EDITION

- The Last Slice of the Action? Supreme Court Delivers in the *Domino's Pizza* Case
- Enhanced Reporting Requirements: What Do I Need to Know?
- Offshore Funds: A Case for Simplification?
- Taxation of Non-Resident Landlords
- CESOP: New EU Tax Information Reporting Requirements
- Transfer Pricing in Financial Services
- Changes Affecting 2022 R&D Tax Credit Claims
- The Use of Discretionary Trusts as Protective Vehicles
- Errors of Law and Errors of Fact and the Standard of Review by the High Court
- Tax Appeals: Your Questions Answered
- Development of the Online Special Assignee Relief Programme Portal (eSARP)

The Last Slice of the Action? Supreme Court Delivers In The *Domino's Pizza* Case

Irish Tax Institute

Editor Julie Burke
Editorial Board
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Deanta Global Publishing Services
Production Liaison
Judy Hutchinson
Advertisers please contact
Judy Hutchinson
Tel +353 1 663 1700
jhutchinson@taxinstitute.ie

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Contents

2023 Number 4

Messages from Irish Tax Institute

4 **Editor's Pages**

8 **President's Pages**

11 **Chief Executive's Pages**

Regular Features

13 **Policy and Representations Monitor**
Lorraine Sheegar, *Tax Manager, Tax Policy & Representations, Irish Tax Institute*

37 **Recent Revenue eBriefs**
Lorraine Sheegar, *Tax Manager, Tax Policy & Representations, Irish Tax Institute*

48 **Direct Tax Cases: Decisions from the Irish Courts and Tax Appeals Commission Determinations**
Mark Ludlow, *Senior Associate – Tax, RDJ LLP*

54 **Direct Tax Cases: Decisions from the UK and European Courts**
Stephen Ruane, *Partner and Leader, Tax Solutions Centre, PwC Ireland*
Patrick Lawless, *Director, Tax Solutions Centre, PwC Ireland*

60 **International Tax Update**
Louise Kelly, *Tax Partner, Deloitte Ireland LLP*
Claire McCarrick *(not pictured), Tax Senior Manager, Deloitte Ireland LLP*

69 **VAT Cases and VAT News**
Gabrielle Dillon, *Director – VAT, PwC Ireland*

79 **Accounting Developments of Interest**
Aidan Clifford, *Advisory Services Manager, ACCA Ireland*

83 **Legal Monitor**
Philip McQueston, *Of Counsel, A&L Goodbody*

86 **Tax Appeals Commission Determinations**
Catherine Dunne, *Barrister-at-Law*

90 **Tax Technology Update – Winter 2023**
Tim Duggan, *Director, Tax Transformation and Technology, KPMG*
Aileen Carroll, *Director, FS Tax, KPMG*

93 **UK and Northern Ireland Tax Update – Winter 2023**
Marie Farrell, *Tax Director, KPMG Ireland (Belfast Office)*

96 **Customs Update – Winter 2023**
Nick Koolen, *Senior Manager, Global Trade & Customs, PwC Ireland*
John O'Loughlin, *Partner, Global Trade & Customs, PwC Ireland*

Feature Articles

103 **The Last Slice of the Action? Supreme Court Delivers in the *Domino's Pizza* Case**
Robert Dever, *Partner, Tax, Eversheds Sutherland LLP*
Julie Galbraith, *Partner, Employment, Eversheds Sutherland LLP*
Laura Ellen Ford *(not pictured), Associate, Tax, Eversheds Sutherland LLP*

108 **Enhanced Reporting Requirements: What Do I Need to Know?**
Niamh Barry, *Director, Deloitte Ireland LLP*

114 **Offshore Funds: A Case for Simplification?**
Kevin Smith, *Partner, Matheson LLP*
Bernadine Dooley, *Associate, Matheson LLP*

122 **Taxation of Non-Resident Landlords**
Charlotte Cumiskey, *Tax Senior Manager, BDO Ireland*

127 **CESOP: New EU Tax Information Reporting Requirements**
Nicola Sheridan, *Tax Director, PwC Ireland*
Ruth Maloney, *Tax Director, PwC Ireland*

130 **Transfer Pricing in Financial Services**
Aoife Murray, *Partner in Transfer Pricing, EY*
Priyanka Asopa, *Director in Transfer Pricing, EY*

133 **Changes Affecting 2022 R&D Tax Credit Claims**
Adrian Walker, *Tax Director, Deloitte Ireland LLP*

138 **The Use of Discretionary Trusts as Protective Vehicles**
Alison McHugh, *Partner, Head of Private Client Tax Services, EY*
Andrea McNamara, *Director, Private Client, EY Law Ireland*

143 **Errors of Law and Errors of Fact and the Standard of Review by the High Court**
Dearbhla M. Cunningham, *Barrister-at-Law*

150 **Tax Appeals: Your Questions Answered**
Gráinne Duggan, *Barrister*

158 **Development of the Online Special Assignee Relief Programme Portal (eSARP)**
Mark Bradshaw, *Assistant Principal, Personal Division, Revenue Commissioners*

Irish Tax Institute News

160 **News & Moves**

Editor's Pages

Julie Burke
Editor

Regular Articles

Policy & Representations Monitor

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

Recent Revenue eBriefs

Lorraine Sheegar lists all Revenue eBriefs issued between 1 August 2023 to 31 October 2023.

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

Mark Ludlow

- The test for determining employment was examined by the Supreme Court in *Revenue Commissioners v Karshan (Midlands) Ltd T/A Dominos pizza* [2023] IESC 24. This case is covered in detail in this issue – The Last Slice of the Action? Supreme Court Delivered in the Domino's Pizza Case, by Robert Dever, Julie Galbraith and Laura Ellen Ford.
- 111TACD2023 determined the date when the appellant (a GP) should be considered to have acquired an interest in a business
- 120TACD2023 examined the transfer of share rights
- 127TACD2023 considered apportionment of consideration for CGT
- 133TACD2023 investigated the issue of wages paid to a family member

Direct Tax Cases: Decisions from the UK and European Courts

Stephen Ruane and **Patrick Lawless**

UK Cases

- In *HMRC v G Lee and another* [2023] UKUT 242 (TCC) held that the calculation of Principal Private Residence (PPR) relief was by reference to the ownership of a dwelling-house rather than the land on which it was constructed.
- In *McEnroe & Newman v HMRC* [2023] UKUT 255, the UT dismissed an appeal that the First-tier Tribunal had erred in law when it rejected an appeal concerning the determination of CGT proceeds on the disposal of shares in a business sale.
- In *Scottish Power & Ors v HMRC* [2023] UKUT 218, the UT held that £28m of consumer settlements payable by a power provider was in lieu of penalties. Accordingly, a corporation tax deduction was denied.
- In *Gunfleet Sands Ltd & Ors v HMRC* [2023] UKUT 260 (TCC) the UT delivered a judgment in an appeal by subsidiaries of Ørsted, a Danish energy group, and a cross-appeal by HMRC in respect of capital allowances claimed on certain expenditure relating to offshore windfarms.
- In *Wilkinson and others v HMRC* [2023] UKFTT 695 (TC), the FTT allowed the taxpayers' appeals on the basis that an exchange of shares in one company for loan notes and shares in another company did not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, was avoidance of liability to CGT.

European Case

- The Italian Supreme Court held that, based on European Union fundamental freedoms, non-resident companies without an Italian permanent establishment (PE) qualify for the Italian 95% participation exemption regime for gains on the sale of shares in an Italian company, provided that the requirements for the regime are met.

International Tax Update

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

- BEPS: Recent Developments
  - Finance (No2) Bill 2023 contains draft legislation to implement Pillar Two
  - Luxembourg has published draft legislation to implement Pillar Two
  - The OECD has published *Minimum Tax Implementation Handbook (Pillar Two)*
  - Sweden has published the final legislative proposal for Pillar Two implementation
  - HMRC has published draft amendments to Pillar Two legislation
  - The OECD/G20 has disclosed a new multilateral convention aimed at implementing Amount A of Pillar One.
  - The OECD has published comments on Amount B under Pillar One
- US Tax Developments
  - The US Treasure and IRS have released interim guidance on the corporate alternative minimum tax (CAMT)
- EU Tax Developments
  - The EU has adopted a package of incentives to reduce the costs of tax compliance for cross-border business
  - The European Commission has commenced infringement proceedings against Itay, Lithuania, Luxembourg and Romania due to their failure to transpose DAC 7
  - Greece has transposed DAC 7 into domestic law
  - DAC 8 on crypto-assets has been formally adopted by EU Member States
  - Belgium has announced an increased investment deduction/credit for qualifying investments in 2024
  - Antigua and Barbuda, Belize and the Seychelles have been added to the EU list of non-cooperative jurisdictions
  - In Ireland the effective tax rate of KDB has increased to 10%
  - The Irish Minister for Finance has published a roadmap for participation exemption on dividend income and foreign branch profits exemption
- The Malaysian government has set out incentives for relocating manufacturing operations to Malaysia
- Proposed legislation refining Hong Kong SAR's foreign-sourced income exemption regime, with a focus on broadening the coverage of foreign-sourced disposal gains has been published
- Papua New Guinea has ratified the MLI

VAT Cases & VAT News

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

VAT Cases

- The Court of Justice of the European Union (CJEU) delivered its judgment in the case of *SC Cartrans Preda SRL m v Direcția Generală Regională a Finanțelor Publice Ploiești – Administrația Județeană a Finanțelor Publice Prahova C461/21*. The specific VAT issue under consideration was a requirement for Cartrans to pay an additional amount of VAT in respect of services relating to the carriage of goods intended to be imported into Romania.
- In *Michael Schütte v Finanzamt Brilon* C453/22, the issue of reimbursement of overpaid tax was considered.

» *Deco Proteste – Editores Lda v Autoridade Tributária e Aduaneira* C505/22 concerned the interpretation of Article 2(1)(a) and Article 16 of the VAT Directive and the principles of neutrality, equal treatment, non-discrimination and proportionality

Tax Appeals Commission Determinations

» 109TACD2023 considered if the provision of tours was VAT exempt or TAMS

» 110TACD2023 relates to the VAT treatment of financial services

» 115TACD2023 examines the refusal to register the appellant for VAT on the basis of not being an accountable person

Accounting Developments of Interest

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

Legal Monitor

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

Tax Appeals Commission Determinations

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

Tax Technology Update – Winter 2023

Tim Duggan & **Aileen Carroll** cover the relevance of technology to tax and address the challenges faced by CTAs.

UK and Northern Ireland Tax Update - Winter 2023

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

Customs Update: Winter 2023

Nick Koolen and **John O'Loughlin** provide a brief overview of preferential origin, with a focus on trade with the UK after Brexit.

Feature Articles

103 The Last Slice of the Action? Supreme Court Delivers in the *Domino's Pizza* Case

Robert Dever, **Julie Galbraith** and **Laura Ellen Ford** provide an overview of the Supreme Court decision in *The Revenue Commissioners v Karshan (Midlands) Ltd t/a Domino's Pizza* [2023] IESC 24.

108 Enhanced Reporting Requirements: What Do I Need to Know?

Niamh Barry gives an overview of the enhanced reporting requirements for employers that are due to take effect from 1 January 2024, including preparation tips and highlights from the recently published Revenue Tax and Duty Manual.

114 Offshore Funds: A Case for Simplification?

Kevin Smith and **Bernadine Dooley** provide an overview of the offshore funds legislation in Ireland and focus on some of the key distinctions and difficulties for taxpayers and advisers in navigating the current legislation.

122 Taxation of Non-Resident Landlords

Charlotte Cumiskey gives an overview of the essential tax obligations of both individual and corporate non-resident landlords in Ireland.

127 CESOP: New EU Tax Information Reporting Requirements

Nicola Sheridan and **Ruth Maloney** explain the CESOP Directive, which will come into effect from 1 January 2024 and will require payment service providers to maintain electronic records on cross-border payments and report this data to tax authorities.

130 Transfer Pricing in Financial Services

Aoife Murray and **Priyanka Asopa** cover some recent developments in Ireland that are relevant to taxpayers operating in the financial services space.

133 Changes Affecting 2022 R&D Tax Credit Claims

Adrian Walker gives an overview of the changes in filing requirements for FY2022 claims under the R&D tax credit scheme.

138 The Use of Discretionary Trusts as Protective Vehicles

Alison McHugh and **Andrea McNamara** set out the circumstances in which discretionary trusts may be used for the purpose of protecting assets and/or individuals.

143 Errors of Law and Errors of Fact and the Standard of Review by the High Court

Dearbhla M. Cunningham discusses the errors that may be reviewed by the High Court and the standard of review applied to them in an appeal against an unfavourable determination of the Tax Appeals Commission by way of case stated.

150 Tax Appeals: Your Questions Answered

Gráinne Duggan answers the questions that she is asked most often about bringing a tax appeal to the Tax Appeals Commission.

158 Development of the Online Special Assignee Relief Programme Portal (eSARP)

Mark Bradshaw introduces Revenue's development of an online Special Assignee Relief Programme portal (eSARP). This development will modernise the existing SARP process.

President's Pages

Tom Reynolds
Irish Tax Institute President

The final quarter of the year has its own momentum in the tax world – the Budget, and the month of leaks leading up to it, the publication of the Finance Bill and the hectic period before the pay and file deadline. For those of us who work in international tax, there was an added dimension this year: a new system of taxation was added to the statute books as the legislation to give effect to Pillar Two, which was included in the Finance Bill, was passed by the Oireachtas and signed into law. From 1 January, companies with annual group revenues exceeding €750m will be subject to a new minimum effective tax rate of 15%.

Pillar Two Implementation Legislation

From early summer the Institute was involved in intensive consultations with Department of Finance and Revenue officials that continued right through the Committee and Report Stages of the legislation. Throughout that period hard and detailed work was undertaken by the Policy & Reps team and the Institute TALC representatives, and it paid off. There were no surprises in the 120 pages of the legislation and, crucially for business, we now have clarity on how the new rules will be implemented in Ireland.

That's not to say that the dust has settled on the Pillar Two rules – far from it. Further guidance is expected from the OECD, and we still do not know if or how the US will change its tax rules to take account of Pillar Two. The plans of large economies such as India and China are also awaited. We are facing into an uncertain period as the new rules bed down, and there is a real risk of tax disputes between businesses and revenue authorities around the world.

For all that, the passage of legislation that will transform how Ireland taxes its large multinational sector is a milestone. It took a long time to get there, and the Institute played an important role in reaching it.

Also included in the Finance Bill were new defensive measures applying to outbound payments designed to prevent double non-taxation. The Government committed to introducing these measures as part the National Recovery and Resilience Plan.

In late summer the Institute had raised concerns about several aspects of the Department's draft legislative approach to these measures as outlined in its Feedback Statement. The Department listened to those concerns, and the legislation as enacted is proportionate and does not go beyond what is required to deliver the commitment to the EU to prevent double non-taxation outcomes.

Indeed, the clarity of the far-reaching and complex corporate tax changes contained in Finance (No. 2) Bill 2023 is a vindication of the iterative stakeholder consultation process that preceded its publication. Long may it continue.

Tax Simplification

These new rules will, however, add another layer of complexity to an already convoluted tax code. In his Budget speech the Minister for Finance, Michael McGrath TD, promised engagement with stakeholders on the interest deductibility rules, which, as members will know, are horrendously complicated. This is welcome, but time is of the essence for reform.

When the Minister announced in mid-September that legislation to allow a participation exemption for foreign dividends of companies based in Ireland was being postponed until the start of 2025, we aired our frustration.

It is six years since the Coffey Review first recommended moving to a territorial system of taxation. The recommendation subsequently featured in the Corporation Tax Roadmaps published by the Department of Finance. We now find ourselves on the cusp of implementing Pillar Two, and we are the only EU country that does not operate an exemption system for dividends.

We have just made our submission to the third public consultation since the Coffey Review.

As we indicated in our response to Minister McGrath's September statement on corporation tax, it is high time that consultation gave way to decisions and progress towards the simplification of Ireland's tax system.

In his Budget, the Minister also announced the establishment of a sub-group of TALC to identify opportunities to simplify the administration of business supports. The Institute and other stakeholders have consistently raised concerns about the complex rules and requirements of the current suite of SME measures. We have responded to many consultations on these issues over the last five years and we have identified solutions from other jurisdictions.

Our worry is that while all of the promised consultations and scoping exercises are going on, our competitiveness is being eroded. As we said in our press statement responding to Budget 2024, the Government should prioritise and resource a whole simplification project that would make these measures fit for their original purpose, which is to build productivity and innovation in our SME sector. It should also set out a clear timetable for a move to a full territorial tax system and reform of our interest deductibility rules.

A clear and simplified business tax code that is easy to administer and comply with would give certainty to domestic and multinational businesses and encourage the inward investment on which the Irish economy has thrived over the last 30 years.

Budget 2024

Leaving aside our weariness about the long road to tax simplification, there were many positives in Budget 2024. Chief among them were the personal tax changes announced by Minister McGrath, which were most welcome. The Minister put money back into workers' pockets at a time when families are under pressure from large increases in the cost of living, which, thankfully, now appear to have peaked. He also improved the competitiveness of our personal tax system, the rating for which had fallen in several influential international tax rankings over recent years.

With the ability to compete on corporation tax being removed from the equation, employment taxes will become an increasingly important factor in multinational investors' decisions about location. The changes introduced by the Minister strengthen our ability to attract highly mobile and scarce talent into our economy.

The Minister also announced welcome and significant changes to some of our business tax measures, chief among them his decision to increase the R&D tax credit from 25% to 30%. This will bolster our competitiveness at a time when other jurisdictions have been enhancing their R&D offerings in a bid to attract multinational investment.

The changes will also benefit our indigenous businesses. The doubling of the first-year payment threshold from €25,000 to €50,000 will significantly improve cash-flow in SMEs that undertake R&D. This should help to drive innovation in the sector.

The Institute also welcomed a new incentive introduced to attract angel investment in Irish SMEs and start-ups. The relief is intended to encourage investors to acquire significant minority shareholdings in early-stage innovative companies that are less than five years old. It allows those investors to avail of a reduced rate of CGT on a sale to a third party.

Enhancements of the Employment Investment Incentive (EII) were also announced in the Budget, including standardising the minimum holding period required to obtain relief at four years and increasing the limit on the amount that an investor can claim relief on for such investments to €500,000 per year of assessment from 1 January 2024.

The Institute also welcomed the enhancement of the film tax credit, as well as the commencement of reforms to the Key Employee Engagement Programme (KEEP) after State Aid approval from the European Commission.

Minister McGrath made a commitment at our Annual Dinner last February to take a fresh look at the current business measures, and he certainly delivered some important reforms that will benefit our domestic sector. The administrative burden in availing of these measures remains a significant blocker for small businesses and start-ups. The Minister clearly understands this issue. Whether the TALC sub-committee group will provide timely solutions remains to be seen.

Conferring Ceremony

It was my privilege to present certificates to our 272 new CTA graduates and 21 Tax Technician graduates in the O'Reilly Hall, UCD, on 30 November. To be in the presence of such a happy, enthusiastic and talented bunch of people

was truly inspiring. It was wonderful to see the proud parents, families and friends, who, having supported our newest members through their studies, were there with them enjoying their big night.

What was really striking about the day was the diversity of the graduates, a powerful reminder of how Ireland has been enriched in recent years by those who have come from all over the world to live and work here and who make their own, unique contribution to our economy and society. After the ugly and shameful scenes that took place in Dublin just a week earlier, Conferring Day was a timely affirmation of what is best about our modern, progressive country.

Well done to Martina O'Brien, her team and all concerned in the organisation of such a memorable and heartwarming event that exuded happiness and confidence. It made me proud to be President of the Institute.

Christmas at the Institute

A fabulously large and beautifully lit Christmas tree adorned the O'Reilly Hall on Conferring Day, but the festive season didn't kick off until the Southwest Region Members' Lunch, which took place in the Clayton Hotel in Cork on 6 December. This event has gone from strength to strength over the last two years, with more than 110 attending this year.

The atmosphere was buzzing, and our guest speaker, the endurance swimmer, Stephen Redmond, was inspirational. The story of how he became the first person in the world to complete the Oceans Seven swimming challenge was fascinating and certainly held the attention of the audience.

It was great to see so many members enjoy catching up with each other over lunch – and great also for the Institute to get out of Dublin.

I want to wish members all over the country a happy and restful Christmas in the company of your loved ones and best wishes for a prosperous and peaceful new year.

Chief Executive's Pages

Martin Lambe
Irish Tax Institute Chief Executive

Introduction

We are coming to the close of another year that has seen much change not just in tax but also in technology, with the fast-paced development of artificial intelligence. The last three months were busy, as always, and punctuated by a number of social and celebratory events, including the graduate conferring ceremony. The Policy and Reps team responded to successive consultations by various stakeholders, and our winter CPD programme continued to support you in meeting your development and training needs, particularly as the CPD deadline comes into focus.

Conferring Ceremony

One of the Institute's flagship events is the Annual Conferring Ceremony, which took place as usual in the O'Reilly Hall in UCD on 30 November. Families and friends of the conferees joined us to mark the great achievement of our newest members. Congratulations to our 272 new CTAs and 21 Tax Technicians – I hope that you enjoyed the occasion and that you will stay connected to the Institute and become active members.

In addition to welcoming our new members, our President, Tom Reynolds, presented two Fellowships. One went to Michael Ryan for his dedication and contribution to the Institute's work over many years, including chairing our *Irish Tax Review* committee. The second was for Emma Arlow, who has generously shared her expertise with members through our publications and CPD programme.

Tom also awarded our 2023 Third-Level Scholarship to Adam McBride, a first-year college student from Castleblaney, Co. Monaghan. As recipient of the scholarship, Adam will receive financial support towards his third-level education, as well as a place on the CTA programme to begin a career as a Chartered Tax Adviser (CTA). We look forward to supporting Adam throughout college and on the CTA programme.

Photos of the special evening can be found here.

Just before the Conferring Ceremony, 19 sponsored awards were presented to students who excelled in their exams. To qualify as a Chartered Tax Adviser (CTA) is quite an achievement, but to excel is exceptional. Well done to all our winners. I would like to thank each of the 12 sponsoring firms for their continued support of our CTA programme.

Earlier in the day, the Institute jointly hosted a Conferring Ceremony with Revenue, where more than 230 Revenue officials were awarded a range of Certificates and Tax Technician qualifications by the Revenue Chairman, Niall Cody, and our President. The Institute is pleased to work in partnership with Revenue assisting in the development of officials, a collaboration that benefits all of us who work in tax in Ireland.

Policy and Representations

The last three months of the year proved busy for tax advisers. Finance (No. 2) Bill 2023 was released and passed through the Oireachtas in just 10 days. This is a challenging timetable in any year, but with this Bill running to 271 pages – the largest in recent years – it was especially challenging. The Bill included the legislation to give effect to new Pillar Two rules, which will see a 15% global minimum effective corporation tax rate applying to all companies

with annual group revenues exceeding €750m from 1 January 2024.

Thank you to all of the members who raised concerns with us, and those matters formed the basis of our engagement with the Department of Finance and Revenue on different elements of the Bill as it has progressed through the Houses of the Oireachtas. Fiona Carey of *PwC* and Brendan Murphy of *Roberts Nathan* analysed the details of Finance (No. 2) Bill 2023 for the first part of our Finance (No. 2) Bill & Act 2023 seminar series. The second part is scheduled for February 2024, once the Bill has been enacted.

In addition to the representations on Budget 2024 and Finance (No. 2) Bill 2023, the team has engaged extensively with Revenue on issues regarding Enhanced Reporting Requirements (ERR). We raised your concerns at the highest levels, in particular, regarding the burden on businesses to report non-taxable payments in "real time" and the limited time given to employers to prepare for implementation. However, the Minister for Finance has now signed the Commencement Order, and ERR will come into effect on 1 January. The Institute will monitor the implementation and keep updated you through TaxFax.

CPD Winter Programme

After taking a short break for pay and file season, the winter CPD programme ramped up again at the end of November. The programme caters for CTAs working in all areas of tax and includes the Finance (No. 2) Bill & Act 2023 seminar series and the Certificate in Taxation of Private Clients. In addition to the live and on-demand sessions, we have created bundles of CPD throughout the year on certain topics. All available seminars are on taxinstitute.ie.

Catching Up with Old and New Friends

In mid-November we welcomed our Past Presidents to our Grand Canal offices. This enjoyable occasion allows us to reconnect with those who steered the Institute from its early years and to seek their valuable insights on our future plans.

Our President, Tom Reynolds, hosted the Southwest Region Members' Lunch in early December. More than 110 members from surrounding counties were welcomed to Cork City for food and conversation and to hear from Steve Redmond, our guest speaker, who was the first person to successfully complete the Oceans Seven Challenge. There was a great atmosphere on a dreary, wet afternoon, so thank you to all who joined us. You can view photos from the event here.

Thank You

All that is left for me to say is that I wish you and your loved ones a safe and healthy Christmas and a Happy New Year. Thank you for continuing to support the Institute, and we look forward to seeing you again in 2024.

Policy and Representations Monitor

Lorraine Sheegar
Tax Manager, Tax Policy & Representations, Irish Tax Institute

News Alert

Key tax measures in Budget 2024 and Finance (No. 2) Bill 2023

On 10 October the Minister for Finance, Michael McGrath TD, and the Minister for Public Expenditure, National Development Plan Delivery and Reform, Paschal Donohoe TD, delivered Budget 2024. This was followed by the publication on 19 October of Finance (No. 2) Bill 2023, which introduced several additional measures not announced on Budget Day.

In a press release after the publication of Finance (No. 2) Bill 2022 (as initiated), Minister McGrath confirmed that draft legislation relating to two measures announced on Budget Day would be introduced at Committee Stage of the Finance Bill. These comprised a new targeted capital gains tax (CGT) relief for angel investors who invest in innovative start-ups and amendments to the land-leasing income tax relief to ensure that the relief is available only when the land has been owned for seven years, so that it is better targeted to active farmers. The Finance (No. 2) Bill 2023 Committee Stage amendments were published on 6 November.

During the Committee Stage debates before the Oireachtas Joint Committee on Finance, Public Expenditure and Reform, and Taoiseach, Minister McGrath stated that he would bring forward several Report Stage amendments to Finance (No. 2) Bill 2023. The Minister confirmed that one of the Report Stage amendments would address an issue regarding the tax treatment of certain income of GPs that arises from contractual arrangements with the HSE. The Finance (No. 2) Bill 2023 Report Stage amendments were published on 21 November.

The key features of Budget 2024 and Finance (No. 2) Bill 2023, including Committee Stage amendments and Report Stage amendments, are outlined below. The Institute's Pre-Finance Bill Submission and Pre-Budget 2024 Submission are available on our website, www.taxinstitute.ie.

Personal tax

- Increase in the ceiling of the 2% USC rate from €22,920 to €25,760 to ensure that it remains the highest rate of USC paid by full-time minimum wage workers when the national minimum wage increases on 1 January 2024 to €12.70. (See s2 F(No.2)B23.)
- A reduction in the 4.5% rate of USC to 4% from 2024 onwards. (See s2 F(No.2)B23.)
- The reduced USC rate of 2% that currently applies to full medical card holders aged under 70 whose aggregate annual income is less than €60,000 is extended until the end of 2025. (See s2 F(No.2)B23)
- Increase of €2,000 in the standard rate income tax band to €42,000 for single individuals and €51,000 for married couples/civil partners (with one earner) for 2024 onwards. (See s9 F(No.2)B23)
- The personal tax credit, employee tax credit and earned income tax credit will increase by €100 to €1,875 for 2024. The Home Carer Credit will be increased by €100 to €1,800, the Single Person Child Carer Tax Credit will be increased by €100 to €1,750 and the

Incapacitated Child Credit will be increased by €200 to €3,500 from 2024 onwards. (See s9 F(No.2)B23)

- In his Budget 2024 Statement Minister Donohoe confirmed that all PRSI contribution rates will increase by 0.1% from 1 October 2024. On 21 November the Minister for Social Protection, Heather Humphreys TD, received Cabinet approval for the Social Welfare (Miscellaneous Provisions) Bill 2023, which provides for incremental increases in all classes of employer, employee and self-employed PRSI over the coming years to support the retention of the State pension age at 66, as follows: 0.1% in 2024; 0.1% in 2025; 0.15% in 2026; 0.15% in 2027; and 0.2% in 2028.
- The Help to Buy scheme will be extended to the end of 2025. The Minister also announced an amendment to the scheme to include properties purchased through the Local Authority Affordable Purchase scheme from 11 October 2023. (See s6 F(No.2)B23)
- Introduction of a new s192O to the Taxes Consolidation Act 1997 (TCA 1997) to provide for an exemption from income tax, USC and PRSI for payments commonly known as a Clinical Placement Allowances made before and after 1 January 2024. (See s3 F(No.2)B23)
- Introduction of a new s192P to TCA 1997 to provide for an exemption from income tax, USC and PRSI for payments made to a qualifying individual of maternity-related administrative support within the meaning of the Local Government Act 2001 (Section 142) (Allowance for Maternity-Related Administrative Support) Regulations 2023, on or after 1 January 2023. (See s4 F(No.2)B23)
- Several amendments to provisions relating to PAYE and USC assessment and refunds in s531AOA, s984B and s985G TCA 1997, which apply a four-year time limit in respect of repayments or credits. Where returns are made after four years (commencing at the end of the year of assessment in which the income tax month falls), employers will not be entitled to a repayment or credit. In addition, the amendments provide that Revenue shall refuse a repayment and notify the employer where it is of the opinion that the requirements for repayment have not been met. These changes apply to returns made for income tax months commencing on or after 1 January 2019. Amendments to s990 TCA 1997 provide that Revenue shall not make or amend an assessment after four years commencing at the end of the year following the year of assessment in which the income tax month falls. The amendment to s990 also provides that Revenue can make or amend an assessment at any time in certain circumstances that include: giving effect to a determination of an appeal; giving effect to a settlement agreement; taking account of matters arising after the return is made; correcting an error in a calculation or correcting a mistake of fact to properly reflect the facts disclosed by the employer. In addition, Revenue may make or amend an assessment at any time where there is fraud or neglect. Finally, an amendment to s997 confirms that there is no time limit for Revenue to make or amend an assessment where there is an incomplete return or a return has not been filed. (See s5 F(No.2)B23)
- Amendment to benefit-in-kind (BIK) for company vehicles to extend the temporary universal relief of €10,000 applied to the original market value (OMV) of a vehicle, including vans and electric vehicles (EVs), for vehicles in Category A–D to reduce the amount of BIK payable. The current reduction of €35,000 in OMV will continue to apply for all EVs until the end of 2025, followed by a reduction of €20,000 in 2026 and €10,000 in 2027. The upper limit in the highest mileage band has been 48,001km since 1 January 2023, and this has been extended until 31 December 2024. (See s7 & s8 F(No.2)B23)
- The Sea-going Naval Personnel Credit is extended 31 December 2024. (See s10 F(No.2)B23)
- Amendment to the rent tax credit to increase the credit to €750 for individual

renters, or €1,500 per year for jointly assessed married couples or civil partners, in the private rented sector who are not in receipt of other State housing supports, for the tax years 2024 and 2025. The Bill also amends s473B TCA 1997 to allow payments made by parents in respect of "digs" or rent-a-room accommodation for their children to attend an approved course to qualify for the credit, and this change will apply retrospectively for the years 2022 and 2023. The amendments exclude members of the Oireachtas who are in receipt of certain allowances under s836 TCA 1997 in respect of a related tenancy from claiming the credit. (See s11 F(No.2)B23)

- A change to the collection mechanism for tax on gains arising on the exercise, assignment or release of a right to acquire shares or other assets (s128 TCA 1997) so that the gains will no longer be subject to self-assessment but taxed under the PAYE system, in respect of gains realised from 1 January 2024. (See s12 F(No.2)B23)
- Introduction of a new, temporary, one-year mortgage interest tax credit for taxpayers with an outstanding mortgage balance on their principal private residence of between €80,000 and €500,000 as of 31 December 2022. Relief will be available at the standard rate of income tax of 20% in respect of the 2023 tax year on the increase in interest paid in 2023 over 2022. The amount qualifying for relief will be capped at €6,250 per residence, equivalent to a maximum tax credit of €1,250. The taxpayer must be compliant with local property tax requirements. The Minister brought forward Report Stage amendments to ensure that the section provides for pro-rating of the maximum tax credit of €1,250 where the interest paid is in respect of a period of less than 12 months and to include properties transferred between spouses and civil partners. (See s13 F(No.2)B23)
- A new s480C was introduced to TCA 1997 to provide for a temporary income tax relief for individual landlords of rented residential premises situated in the State for the years of assessment 2024 to 2027. The maximum tax credit available to the landlord shall be €600 for 2024, €800 for 2025, and €1,000 for 2026 and 2027. In the case of joint ownership of a property, the relief will be divided in proportion to the percentage of the rental income to which the owners are entitled. A qualifying premises must be owned by the landlord on 31 December in the year of assessment and occupied by a tenant under a tenancy registered with the Residential Tenancies Board or let to a public authority (including a local authority) or actively marketed for rent. The relief will not be available where the qualifying premises is occupied by a tenant who is connected to the landlord (by virtue of s10) or is an uncle, aunt, niece, nephew of the landlord or their spouse or civil partner. Relief granted will be clawed back if, within four years of the start of the first year in which the relief was claimed, any of the qualifying premises are disposed of or are otherwise removed from the property market. (See s21 F(No.2)B23)
- A number of amendments were made to the provisions for charities and sporting bodies, including (See s14, s15, s16 & s22 F(No.2)B23):
- an amendment to s208 TCA 1997 to extend the exemption for charities from income tax in respect of profits or gains arising in certain circumstances, including profits or gains of a trade carried on by a charity, to include professions;
- an amendment to s208B TCA 1997 to insert a definition of CHY number and provide that Revenue shall withdraw the exemptions under s207, s208 or s208A where it is satisfied that an organisation is no longer eligible and that Revenue will inform the charities regulatory authority of cases where the exemption is withdrawn;
- a further amendment to s208B to provide that Revenue may publish the name, address and CHY number of a charity;
- an amendment to s235 TCA 1997 to include new definitions of "competitive sport", "games and sports exemption number" and "recreational sport" and to state that Revenue may publish the name, county, and

games and sports exemption number of an approved body; and

- amendments made to Part 1 of Schedule 26A, which sets out the list of approved bodies for the purposes of the relief, to refer to the Higher Education Authority Act 2022 and add the Royal Irish Academy to the list in the Schedule, with these changes effective from 10 November 2022.
- Amendment to Schedule 13 TCA 1997, which lists the entities that are accountable persons for the purposes of professional services withholding tax (PSWT), to remove The Commissioner of Valuation, The Chief Boundary Surveyor and The Director of Ordnance Survey. It also adds the Irish Air Navigation Service, Tailte Éireann and Coimisiún na Meán as paragraphs 212, 213 and 214, respectively. In addition, the Royal Irish Academy and the update to the definition of a designated institution of higher education are included, effective from 10 November 2022. (See s23 F(No.2)B23)
- Amendment to the tax treatment of payments received under the Brexit Voluntary Permanent Cessation Scheme in s669O TCA 1997 relating to the elections made for a deduction of certain amounts of temporary tie-up payments. (See s27 F(No.2)B23)
- Increasing the exemption from income tax, USC and PRSI for certain profits arising to a qualifying individual who generates energy from renewable, sustainable or alternative energy sources for their own consumption (i.e. microgeneration of electricity) from €200 to €400. The relief is also extended to 2025. (See s2 8F(No.2)B23)
- From 1 January 2024, an increase in the aggregate lifetime amount of relief available to a person for stock relief for young trained farmers under s667B TCA 1997 from €70,000 to €100,000, which is the maximum amount allowable under the new EU Agricultural Block Exemption Regulation (ABER).
- From 1 January 2024, an increase in the aggregate lifetime amount of relief available to a person for a succession farm partnership under s667D TCA 1997 from €70,000 to €100,000, which is the maximum amount allowable under the new EU ABER. (See s32 F(No.2)B23)
- Amendment to s667C TCA 1997 confirming that the aggregate relief that can be received in respect of stock relief for registered farm partnerships will increase from €15,000 to €20,000 for qualifying periods commencing on or after 1 January 2024, in line with Commission Regulation (EU) No. 1408/2013 (agricultural De Minimis Regulation). (See s32 F(No.2)B23)
- Extension of the scheme in s285D TCA 1997, which provides accelerated capital allowances (at 50% per annum over two years) for capital expenditure incurred on certain eligible farm safety equipment, to 31 December 2026. (See s30 F(No.2)B23)
- Amendment to the relief for certain income from leasing of farm land under s664 TCA 1997 to replace references to the EU Basic Payment Scheme with references to the EU Basic Income Support for Sustainability. Committee Stage amendments to s664 impose a seven-year holding requirement in respect of purchases of farm land on or after 1 January 2024, thereby restricting availability of the income tax relief in order that it does not become immediately available to such purchasers of agricultural land. The requirement to own the farm land for seven years before letting it out under a qualifying lease will not apply to individuals who have acquired the land other than by way of a purchase – for example, by inheritance or gift. In addition, a number of anti-avoidance provisions were introduced to deal with situations in which the application of the seven-year holding rule could otherwise be circumvented and to introduce a provision to provide that the seven-year holding rule will not apply in specific cases where the death of a spouse is involved. (See s33 F(No.2)B23)
- A new s1008A TCA 1997 was introduced at Report Stage of Finance (No. 2) Bill 2023 to provide that where individual GPs enter into

contracts with the HSE to provide certain medical services and provide those services in the conduct of a partnership profession with other individual GPs, the income from those services can be treated for income tax purposes as that of the partnership. The Report Stage amendment also provides that any PSWT credit may be claimed by the partnership in such instances. The partner who has the contract with the HSE, and not the precedent partner of the medical partnership, will provide the tax number of the medical partnership concerned to the HSE for the purposes of PSWT. (See s38 F(No.2)B23)

Pensions

- Amendment to s784 TCA 1997 in relation to retirement annuity contracts. From 1 January 2024, Revenue will not approve any contracts under this section except where the application has been made for approval before 1 January 2024. (See s17 F(No.2)B23)
- Amendment to one of the transactions that are regarded as distributions in s784A TCA 1997. Where a loan is made to an individual who is beneficially entitled to the assets in an approved retirement fund (ARF) or to any person connected with that individual, this is regarded as a distribution in the amount equal to the value of the assets used to make the loan or used as security for a loan. This is extended to apply to a loan made to a close company where the individual beneficially entitled to the assets of the ARF, or any person connected with that individual, is a participator in that close company. As the transactions in s784A TCA 1997 are referred to in s779A, s787G and s787AA TCA 1997, this treatment will also apply to beneficiaries of other pension products, i.e. occupational pension schemes, personal retirement savings accounts (PRSAs) and pan-European personal pension products, where assets are used in a similar way. (See s18 F(No.2)B23)
- Amendment to s787K TCA 1997 in relation to Revenue approval of PRSA products to remove the existing upper age limit of 75 years for holders to make initial withdrawals from their PRSA. (See s19 F(No.2)B23)
- Introduction of a new s790F to TCA 1997 requiring from 1 January 2024 that in order for retirement benefit schemes and approved retirement funds to avail of an exemption from income tax or capital gains tax derived from rents receivable from a qualifying lease, the tenancy must be registered under Part 7 of the Residential Tenancies Act 2004. (See s20 F(No.2)B23)

Employment Investment Incentive

(See s31 F(No.2)B23)

- Amendment to the EII to standardise the minimum holding period required to obtain relief to four years and to increase the limit on the amount that an investor can claim relief for such investments to €500,000 per year of assessment from 1 January 2024.
- Amendments to Part 16 of TCA 1997 to reflect amendments to the EU General Block Exemption Regulation (GBER), which is a European Commission Regulation that allows Member States to put certain State Aid schemes into place without prior notification to the Commission, provided certain conditions are met. The EII, Start-Up Relief for Entrepreneurs (SURE) and the Start-up Capital Incentive (SCI) under Part 16 of TCA 1997 come within Article 21 of the GBER.
- On 23 June the Commission adopted Commission Regulation (EU) 2023/1315, which provides for a targeted amendment to the GBER to help facilitate, simplify and speed up support for the EU's green and digital transitions. Member States have a six-month transition period to implement the necessary changes to ensure that their applicable schemes are compatible with the revised GBER. The amendments to Part 16 TCA 1997, outlined below, reflect the changes contained in Article 21 and Article 21a of the revised GBER:
- The definition of "expansion risk finance investment" in s493 TCA 1997 has been amended to refer to funding a "new economic activity" instead of "to fund

entering a new product on the market or entering a new geographic market".

- An amendment s494 TCA 1997, which deals with eligible shares, to provide that shares, other than where SURE relief under s507 is claimed, may be redeemable.
- The anti-avoidance s495 TCA 1997 has been amended to apply to shares in a company that carry preferential rights to a dividend or to repayment of capital on a winding up, except in circumstances where the shares are issued to the managers of a qualifying investment fund.
- Amendments to s496 TCA 1997, which deals with qualifying investments, to provide for a reduction in the level of investment required by a qualifying company seeking expansion risk finance from 50% of the average annual turnover to 30% where the investment will be used to significantly improve the environmental performance of the company or for other environmentally sustainable investments. The amendments also extend the availability of relief to undertakings that have been operating in any market for less than ten years after their registration, in addition to the current limit of seven years after their first commercial sale. The reference to the requirement that follow-on risk finance investment in eligible undertakings after either initial or expansion risk finance must be "foreseen" in the business plan is changed to "provided for" in the business plan.
- The limits on the amounts that a RICT group can raise through the issue of qualifying shares under s497 TCA 1997 has been amended to increase the lifetime limit on the amount of risk finance investment that may be raised to €16.5m (previously, the limit was €15m), with a correlating increase in the amount that may be raised in any 12-month period to €5.5m. The Minister brought forward technical amendments to Part 16 at Report Stage to ensure that the reliefs are fully aligned with the GBER and provide that the €16.5m limit applies to the cumulative amount of risk finance investment that may be raised under both Part 16 and the new CGT angel investor relief under Chapter 6A of Part 19 TCA 1997, outlined in more detail below.
- Following the updates to the revised GBER, the rate of relief given will now depend on the basis on which the company seeking investment is eligible for relief, and on whether the investment is direct or made through a qualifying investment fund. Previously, income tax was granted at the marginal rate (40%); however, the amendments to s502 TCA 1997 provide that the rates of relief for investments made on or after 1 January 2024 will be 20%, 35% or 50%, depending on eligibility criteria.

EU Minimum Tax Directive – Pillar Two GloBE Rules

(See s94 F(No.2)B23)

- Introduction of a new Part 4A to TCA 1997, which transposes the EU Minimum Tax Directive into Irish law. On 15 December 2022 the European Commission adopted the EU Minimum Tax Directive to implement Pillar Two of the *Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, which was agreed by the member countries of OECD/G20 Inclusive Framework on BEPS, into EU law. The Directive must be transposed into the national law of EU Member States by the end of 2023 and applies for accounting periods beginning on or after 31 December 2023.
- Pillar Two primarily consists of two interlinked rules, the income inclusion rule (IIR) and the undertaxed profits rule (UTPR), together referred to as the Global Anti-Base Erosion (GloBE) Rules. These rules require EU 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.
- Chapters 1 to 8 of the new Part 4A provide for the IIR and UTPR. The IIR is the primary GloBE Rule and imposes top-up tax on a

parent company in respect of the low-taxed income of a constituent entity. It applies to corporate groups whose ultimate parent entity (UPE) is Irish resident and whose annual consolidated group revenue is at least €750m in at least two of the previous four fiscal years. The UTPR is a secondary GloBE Rule and provides for a top-up tax to be collected in instances where a qualified IIR is not applied. Tax arising under the UTPR can be collected by other group entities regardless of whether they are parent entities.

- Chapter 9 of the new Part 4A provides for a domestic top-up tax that will be adopted in Ireland. Under the Directive, each EU Member State may elect to apply a domestic top-up tax to the constituent entities of a group located in that jurisdiction. In general, where a jurisdiction implements a domestic top-up tax and that top-up tax is considered to be a "qualified" domestic top-up tax (QDTT), a credit will be given for the QDTT when calculating the amount of top-up tax to be applied under the IIR or UTPR.
- A number of safe harbours have been introduced in Part 4A, including the Transitional Country-by-Country Reporting (CbCR) Safe Harbour, the Transitional UTPR Safe Harbour and the QDTT Safe Harbour.
- The Transitional CbCR Safe Harbour is a temporary measure intended to ease the administrative burden on in-scope MNE groups in respect of their GloBE compliance obligations during the initial years of implementation. During the transitional period (i.e. any fiscal year beginning on or before 31 December 2026 and ending no later than 30 June 2028) the top-up tax in a jurisdiction will be deemed to be zero, and detailed GloBE calculations will not be required where certain criteria are met.
- The Transitional UTPR Safe Harbour is designed to allow transitional relief from the application of the UTPR to the jurisdiction of a UPE for the fiscal years that are no more than 12 months in duration and that begin on or before 31 December 2025 and end before 31 December 2026 (i.e. the transition period). Under the Transitional UTPR Safe Harbour, on election by the MNE group, the UTPR top-up tax amount calculated for the UPE jurisdiction shall be deemed to be zero for each fiscal year during the transition period if the UPE jurisdiction has a corporate income tax at a rate of at least 20%.
- The QDTT Safe Harbour has been introduced in line with the standards set out in the OECD's July 2023 Administrative Guidance on the GloBE Model Rules in respect of constituent entities located in other jurisdictions that have obtained safe harbour status following the OECD peer-review process. This means that where an Irish entity is required to implement an IIR or UTPR, the calculations can recognise and exclude entities in jurisdictions where a domestic top-up tax qualifying for safe harbour status has been applied.
- Chapter 10 of the new Part 4A contains administrative provisions, including sections dealing with: the obligation to register; the top-up tax information return; the IIR return; the UTPR return; the UTPR group and group recovery; the QDTT return; the QDTT group and group recovery; expression of doubt; payment; assessments and enquiries; appeals; surcharges for late returns; interest on overdue amounts; and penalties.
- Transitional simplified jurisdictional reporting has been introduced in line with the OECD's July 2023 Guidance on the GloBE Information Return. Where the section applies, on the making of an election, the filing constituent entity is not required to report, in the top-up tax information return for a fiscal year beginning on or before 31 December 2028 and ending on or before 30 June 3030, all adjustments to the Financial Accounting Net Income or Loss, current tax expense or deferred tax expense on the basis of constituent entity by constituent entity (subject to a few exceptions), and all adjustments can be reported on a net basis.
- The new legislation provides relief from the application of a penalty relating to a fiscal year beginning on or before 31 December 2026 and ending on or before 30 June

2028 where the constituent entity has taken "reasonable care to ensure the correct application of this Part". This provision is in line with the Transitional Penalty Relief set out in the OECD's December 2022 Guidance on Safe Harbours and Penalty Relief.

- A number of technical amendments were introduced at Committee Stage to ensure that the provisions in Part 4A TCA 1997 operate as intended and to correct cross-referencing and typographical errors in the Bill as initiated. During the Committee Stage debates the Minister confirmed that a number of the amendments are updates to better reflect agreed OECD Commentary and Administrative Guidance on the Pillar Two Model Rules, which is used as a source of interpretation or illustration to ensure consistency in application across implementing jurisdictions.
- The Minister brought forward further technical amendments at Report Stage of the Finance (No. 2) Bill 2023.

Corporation tax

- Introduction of new defensive measures applying to outbound payments of interest, royalties and distributions (including dividends) towards jurisdictions on the EU list of non-cooperative jurisdictions, no-tax and zero-tax jurisdictions. 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. As part of the legal commitment made by Ireland to secure funding under the EU Recovery and Resilience Facility, the Government agreed to legislate for these new defensive measures to apply to outbound payments by 31 March 2024. The new measures will apply to a payment of interest or royalties or the making of a distribution on or after 1 April 2024. However, where there are existing arrangements in place on or before 19 October 2023, the new measures will apply only to payments or distributions made on or after 1 January 2025. A technical amendment was made to the definition of "relevant payment" at Report Stage to ensure that the legislation operates as intended. (See s36 F(No.2)B23)
- Several amendments relating to the taxation of leases were made, together with a number of consequential amendments. Amendments to s299 TCA 1997 allow accounting rules to be used for leases that meet a threshold for being treated as financing transactions. These are leases where the burden of wear and tear of the asset falls to the lessee rather than the lessor, subject to certain anti-avoidance criteria being met. As a result of the amendment to s299, a number of technical amendments are required to s288, s539, s555 and s603 TCA 1997 to ensure that the provisions operate as intended and to ensure consistency with capital gains tax provisions. A technical amendment to s402 TCA 1997 corrects a previous drafting error relating to corporate Case IV lessors. Section 403 TCA 1997 ring-fences the leasing of machinery or plant so that, where it is carried on in conjunction with other activities, capital allowances on leased machinery or plant can be set off only against leasing income. The lease-adjacent activities set out in s403(1)(d)(i) have been extended. As a result of the amendments to s403, technical amendments are made to s396A and s420A TCA 1997. Amendments to s76D TCA 1997 in Finance (No. 2) Bill (as initiated) confirmed that in calculating the profits of a trade, the income from a lease (in the case of a lessor) and the lease rental payments (in the case of a lessee) are generally to be treated as arising evenly over the life of the lease, irrespective of how the transaction is recorded in the company's accounts. However, amendments to delete "lease" and substitute "finance lease" and to address a number of issues raised after the publication of Finance (No. 2) Bill 2023 were made at Report Stage. The amendments remove operating lessors from this section at this time, pending further review of issues identified. Therefore, operating lessors will continue to be taxed in line with the existing rules. A technical amendment was also proposed at Report Stage to ensure that the section operates as intended where lease

payments may be subject to various changes throughout the lease. Finally, a further two Report Stage amendments provide that non-trading lessors will be entitled to a deduction for their interest expense and, under s299 TCA 1997, similar to Case I lessors, non-trading lessors will be taxed on their net annual financing profit arising from the lease rather than their rental profit. (See s39 F(No.2)B23)

- Introduction of a new s76E TCA 1997, which provides for interest deductibility for a "qualifying financing company" where certain criteria are met. A qualifying financing company is one that obtains third-party finance for the purpose of on-lending that money to a qualifying subsidiary (i.e. direct 75% or more shareholding) for a qualifying business purpose. The Minister brought forward two Report Stage amendments to this section to allow a qualifying financing company to issue relevant loans to qualifying indirectly held subsidiaries, in addition to qualifying directly held subsidiaries, and to allow a qualifying financing company to issue loans to subsidiaries resident in countries with which Ireland has a double taxation agreement, in addition to EU and EEA states. The Report Stage amendments necessitate the provision of additional anti-avoidance rules. (See s40 F(No.2)B23)
- Amendments to the provision for pre-trading expenses related to a trade or profession to confirm that these may not be taken into account in calculating a loss to be set off against other income under s381, s396(2), s396A, s396B, s420, s420A and s420B TCA 1997. These sections are relevant to the set-off of losses against other income taxable at the 12.5% rate, on a value basis, or which could be surrendered as group relief. The amendment will apply for accounting periods commencing on or after 1 January 2024. (See s42 F(No.2)B23)
- Technical amendments to the group relief provisions for corporation tax in s422, s423 and s428 TCA 1997 to clarify that the restrictions where group members have non-corresponding periods also apply in respect of group relief that may be set off against other income taxable at the 12.5% rate or on a value basis. The amendments will apply for accounting periods commencing on or after 1 January 2024. (See s43 F(No.2)B23)
- The cap for film relief is increased from €70m to €125m and will apply to films certified by the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media after 1 January 2024 or after the commencement of the section, whichever is later. This amendment is subject to a Ministerial Commencement Order as it is subject to EU State Aid approval. (See s41 F(No.2)B23)
- Several amendments were made to the digital games tax credit to align it with international definitions of refundable tax credits, such as under the Pillar Two GloBE Rules. In respect of accounting periods commencing on or after 1 January 2024, a digital games development company will have the option to call for payment of the credit or to request that the credit be offset against tax liabilities. A valid claim must be submitted, and Revenue has 48 months from submission of such claim to fulfil payment. Claims for the digital games tax credit cannot include expenditure met by grant aid and must be made within 12 months from the end of the accounting period in which the last of the expenditure giving rise to the claim is incurred. Where a company receives its final cultural certificate within three months before the 12 month deadline, the company has three months from this date to make its claim. Where a company specifies that the amount of the credit is to be offset against the company's corporation tax liability, this may be taken into account for the purposes of calculating preliminary corporation tax. Amendments have been made to the interest and penalty provisions to reflect the new claim mechanism and to the provision in relation to unauthorised claims. (See s99 F(No.2)B23)
- Amendment to the accelerated capital allowances scheme for energy-efficient equipment to extend the scheme until 31 December 2025. (See s29 F(No.2)B23)

- Amendments to s153, s172A and s172C TCA 1997 to ensure that dividend withholding tax (DWT) and the related income tax provisions operate in line with EU law. The definition of "relevant territory" in s153 and s172A is extended to include European Economic Area countries. Section 172C provides an exemption from DWT where a distribution is made by an Irish-resident company to an "excluded person" who is beneficially entitled to the distribution, and the section is amended to extend the definition to include equivalent pension schemes located in a country with which Ireland has a tax information exchange agreement in accordance with s826(1B). The Minister brought forward a technical amendment to the DWT provisions at Report Stage of the Finance (No. 2) Bill 2023 to ensure that the new measures to apply to outbound payments of interest, royalties and distributions operate in priority to the new exemption provided in s172C TCA 1997. (See s37 F(No.2)B23)
- An amendment to s835YA TCA 1997 to take account of the EU list of non-cooperative jurisdictions for tax purposes updated in February 2023. The Minister brought forward a Report Stage amendment to take account of the update to the EU list that was made at ECOFIN in October 2023. (See s44 F(No.2)B23)
- A number of technical amendments to the Anti-Tax Avoidance Directive (ATAD) anti-hybrid mismatch rules introduced in Finance Act 2019 and anti-reverse hybrid mismatch rules introduced in Finance Act 2021. (See s45 F(No.2)B23)

R&D tax credit

(See s34 F(No.2)B23)

- Amendments to the R&D tax credit in s766C and s766D TCA 1997 to increase the rate of the from 25% to 30% of qualifying expenditure in respect of accounting periods commencing on or after 1 January 2024. This rate change will maintain the net value of the existing credit for companies that are subject to the new 15% minimum effective tax rate under Pillar Two while delivering a real increase in the credit to SMEs, which will not be in scope of Pillar Two.
- Amendments have also been made to increase the amount of the first-year payment in s766C(6) from €25,000 to €50,000 to apply in respect of claims made in an accounting period commencing on or after 1 January 2024.
- Introduction of a new "pre-notification requirement", which will apply to companies intending to claim the R&D tax credit for the first time and companies that have not claimed the credit in the previous three years. The pre-notification requirement provides that a company shall notify Revenue, in writing, 90 days before a claim is made under s766C or s766D and provide certain information. Revenue may request further information, explanations, etc. after submission of the notification. The pre-notification requirement will apply in respect of claims made in an accounting period commencing on or after 1 January 2024.
- Amendment to clarify that, after a payment or offset of the R&D tax credit, Revenue may examine a claim and make or amend an assessment. This provision will apply in respect of claims made in an accounting period commencing on or after 1 January 2024.
- Introduction of a new requirement for companies to provide details in the corporation tax return of the amount of non-refundable R&D tax credits that is being carried forward and is available to be offset against future corporation tax liabilities of the company. This provision shall apply in respect of accounting periods ending on or after 31 December 2023.
- Introduction of new transfer-of-trade provisions for both R&D expenditure and capital expenditure on R&D buildings to enable a successor company to step into the shoes of its predecessor and continue to claim the R&D relief. Both the predecessor company and the successor company must have been members of the same group, within the meaning of s411(1) TCA 1997, at

the time when the predecessor company ceases, and successor company commences, to carry on that trade, and the successor company must carry on the trade and R&D activities for two years after this event. The transfer of the building or structure must have been a transfer to which s617 TCA 1997 applies, and the qualifying building must continue to be used by the successor company throughout the remainder of the specified time for the purposes of the R&D activities. This provision will apply in respect of claims made in an accounting period commencing on or after 1 January 2024.

- An amendment to s766 TCA 1997 to provide that provisions relating to expenditure on machinery or plant which is used for R&D purposes will also apply for the purposes of s766C.
- An amendment to s766A TCA 1997 to refer to "relevant expenditure". This provision is deemed to have applied from 15 December 2022.

Capital gains tax

- Introduction of a new Chapter 6A to TCA 1997 to legislate for a new, targeted CGT relief for investment in innovative start-up small and medium-sized enterprises (SMEs). The relief aims to assist SMEs in attracting investment and make Ireland a more attractive location for angel investors. The relief is intended to encourage investors to acquire significant minority shareholdings in early-stage innovative companies that are less than five years old. It allows those investors to avail of a reduced rate of CGT on a sale to a third party. The investment made must be for a minimum amount of €20,000, or €10,000 where at least a 5% shareholding is acquired. The shares acquired must be held for a minimum of three years. A reduced CGT rate of 16% is available on a gain of value equivalent to twice the value of the investor's initial investment. An effective reduced rate of 18% applies to individuals who make the investment via a qualifying partnership. There is a lifetime limit of €3m on gains that may avail of the reduced rate of CGT. The relief is a form of permissible State Aid, and the legislative provisions are drafted in accordance with Articles 21 and 21a of the revised GBER. The relief is subject to a certification process, and a certificate of qualification will issue from Revenue once an application is made. Revenue will publish a register of companies that are issued with a certificate of qualification. This section is subject to a Ministerial Commencement Order to allow the systems necessary for the certification process to be established. The Minister brought forward an amendment to the new section at Report Stage to introduce additional provisions to facilitate the operation of the certification system. During the Committee Stage debates, the Minister confirmed that he intends to commence this section no later than the first quarter of 2024, in part to avoid any lag or delay to individuals' making investments in the innovative SMEs. (See s46 F(No.2)B23)
- Amendment to the definition of "holding company" in s597AA TCA 1997 (revised entrepreneur relief) to clarify that it means a company (i) that holds shares in other companies, all of which are its 51% subsidiaries, and (ii) whose business consists wholly or mainly of the holding of shares in those subsidiaries. During Committee Stage debates the Minister confirmed that this amendment originated from legal advice received by Revenue during a recent appeal, which indicated that the section, as currently drafted, does not adequately stipulate that each subsidiary of a holding company must be a 51% subsidiary; this amendment clarifies the policy intention when the relief was originally introduced. (See s48 F(No.2)B23)
- Introducing changes to CGT retirement relief (s598 and s599 TCA 1997) for disposals made on or after 1 January 2025, which the Minister announced on Budget Day, including (See s49 & s50 F(No.2)B23):
- Extending the relief on a disposal of qualifying assets to someone other than a child (s598), where market value of the assets at the time of disposal does not exceed €750,000, to individuals aged from 55 to 69. Currently, the €750,000 cap applies to individuals aged between 55 and

65, and a cap of €500,000 to claim full relief applies if the individual is aged 66 older. The €500,000 cap is also extended to apply where the individual is aged 70 or older at the time of disposal.

- Inserting an updated reference to Regulation (EU) 2021/2115 regarding the definition of "payment entitlement" and inserting a new sub-section providing that relief must be claimed in a tax return filed by the individual for the relevant year of assessment as a chargeable person.
- Amending the relief on a disposal to a child (s599). At present, if the individual disposing of the qualifying assets is aged between 55 and 65 and the disposal is to a child, full relief may be claimed. The upper age limit is increased from 65 years to 69 years. However, a new cap of €10m will apply to claims for relief where the individual disposing of the assets to a child is aged from 55 to 69. The reduced relief that is currently available on disposals from age 66 onwards (the existing €3m cap) will therefore now apply where the individual is 70 or older.
- As outlined by the Minister on Budget Day, these changes will take effect from 1 January 2025, to allow for a suitable transition period. The Minister brought forward a Report Stage amendment to ensure that the interaction between the existing €3m limit and the new €10m limit will work as intended.
- A retrospective amendment to the CGT relief in s604A TCA 1997 on the disposal of land or buildings acquired between 7 December 2011 and 31 December 2014 and held for between four and seven years from the date of acquisition (with reduced relief available if held for more than seven years) to provide that relief is available only on property that was "purchased" for full market value or "purchased" from a relative for at least 75% of market value. During Committee Stage debates the Minister confirmed that the amendment clarifies, rather than alters, the qualifying conditions for the relief and reflects the consistently maintained policy position that the CGT relief is available only in relation to properties that were purchased in the relevant period and does not otherwise extend to properties acquired in that period, for example, by way of gift or inheritance. The Minister stated that Revenue has applied in practice what is now confirmed in the legislation and the amendment will not result in any clawback for individuals who have already claimed the relief. The Minister also noted that it is not proposed or considered necessary to undertake a retrospective compliance exercise. (See s51 F(No.2)B23)
- Amendment to the deferment of the charge to CGT on the receipt of compensation and insurance moneys for disposal in certain cases (s536 TCA 1997) to provide that this deferment will not apply in the case of a disposal (or deemed disposal) of a property or interest in a property to an authority possessing compulsory purchase powers. (See s47 F(No.2)B23)

Capital acquisitions tax

- Amendments to the Group B CAT threshold to ensure that foster children can avail of the threshold in respect of gifts and inheritances received from the wider family members of the person providing foster care based on their relationship to their foster parent. (See s78 F(No.2)B23)
- Amending the changes made by s75 of Finance Act 2022 to s2 and Schedule 2 of the Capital Acquisitions Tax Consolidation Act 2003 (CATCA 2003) to make provisions for persons who have been the subject of incorrect birth registrations. (See s79 F(No.2)B23)
- Introduction of a new mandatory reporting requirement in relation to interest-free "specified loans", i.e. a loan made to a person by a close relative; to a person by a company with a close relative as beneficial owner; by a close relative to a company with the person as beneficial owner; or by a company with a close relative as beneficial owner to a company with the person as beneficial owner. A beneficiary will be required to deliver a CAT return where there is a deemed

gift under s40(2) CATCA 2003 in respect of the use or enjoyment of the specified loan, where no interest has been paid in respect of the loan within six months of the relevant period in which this gift is deemed to have been taken and the balance outstanding on the specified loan (aggregated with any other specified loan in the relevant period) exceeds €335,000 on at least one day in the relevant period. (See s80 F(No.2)B23)

- Technical changes to the CAT agricultural relief provisions and amendments to the provisions providing for the clawback of CAT agricultural relief and business relief to address a number of inconsistencies and anomalies identified in the provisions. (See s81 F(No.2)B23)

Property

- Increase to the rate at which vacant homes tax (VHT) is charged from three to five times the property's existing base local property tax liability, with this increase taking effect from the next chargeable period, i.e. beginning 1 November 2023. In addition, some technical amendments relating to care and management of the VHT were made to ensure that the administrative provisions in Part 37 TCA 1997 apply in full to VHT. (See s90 F(No.2)B23)
- Deferring the first liability date for residential zoned land tax (RZLT) by one year to 1 February 2025 (for land meeting the relevant criteria on 1 January 2022). Amendments also exclude from RZLT land that is zoned residential but is subject to land management objectives in a local authority development plan or local area plan that has identified the land for phased rather than immediate development. A further opportunity has been given to landowners to make a submission to the local authority, by 31 May 2024, to request a change to the zoning of their land included in a draft revised final map to be published on 1 February 2024. The amendments provide for the publication of a final map, and a revised final map on an annual basis beginning on 31 January 2025, and extend the opportunity to defer the RZLT should the variation process, by which such rezoning may take place, not have concluded by the next RZLT return date. (See s92 F(No.2)B23)
- Amendment to the deduction available for certain retrofitting expenditure incurred by landlords of rented residential properties to provide that landlords of properties that were previously subject to rent controls are eligible to claim a deduction for retrofitting expenditure under s97B TCA 1997. (See s24 F(No.2)B23)
- In respect of the non-resident landlord withholding tax (NLWT) system, the amendments confirm that where a tenant of a non-resident landlord pays rent to a collection agent, the tenant is not obliged to deduct and remit withholding tax to Revenue. In such cases the collection agent deducts and remits tax through the NLWT system, or the collection agent remains the assessable and chargeable person in respect of the landlord's rental income. (See s25 F(No.2)B23)
- Amendments to the Defective Concrete Products Levy (DCPL) to remove ready-to-pour concrete used in the manufacture of certain precast concrete products from 1 January 2024 and include related procedural requirements, including penalties for false declarations. The amendments also provide for a scheme for repayment of DCPL to a specified person who has utilised ready-to-pour concrete in the manufacture of precast concrete products in the accounting period 1 September 2023 to 31 December 2023. A technical amendment was made at Report Stage. (See s93 F(No.2)B23)

Stamp duty

- Increase to the maximum annual rent threshold from €40,000 to €50,000 for the exemption from stamp duty for leases of houses and apartments with a term of less than 35 years. (See s68 F(No.2)B23)
- From 1 January 2024, an increase in the aggregate lifetime amount of relief available to a person under stamp duty relief for young trained farmers from €70,000 to

€100,000, which is the maximum amount allowable under the new EU ABER. (See s69 F(No.2)B23)

- Consanguinity relief from stamp duty will be extended for a further five years to 31 December 2028. (See s70 F(No.2)B23)
- Amendment to farm consolidation relief from stamp duty to include civil partners, in addition to spouses, to take account of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010. (See s72 F(No.2)B23)
- Introduction of a revised bank levy that will apply for 2024, which will be payable by banks that received State assistance during the banking crisis, namely, AIB, Bank of Ireland, EBS and PTSB. The current bank levy is due to expire on 31 December 2023. The revised bank levy will be applied at the rate of 0.112% of the value of eligible deposits held by each bank on 31 December 2022. The revised bank levy will be reviewed by the Department of Finance next year to ensure that it remains appropriately calibrated. (See s73 F(No.2)B23)
- Repealing s78I of the Stamp Duties Consolidation Act 1999 (SDCA 1999), dealing with American depositary receipts, and inserting a new sub-section 78B(4) SDCA 1999, which provides an exemption from stamp duty on shares listed on a recognised stock exchange located in the US or Canada where the trade is settled through a securities settlement system located in the US or Canada, which puts a Revenue administrative practice on a statutory footing. (See s74 F(No.2)B23)
- Changes to the provisions relating to the repayment of stamp duty to replace s159A SDCA 1999. (See s76 F(No.2)B23)

VAT

- Increase to the VAT registration thresholds for businesses from €37,500 to €40,000 for services and from €75,000 to €80,000 for goods with effect from 1 January 2024. (See s58 F(No.2)B23)
- Temporary extension of the 9% VAT rate to gas and electricity supplies for an additional 12 months, from 11 October 2023 to 31 October 2024. (See s59 F(No.2)B23)
- Deletion of s51 of the Value-Added Taxes Consolidation Act 2010 (VATCA 2010), which dealt with the power given to Revenue to determine the rate of tax chargeable on the supply of goods or services of any kind, or in any particular circumstances, or to determine whether a particular activity is exempt. The deletion of this section is as a result of the provision's not being used and its no longer being considered necessary. (See s60 F(No.2)B23)
- Introduction of a new s92A to VATCA 2010, setting out the appropriate VAT treatment of the planned deposit return scheme to provide for the operator of the scheme to account for VAT on unredeemed deposits without any requirement for businesses in the supply chain to account for VAT on deposits at any point. (See s61 F(No.2)B23)
- Removal of the word "issuing" in relation to stocks, shares, debentures and other securities as set out in paragraph 6(1)(a) of Schedule 1 VATCA 2010. (See s63 F(No.2)B23)
- Putting on a legislative footing the Revenue practice to treat the letting of emergency accommodation as an exempt activity as set out in the EU VAT Directive. (See s64 F(No.2)B23)
- Amendment to provide that the zero rate of VAT will apply to the supply of e-books and audiobooks from 1 January 2024. (See s65 F(No.2)B23)

Miscellaneous measures

- Amendment to s220, Schedule 4 and Schedule 15 TCA 1997 to include additional not-for-profit bodies and/or non-commercial State-sponsored bodies in the list of exempt bodies. The exemption from taxation for these bodies avoids circular payments in and out of the Exchequer. The exemptions are to take effect from the dates of establishment of the bodies. (See s35 F(No.2)B23)

- Extension of the temporary excise rate reductions applying to auto diesel, petrol and marked gas oil (MGO), which were due to expire on 31 October 2023, until 31 March 2024, with a phased restoration of the outstanding amounts of 8 cent on petrol, 6 cent on diesel and 3.4 cent on MGO taking place in two equal instalments on 1 April 2024 and 1 August 2024. (See s52 F(No.2)B23)
- Extension of vehicle registration relief for battery electric vehicles to 31 December 2025. (See s55 F(No.2)B23)
- Amendment to s895 TCA 1997 to provide circumstances where an individual will not become a chargeable person on the opening of a foreign bank account. (See s83 F(No.2)B23)
- Amendments to the sections in TCA 1997 relating to FATCA, CRS and DAC2 reporting (s891E, s891F and s891G, respectively) to confirm how to identify the liable person for trusts and partnerships to whom penalties should apply for non-compliance, failure to deliver or the making of incorrect returns. (See s86 F(No.2)B23)
- Clarifying the powers available to authorised Revenue officers to make enquiries into the accuracy of a return or the failure to make a return under DAC6 and amendments to ensure appropriate transposition of DAC7, relating to the new reporting requirements for digital platform operators. (See s87 F(No.2)B23)
- Introduction of a new 891L to TCA 1997 to transpose Article 12a of EU Directive 2021/514 (DAC7) into Irish law and concerning a common legal basis by which EU Member States are obliged to facilitate other Member States in conducting joint audits. A Committee Stage amendment clarifies that the provisions of s851A TCA 1997, which relates to the confidentiality of taxpayer information and already applies to Revenue officials, shall also apply to a nominated officer (i.e. a foreign tax official carrying out a joint audit). (See s88 F(No.2)B23)

Supreme Court delivers judgment on employment status case

The Supreme Court judgment on the key factors to be considered when classifying an individual's employment status for income tax purposes in *The Revenue Commissioners v Karshan (Midlands) Ltd. t/a Domino's Pizza* was delivered by Mr Justice Brian Murray on 20 October. The case was concerned with whether delivery drivers were independent contractors under a "contract for service" and taxable under Schedule D of TCA 1997 or employees under a "contract of service" and taxable under Schedule E (PAYE) of TCA 1997. (See also article by Robert Dever Julie Galbraith & Laura Ellen Ford "The Last Slice of the Action? Supreme Court Delivers in the *Domino's Pizza* Case" in this issue).

Murray J decided that the question of whether a contract is one "of service" or "for service" should be resolved by reference to the following five questions:

- Does the contract involve the exchange of a wage or other remuneration for work?
- If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?
- If so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement?
- If these three requirements are met, the decision maker must then determine whether the terms of the contract between employer and worker, interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment or with some other form of contract, having regard, in particular, to whether the arrangements point to the putative employee's working for themselves or for the putative employer.
- Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing.

In this case, Murray J found that the Tax Appeal Commissioner was entitled to conclude that the drivers were employees for the purposes of income tax.

Revenue welcomed this judgment in a press release and noted that businesses are responsible for ensuring that the correct taxes are deducted from their employees' pay (which includes both salary payments and any notional pay received) and remitted to Revenue under Schedule E (PAYE), at the right time, and encouraged all businesses, and any agents representing them, to familiarise themselves with the details of this judgment.

In particular, any businesses that currently engage contractors, sub-contractors or other workers on a self-employment basis (i.e. where that worker is not treated as an employee of the business for income tax purposes) should review the nature of any such arrangement(s) in light of this judgment and consider any implications it may have for them. It is important to note that this judgment is relevant to a broad range of work and is not limited to delivery drivers.

Where a business considers that it may have previously misclassified a worker as self-employed, rather than as an employee, and wishes to regularise its position, it should do so as set out in Section 2 of Revenue's Code of Practice for Revenue Compliance Interventions.

Opinion of Advocate-General in Apple State Aid case published

The Opinion of the Advocate-General in the Apple State Aid case was published on 9 November. In his Opinion, the Advocate-General proposes that the judgment of the General Court of the European Union (GCEU) on "tax rulings" adopted by Ireland be set aside in the Apple State Aid case and the case be referred back to the GCEU for a new decision on the merits.

The Apple State Aid case concerns a Decision issued by the European Commission to Ireland in 2016, finding that Ireland had provided State Aid to Apple. Ireland challenged this finding to the GCEU. In 2020 the GCEU issued its judgment, which annulled the Commission's State Aid decision of 2016. The Commission appealed the GCEU judgment to the Court of Justice of the European Union (CJEU), and the CJEU heard the appeal on 23 May 2023.

The Advocate-General analyses the legal aspects of the case in detail and, separately from the deliberations of the court, provides an Opinion regarding the issue being heard. This Opinion does not form part of the CJEU's judgment but is considered by the court when arriving at its final judgment. After the publication of the Advocate-General's Opinion, the court's judgment will be pronounced in open court. The timing of the judgment is at the discretion of the court.

Commenting on the Opinion of the Advocate-General, the Minister for Finance, Michael McGrath TD, said:

> "It is important to bear in mind that this Opinion does not form part of the Court of Justice of the European Union judgment but is considered by the Court when arriving at its final ruling. My department and the State's legal team will consider the full Opinion of the Advocate General in detail. It has always been, and remains, Ireland's position that that the correct amount of Irish tax was paid and that Ireland provided no State aid to Apple. We now await the judgment of the Court of Justice of the European Union on this matter."

Institute responds to consultation on funds sector

The Institute responded to the Department of Finance's consultation on the "Funds Sector 2030: A Framework for Open, Resilient & Developing Markets" in September. Our response, which was completed via an online portal, focused on the tax issues raised in the following sections of the consultation paper: Section 5: Taxation of investment products; Section 6: The role of the REIT and IREF regimes in the Irish property market; Section 7: The role of the section 110 regime; and Section 8: General Questions. (See also article by Kevin Smith & Bernadine Dooley

"Offshore Funds: A Case for Simplification?" in this issue)

We highlighted the complexity of determining the correct tax treatment of a fund investment and urged that the taxation of fund investments be overhauled to simplify the regime and support tax compliance. Observing that varying tax rates' applying to different forms of investment can impact investor behaviour, we sought the alignment of the tax treatment of savings and investment products.

We highlighted that certainty of tax treatment is of paramount importance to investors and that changes to the taxation of Irish property structures and products in the recent past have reduced investor confidence in the products available. On the basis that leverage limits for Irish property funds are now governed by the Central Bank of Ireland, we urged that consideration be given to removing the IREF income tax rules that were introduced to counter the use of excessive debt and other payments to reduce distributable profits. We also underlined that a number of aspects of the Irish REIT regime are not operating as intended and are not aligned with the policy objectives of the REIT regime.

We stressed that a number of legislative changes are required to ensure that the s110 TCA 1997 regime continues to be considered internationally as a well-functioning tax-neutral special-purpose vehicle.

The consultation paper asked stakeholders to identify their top three priority proposals for Government implementation. The priority proposals identified in the Institute's submission were, first, that Ireland should adopt a participation exemption for foreign dividends on the election of the taxpayer; second, that a key focus of policy-makers should be to simplify the existing complex rules that apply to savings and investment products, to property funds and to s110 companies; and third, that the tax treatment of savings and investment products should be aligned.

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

Institute responds to second OECD consultation on Pillar One – Amount B

The Institute responded to the second OECD public consultation on Pillar One – Amount B on 1 September. Amount B is intended to apply the arm's-length principle to in-country baseline marketing and distribution activities on a simplified and streamlined basis, with a particular focus on the needs of low-capacity countries.

The consultation document sought stakeholders' views on the design elements of Amount B, including:

- ensuring an appropriate balance between a quantitative and qualitative approach in identifying baseline distribution activities and
- the appropriateness of the pricing framework, including in light of the final agreement on scope; the application of the framework to the wholesale distribution of digital goods; country uplifts within geographic markets; and the criteria to apply Amount B utilising a local database in certain jurisdictions.

In our response we underlined that a key objective of Amount B is to improve tax certainty and reduce disputes involving in-scope baseline marketing and distribution transactions. To achieve this objective, we urged members of the Inclusive Framework to adopt the "Alternative A" approach to define scope, as it would be easier to apply and administer, which would provide the necessary certainty sought by both taxpayers and tax administrations. In addition, we contended that it should be possible for the wholesale distribution of digital goods to come within the scope of Amount B.

The consultation document proposes that the Amount B pricing methodology would recognise that a distributor operating in a "high country risk" jurisdiction would

be entitled to higher returns relative to a distributor operating in a "low country risk" jurisdiction and that an adjustment would be made to the return under the global pricing matrix by reference to the sovereign credit rating category of the jurisdiction. In our submission we highlighted that an adjustment would not generally be made based on the sovereign credit rating category of a jurisdiction. We also noted that as the level of sovereign credit risk depends on various factors, it is doubtful that using sovereign credit ratings would be a coherent approach to determine the appropriate level of return to which a distributor should be entitled.

Regarding the proposal that a modified pricing matrix would apply for certain jurisdictions to take account of local market differences, we emphasised that such an approach would undoubtedly add further complexity to the application of Amount B and that the global dataset should be sufficiently robust to remove the need for a modified pricing matrix. If members of the Inclusive Framework determine that a modified pricing matrix is appropriate, we stressed that there must be distinct economic evidence to demonstrate the existence of genuine local market differences that would support the use of a modified pricing matrix for a particular jurisdiction. We also noted the importance of any modified pricing matrix being fully transparent and based on independent verifiable data.

The Inclusive Framework plans to approve a final report on Amount B and incorporate key content into the OECD Transfer Pricing Guidelines by January 2024.

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

CFE responds to Commission's FASTER withholding tax proposal

On 19 June 2023 the European Commission launched a public consultation on a proposed Directive on a new EU system for the avoidance of double taxation and prevention of tax abuse: Faster and Safer Relief of Excess Withholding Taxes (known as FASTER).

The Institute, which is a member organisation of CFE Tax Advisers Europe (CFE), was part of the working group that helped to formulate the CFE's response to the consultation, which was submitted to the Commission on 18 September. In its response CFE reiterated that it is supportive of the initiative to introduce an EU-wide system for relief at source of withholding tax on dividend, interest and royalty payments and service fees, and to provide for exchange of information and cooperation between tax authorities under the system, as was set out in its response to the June 2022 consultation on the proposal.

In its response CFE noted that it believes that a tax residence certificate should be issued in a harmonised format within the EU, in both the local language and English. Furthermore, it should certify the residence of the taxpayer under the applicable domestic law and not for the purposes of particular tax treaties. In the view of CFE and its member organisations, the scope of the proposed Directive is too restricted, given the extremely limited application to only publicly traded bonds and shares, which is much narrower than was originally envisaged at the time of the Commission's consultation process in 2022. CFE highlighted that it is of the view that relief at source via a digital certificate mechanism should be applicable to all types of dividend, interest and royalty payments and to service fees.

CFE noted that the role of financial intermediaries should be revisited and observed that the proposed Directive will not enter into force until January 2027, which is a relatively long transition period, compared with other direct tax proposals, for what would seemingly be a less complicated implementation.

Policy News

Minister McGrath publishes roadmap for introduction of participation exemption

On 14 September the Minister for Finance, Michael McGrath TD, published a Roadmap for the Introduction of a Participation Exemption to Irish Corporation Tax, including a technical public consultation to inform ongoing design work. The roadmap sets out a project timeline for the planned introduction of a participation exemption for foreign-source dividends in Finance Bill 2024, with an effective date of 1 January 2025. It notes that further examination of the potential benefits and impacts of a foreign branch exemption is merited before a decision is reached on its implementation.

The technical consultation outlined in the roadmap includes 53 questions covering the structural design of a participation exemption for dividends and consequential amendments that may be required to accommodate the new regime. It also includes eight questions seeking further information relating to a potential exemption for foreign branch profits, to inform further consideration of the policy merits of this proposal. The deadline for responding to the consultation was Wednesday, 13 December 2023.

According to the project timeline in the roadmap, a first Feedback Statement on a participation exemption for foreign dividends will be published by the end of March 2024, to set out draft approaches to the legislation and facilitate detailed technical consultation. A second Feedback Statement may be published in July 2024, if required.

The move to a territorial system of taxation has been a long-standing area of focus for the Institute. We stressed the need for a move to a territorial system of taxation in our Pre-Finance Bill Submissions in 2020, 2022 and 2023 and in our response to the Department of Finance's 2022 public consultation on a territorial system of taxation and our response to the Department of Finance consultation on the Funds Sector 2030: A Framework for Open, Resilient & Developing Markets in September 2023.

The Institute issued a press release on 15 September 2023 in which Institute President Tom Reynolds welcomed the Minister's commitment to legislate for a participation exemption for foreign dividends of companies based in Ireland but noted members' disappointment that the legislation will not be published until Finance Act 2024, to come into effect on 1 January 2025.

VAT Modernisation consultation: real-time digital reporting and electronic invoicing

As signalled in Minister McGrath's Budget 2024 speech, Revenue launched a public consultation on how we can use digital advances to modernise Ireland's VAT invoicing and reporting system on 13 October. This initial consultation covers the reform of business-to-business (B2B) and business-to-government (B2G) VAT reporting, supported by e-invoicing. Revenue is interested in the views of stakeholders on the development of a new system of digital real-time VAT reporting in conjunction with mandatory e-invoicing. The consultation process will run until **Friday, 12 January 2024**.

Minister signs Commencement Orders to implement Finance Act 2022 amendments to KDB and KEEP

Finance Act 2022 provided for an increase in the effective tax rate of the Knowledge Development Box (KDB) from 6.25% to 10%; however, this amendment was subject to a Ministerial Commencement Order once agreement was reached by the OECD/G20 Inclusive Framework on BEPS on the subject-to-tax rule (STTR). The Inclusive Framework reached an agreement on the STTR in July 2023, and the Minister for Finance, Michael McGrath TD, signed an Order to commence the Finance Act 2022 provision (SI 435 of 2023) on 31 August, providing for an increase in the effective tax rate for the KDB with effect from **1 October 2023**.

On 14 November Minister McGrath also signed an Order to commence the Finance Act 2022

amendments to the Key Employee Engagement Programme (KEEP) after the receipt of State Aid approval from the European Commission (SI 555 of 2023). The amendments came into effect on **20 November 2023**.

The amendments provide:

- For the extension of the scheme to the end of 2025. This continuation of the scheme beyond its current sunset date of end of 2023 provides certainty to stakeholders regarding the future of the scheme.
- That shares that were acquired through a company buyback of shares can qualify for the KEEP.
- For the increase of the limit for the total market value of issued but unexercised qualifying share options for qualifying companies and qualifying holding companies from €3m to €6m.
- Changes to the types of shares that qualify for the KEEP from new ordinary fully paid up shares to ordinary fully paid up shares, so that existing shares that a company holds can qualify.

European Council adopts Directive amending DAC8

The European Council adopted the Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC8) at a meeting of the Economic and Financial Affairs Council on 17 October. The amendments mainly concern the reporting and automatic exchange of information on revenues from transactions in crypto-assets and on advance tax rulings for high-net-worth individuals. The aim of the Directive is to strengthen the existing legislative framework by enlarging the scope for registration and reporting obligations and overall administrative cooperation of tax administrations.

Under the Directive, there will be a mandatory automatic exchange between tax authorities of information that will be required to be reported by crypto-asset service providers. The Directive covers a broad scope of crypto-assets, building on the definitions that are set out in the Regulation on Markets in Crypto-Assets (MiCA). Crypto-assets that have been issued in a decentralised manner, as well as stablecoins, including e-money tokens and certain non-fungible tokens (NFTs), are included in the scope.

The Directive amends a number of existing provisions of the DAC. It 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 related taxes. It also amends DAC provisions on penalties that are to be applied by Member States to persons for failing to comply with national legislation on reporting requirements adopted pursuant to DAC.

The Directive will be published in the *Official Journal* and enter into force 20 days after its publication.

Crypto-Asset Reporting Framework

In a Joint Statement on 10 November 48 countries, including Ireland, welcomed the new international standard on automatic exchange of information between tax authorities developed by the OECD, the Crypto-Asset Reporting Framework (CARF), and confirmed that they intend to implement the OECD's global tax transparency framework for the reporting and exchange of information with respect to crypto-assets by 2027.

CARF is a key component of the *International Standards for Automatic Exchange of Information in Tax Matters* developed by the OECD under a G20 mandate. It provides for the automatic exchange of tax-relevant information on crypto-assets and comes against the backdrop of a rapid adoption of the use of crypto-assets for a wide range of investment and financial uses. The CARF is being delivered within the EU through an amendment to the Directive on administrative cooperation.

European Commission adopts proposals for BEFIT and transfer pricing

On 12 September the European Commission adopted a key package of initiatives to reduce tax compliance costs for large, cross-border

businesses in the EU, including a Proposal for a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT), which provides for a new, single set of rules to determine the tax base of groups of companies, and a Proposal for a Council Directive on Transfer Pricing, which is intended to harmonise transfer pricing rules within the EU and ensure a common approach to transfer pricing issues.

Proposal for a Council Directive on BEFIT

The BEFIT proposal builds on the OECD's international agreement on a global minimum level of taxation, i.e. Pillar Two of the *Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* and the EU Pillar Two Minimum Tax Directive, adopted at the end of 2022. BEFIT replaces the Commission's common corporate tax base (CCTB) and common consolidated corporate tax base (CCCTB) proposals, which are withdrawn.

The BEFIT proposal includes common rules to compute the tax base at entity level, aggregation of the tax base at EU group level and allocation of the aggregated tax base. It is proposed that the new rules would be mandatory for groups operating in the EU with an annual combined revenue of at least €750m and where the ultimate parent entity holds at least 75% of the ownership rights or of the rights giving entitlement to profit. A one-stop-shop would allow one group member to file the group's information returns with the tax administration of one Member State.

If adopted by the European Council, the BEFIT Directive would be implemented into the national law of Member States by 1 January 2028, with the rules applying from 1 July 2028. The Commission is seeking feedback on this proposed Directive. The deadline for providing feedback is currently set for 22 January 2024; however, this period will be extended every day until the proposal is available in all EU languages.

Proposal for a Council Directive on Transfer Pricing

The proposed Directive on Transfer Pricing incorporates the arm's-length principle and key transfer pricing rules into EU law, clarifies the role and status of the OECD Transfer Pricing Guidelines and creates the possibility to establish common binding rules on specific aspects of the rules within the EU.

The Directive would apply to taxpayers that are registered in, or subject to, tax in one or more Member State, including permanent establishments in one or more Member State. If adopted by the European Council, the rules would apply from 1 January 2026. The Commission is seeking feedback on this proposed Directive by Wednesday, 3 January 2024.

European Commission presents SME Relief Package

On 12 September the European Commission presented a series of initiatives to address the needs of Europe's small and medium-sized enterprises (SMEs). The Communication on the SME Relief Package proposes new measures that are intended to provide short-term relief, boost the long-term competitiveness of SMEs and strengthen fairness in the business environment across the Single Market, including:

- a proposal for a Council Directive establishing a head-office tax system for micro, small and medium-sized enterprises and amending Directive 2011/16/EU;
- a proposal for a Regulation of the European Parliament and of the Council on combating late payment in commercial transactions; and
- a set of measures to improve access to finance and skilled workforce and to support SMEs throughout their business lifecycle.

The proposal for a head-office tax system for SMEs (known as HOT) is intended to give SMEs operating cross-border through permanent establishments the option to interact with only one tax administration instead of having to comply with multiple tax systems. If adopted by the European Council, the rules would apply from 1 January 2026.

SMEs would calculate their taxes based only on the tax rules of the Member State of their head office. They would file a single tax return, with the tax administration of their head office,

which would share this return with the other Member States where the SME is operating. The Member State of the head office would also subsequently transfer any resulting tax revenues to the countries where the permanent establishments are located.

The scope of these rules would be limited to stand-alone SME entities with permanent establishments and would not be extended to SME groups with subsidiaries. If an SME chooses to apply the new rules, it would have to remain under this system for five fiscal years, unless the head office changes residence in the meantime or its foreign business activity grows exponentially in comparison to the business activity in the Member State of origin. In that case, the rules would cease to apply. An SME would be able to renew its choice every five years without limit, provided it continues to meet the eligibility criteria.

The Commission is seeking feedback on this proposed Directive by Thursday, 21 December 2023.

European Commission adopts detailed reporting rules for CBAM

On 17 August the European Commission adopted the rules governing the implementation of the Carbon Border Adjustment Mechanism (CBAM) during its transitional phase, which commenced on 1 October 2023 and runs until the end of 2025.

The Implementing Regulation, which was adopted in May 2023, details the transitional reporting obligations for EU importers of CBAM goods, as well as the transitional methodology for calculating embedded emissions released during the production process of CBAM goods.

In the CBAM's transitional phase, traders will only have to report on the emissions embedded in their imports subject to the mechanism without paying any financial adjustment, giving adequate time for businesses to prepare and to allow for the definitive methodology to be fine-tuned by 2026.

Although importers will be asked to collect fourth-quarter data as of 1 October 2023, their first report must be submitted by 31 January 2024. The Commission has developed a dedicated CBAM webpage with additional resources for EU importers.

UK Autumn Statement 2023

On 22 November the UK Chancellor of the Exchequer, the Rt Hon. Jeremy Hunt MP, delivered his Autumn Statement 2023. Some of the key tax measures announced are outlined below.

R&D tax reliefs

The two existing R&D tax reliefs available in the UK, the R&D Expenditure Credit (RDEC) and Small and Medium Enterprise Scheme, will be merged into a single, simplified scheme, with expenditure incurred in accounting periods beginning on or after 1 April 2024 to be claimed under the merged scheme. Some of the key aspects of the merged scheme are:

- A benefit in the form of an above-the-line expenditure credit calculated at a rate of 20% (in line with the existing RDEC).
- The notional taxation of the credit in loss-making companies will be lowered from 25%, as per the current RDEC scheme, to 19%.
- The new, merged scheme will apply the more generous PAYE and NIC caps from the existing SME scheme.
- The intensity threshold for additional support for R&D-intensive loss-making SMEs will be reduced from 40% to 30%. The UK Government will also introduce a one-year grace period, so that companies that dip under the 30% qualifying R&D expenditure threshold will continue to receive relief for one year.
- From 1 April 2024 R&D claimants will no longer be able to nominate a third-party payee for R&D tax credit payments, subject to limited exceptions.

Capital allowances: permanent full expensing

In the Spring Budget 2023 the UK Government introduced full expensing (100% upfront capital allowances) for three years from 1 April 2023 on qualifying main-rate plant and

machinery investments. This measure has now been made permanent to incentivise capital investment by companies. The UK Government also announced that it will undertake a technical consultation with industry to determine how the UK's capital allowances legislation could be simplified.

UK implementation of OECD/G20 Pillar Two global minimum tax

The Autumn Statement 2023 affirms that the UK Government is committed to delivering the OECD/G20 two-pillar solution to address the tax challenges posed by digitalisation. It outlines the importance for the UK of implementing Pillar Two on a similar timeline to other countries.

The statement notes that more than 30 countries across the world have taken steps towards implementation. It outlines that other countries moving to implement Pillar Two from 31 December 2023 or 1 January 2024 include the EU Member States, Australia, Canada, New Zealand, South Korea, Switzerland and Vietnam.

The statement highlights that Japan plans to implement Pillar Two from 1 April 2024 and that jurisdictions implementing Pillar Two in 2025 include Thailand and Singapore, with many more countries expected to follow. The statement remarks that the UK Government will continue to monitor international developments on implementation.

National Insurance Contributions and National Living Wage

From 6 January 2024 the main rate of Class 1 employee NICs will be reduced from 12% to 10%. The main rate of Class 4 self-employed NICs will reduce from 9% to 8% from 6 April 2024.

The UK Government has also provided that no one will be required to pay Class 2 self-employed NICs from 6 April 2024. Details of this change are:

- From 6 April 2024 self-employed people with profits above £12,570 will no longer be required to pay Class 2 NICs but will continue to receive access to contributory benefits, including the State pension.
- Those with profits of between £6,725 and £12,570 will continue to get access to contributory benefits, including the State pension, through a National Insurance credit without paying NICs, as they do currently.
- Those with profits under £6,725 and others who pay Class 2 NICs voluntarily to get access to contributory benefits, including the State pension, will continue to be able to do so.

From 1 April 2024 the National Living Wage will increase by 9.8% to £11.44 an hour for eligible workers across the UK aged 21 and over. The National Minimum Wage rates for young people and apprentices will also increase (i.e. for those aged 18–20 by 14.8% to £8.60 an hour, for 16–17-year-olds and apprentices by 21.2% to £6.40 an hour).

Other measures

- The UK Government intends to replace the existing film, TV and video games tax reliefs with refundable expenditure credits in the Autumn Finance Bill 2023. These expenditure credits will be available to claim from 1 January 2024. The existing reliefs will cease to be available from 1 April 2027.
- The Enterprise Investment Scheme and Venture Capital Trust will be extended to 6 April 2035.
- From 6 April 2024 the income tax cash basis will be set as the default method for self-employed and partnerships to calculate taxable profits from 2024–25 onwards, with the possibility to opt out to the accruals basis. The current turnover thresholds to use the cash basis will be removed.
- The Climate Change Agreement Scheme will be extended until 2033, which gives tax relief to energy-intensive businesses to encourage investment in energy efficiency and support the net-zero transition.
- A package of design changes are planned to simplify and improve Making Tax Digital for Income Tax Self-Assessment, which will take effect from April 2026, after a review undertaken by the UK Government.

Update on Two-Pillar Solution

Pillar One

The OECD/G20 Inclusive Framework on BEPS released the text of a new Multilateral Convention to Implement Amount A of Pillar One ("the MLC") on 11 October. The MLC, which is part of the Inclusive Framework's *Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, reflects the current consensus achieved among members of the Inclusive Framework.

The MLC text, which is not yet open for signature, states that there are different views on a handful of specific items of a small number of jurisdictions that are constructively engaged in resolving these differences. For the MLC to enter into force, it needs to be ratified by at least 30 jurisdictions that account for at least 60% of the ultimate parent entities of in-scope multinational enterprises. Once these minimum conditions are met, the jurisdictions that have ratified can decide when the MLC will enter into force.

During the ECOFIN meeting on 9 November, the European Council and European Commission issued statements welcoming the progress made by the Inclusive Framework on finalising the Multilateral Convention implementing Pillar One, which will shortly be opened for signature, and noted the progress made on Amount B.

Pillar Two

On 3 October the Inclusive Framework concluded negotiations and adopted a new Multilateral Convention to Facilitate the Implementation of the Pillar Two Subject to Tax Rule ("the STTR Multilateral Instrument", or STTR MLI), which will facilitate the implementation of the STTR in existing bilateral tax treaties. The STTR MLI is open for signature.

The STTR is a treaty-based rule that applies on a transactional basis to intragroup payments from source states that are subject to low nominal tax rates in the state of the payee. The STTR is based on an understanding that where, under a tax treaty, a source state has ceded taxing rights on certain outbound intragroup payments, it should be able to recover some of those rights where the income in question is taxed (if at all) in the state of the payee (i.e. the residence state) at a rate below 9%.

The STTR applies before the Pillar Two Global Anti-Base Erosion (GloBE) Rules and is creditable in computing the effective tax rate for the income inclusion rule and undertaxed profits rule. It is not limited to members of groups meeting the revenue thresholds applying for the purposes of the GloBE rules, i.e. corporate groups with annual global turnover of at least €750m.

Inclusive Framework jurisdictions that apply nominal corporate income tax rates below the STTR minimum rate of 9% to items of covered income are required to implement the STTR in their bilateral tax treaties when requested to do so by Inclusive Framework jurisdictions identified as developing for this purpose. Inclusive Framework members can elect to implement the STTR by signing the MLI or bilaterally amending their treaties to include the STTR when requested by developing Inclusive Framework members.

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

During the ECOFIN meeting on 9 November the European Council and European Commission issued statements confirming that the administrative guidance on Pillar Two endorsed by the Inclusive Framework in December 2022, February 2023 and July 2023 is compatible with Council Directive (EU) 2022/2523 of 14 December 2022 (known as the EU Minimum Tax Directive or the Pillar Two Directive). The Council statement highlighted that the recitals of the Pillar Two Directive refer to the use of the guidance developed by the Inclusive Framework as a source of illustration or interpretation and noted the intention of Member States to follow this guidance when transposing the Pillar Two Directive into their national law to avoid divergences and inconsistencies in interpretation of the provisions of that Directive.

Recent Revenue eBriefs

Lorraine Sheegar
Tax Manager, Tax Policy & Representations, Irish Tax Institute

Revenue eBriefs Issued from 1 August to 31 October 2023

No. 176 Temporary Solidarity Contribution

Revenue published a new "Temporary Solidarity Contribution" manual, which provides guidance on the application of this contribution to windfall gains made in 2022 and 2023 by the fossil fuel production and refining sector.

Council Regulation (EU) 2022/1854 of 6 October 2022 provided for the introduction of a temporary solidarity contribution by Member States. This was implemented in Ireland in the Energy (Windfall Gains in the Energy Sector) (Temporary Solidarity Contribution) Act 2023 ("the Act").

The Act inserted Part 24B into the Taxes Consolidation Act 1997 and provides for the relevant definitions of "taxable profits" and associated provisions required to ensure operability of the measures included in the Act. Part 24B should be read in conjunction with the Act. The temporary solidarity contribution is a levy placed under the care and management of the Revenue Commissioners.

No. 177 Income Tax Return Form 11 2022 – ROS Form 11

Revenue has published the manual "Income Tax Return Form 2022 – ROS Form 11" to highlight further updates and changes to the 2022 form. The Form 11 was updated at the end of January 2023 to add questions for the rent tax credit claim, and in June 2023 for updates to the Employment Investment Incentive (EII), Start-Up Relief for Entrepreneurs (SURE) and Start-up Capital Incentive (SCI). The ROS Form 11 is updated on an ongoing basis to include additional prefilled information from third parties. Agricultural payments information is available on the Form 11, and the prefilled information on the rental income panel was due to be available from the end of August.

There is no ROS offline version of the 2022 Form 11, but it is available in the Return Preparation Facility.

The changes to the ROS Form 11 manual include:

- an update on prefilled data on electronic professional services withholding tax (ePSWT) filing notification data (in paragraph 3.2);
- a "workaround" to enable filing of the 2022 form for non-resident landlords who do not have a collection agent acting on their behalf and where the tenant did not withhold any tax (in paragraph 4.1);
- a new question in the "Allowable Deductions incurred in Employment" panel to reflect situations where a remote working relief claim may have been made in real time, via myAccount (in paragraph 6.1);
- updated guidance on "Taxable Benefits (not taxed at source under PAYE)" to amend the heading "Other" to "Other including BIK" (in paragraph 6.2) – amounts entered in this field are charged to tax, USC and PRSI;
- updates to the tax credits panel (in paragraph 8 and subsequent paragraphs) to

reflect increased values, warning messages, some changes to the EII, SURE and SCI sub-panels, and updates to pre-populated real-time information from the Receipts Tracker; and
- a new sub-panel regarding rent tax credit claims (in paragraph 8.9).

No. 178 Update to the Share Schemes Manuals

Revenue has updated "Chapter 3 – Unapproved Share Options" of the Share Schemes Manual. An update, in section 3.6.3, relates to "Interest on the late payment of RTSO". A new section 3.6.4 has also been inserted, which concerns "Penalties for the non-filing of the Form RTSO1". The examples in the manual have been updated throughout. "Chapter 10 – Approved Profit Sharing Schemes (APSS)" of the Share Schemes Manual has also been amended to include updated examples.

No. 179 Submission of iXBRL Financial Statements – Updates to Manual

Revenue updated the manual "Submission of iXBRL Financial Statements as Part of Corporation Tax Returns", as follows:

- Section 1.6 reflects the withdrawal of older taxonomies.
- Section 1.8 includes an updated URL for the iXBRL hub on the Revenue website.
- Section 3.1.8 confirms the iXBRL filing obligations of non-resident corporate landlords.

No. 180 A Guide to Self-Assessment

Revenue's manual "A Guide to Self-Assessment" has been amended in paragraph 4 to reflect the online payment options available.

No. 181 Vehicle Registration Tax Manual Section 3

Section 2 of Revenue's manual "Vehicle Registration Tax (VRT) Section 3", titled "Vehicles for People with Disabilities Tax Relief Scheme", has been revised.

No. 182 Authorisation of Warehousekeepers & Approval of Tax Warehouses Manual

Revenue has updated paragraphs 1.3.1 and 1.3.2 of its manual "Authorisation of Warehousekeepers & Approval of Tax Warehouses". Section 47 of Finance Act 2021 amended 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, as reflected in the updated manual.

No. 183 Compliance Procedures for Gaming and Amusement Licences

Revenue has renamed the manual "Amusement and Gaming Licences Compliance Procedures" as "Compliance Procedures for Gaming and Amusement Licences". In addition to formatting and corrections being carried out, Freedom of Information exemptions have been revised and the processes outlined in section 2 to grant a gaming licence, gaming machine licence, amusement permit and amusement machine licence have been consolidated. No new requirements or procedures have been introduced.

No. 184 Guidance on the Defective Concrete Products Levy

The Defective Concrete Products Levy (DCPL) applies to the "first supply" of certain concrete products on or after 1 September 2023, and the registration system for the DCPL is now available. Revenue updated the manual "Defective Concrete Products Levy" to include Appendices I–IV, which provide details and screenshots on:

- registering for the DCPL,
- ceasing a DCPL registration and
- re-registering for the DCPL.

Details on the registration process for taxpayers who are registered for ROS are included in Appendix I. Appendix II outlines the process for agents who will manage their clients' DCPL obligations. Users of myAccount must complete

the Form DCPL – reg. Signed and scanned copies of this form can be sent to Revenue using MyEnquiries.

No. 185 R&D Corporation Tax Credit – Operational Guidance on Claims under Sections 766C, S766D, S766(4D) or S766A(4C)

Revenue published a new manual, "Research and Development (R&D) Corporation Tax Credit under Sections 766C, S766D, S766(4D) or S766A(4C) – Operational Guidance", providing operational guidance on how to submit a claim for the R&D corporation tax credit under s766C, s766D, s766(4D) or s766A(4C) TCA 1997 for the years 2022 and 2023 and later years. These sections contain changes to the R&D tax credit that were introduced in Finance Act 2022.

This manual should be read in conjunction with the manual "Research and Development (R&D) Corporation Tax Credit" (Part 29-02-03), which sets out the policy guidance. The manual includes information on the completion, submission and processing of the Form CT1: Corporation Tax return for the year 2022 – R&D Specified Return, which is part of the 2022 Form CT1.

No. 186 Stamp Duty Tax and Duty Manual – Part 7: Exemptions and Reliefs from Stamp Duty – Updated

Revenue has updated the Stamp Duty Manual "Part 7: Exemptions and Reliefs from Stamp Duty" to provide clearer and/or more detailed guidance on the following sections:

- Section 82 – Charities,
- Section 82C – Pension Schemes and Charities,
- Section 84 – Repayment of stamp duty on certain transfers of shares,
- Section 86A – Euronext Growth Market,
- Section 87B – Merger of Companies,
- Section 88 – Certain Stocks and Marketable Securities,
- Section 88F – Reconstruction or amalgamation of offshore funds,
- Section 93A – Approved Housing Bodies,
- Section 106B – Housing Authorities and the Housing Agency and
- Section 111 – Oireachtas Funds.

In addition, the manual has been updated to provide a summary of two new reliefs that were introduced in June 2023:

- Section 83DA – Repayment of stamp duty under Affordable Dwelling Purchase Arrangement and
- Section 83DB – Repayment of stamp duty in respect of certain residential units.

No. 187 Mineral Oil Tax (MOT) Rate Changes

Revenue has updated the manual "Excise Duty Rates – Energy Products and Electricity Taxes" to reflect increases in mineral oil tax rates on certain mineral oils. The rate increases are effective from 1 September 2023.

No. 188 Capital Allowances – Property in Joint Names

Revenue has updated the manual "Capital Allowances – Property in Joint Names", which deals with the treatment of capital allowances where a property is acquired in joint names by spouses or by civil partners but the expenditure is incurred by one spouse or civil partner. The updated guidance confirms that the treatment outlined in the manual is available where a property is purchased in joint names by a married couple or civil partners who are jointly assessed.

No. 189 Company Reconstructions Without Change of Ownership

Revenue's manual "Company Reconstructions Without Change of Ownership" has been updated at paragraphs 1 and 6 to reflect amendments made to s400 TCA 1997 as a result of the introduction of the interest limitation rule (ILR) in Part 35D TCA 1997. The manual outlines that further details on the operation of the ILR, including deemed borrowing costs and total spare capacity, are available in the manual "Guidance on the Interest Limitation Rule".

No. 190 Domicile Levy

Revenue has updated and refreshed the manual "Domicile Levy (Part 18C)" throughout. The updates have been made to provide clearer and/or more detailed guidance on various aspects of the levy, including:

- the position regarding the claiming of a credit for liabilities such as USC and PRSI in arriving at the amount of the levy that is chargeable for the year;
- the meaning of the term "world-wide income", including the steps to be taken in calculating this amount;
- the meaning of the terms "market value" and "Irish property";
- the position regarding the power of Revenue to make and amend assessments to the levy and the right of an individual to make an appeal;
- information on applicable penalty and interest provisions; and
- worked examples.

No. 191 Vacant Homes Tax

Revenue has published a new "Vacant Homes Tax (VHT)" manual. Finance Act 2022 introduced the annual VHT, which applies to residential properties in use as a dwelling for fewer than 30 days in a 12-month chargeable period. The first chargeable period is 1 November 2022 to 31 October 2023. Therefore, where a property has been in use for fewer than 30 days in that period, a return must be filed electronically by 7 November 2023. Any liability to VHT must be paid, or an agreed payment arrangement entered into, on or before 1 January 2024.

VHT is charged in addition to local property tax (LPT) and is calculated as three times the base LPT rate (i.e. the rate excluding any local adjustment factor). The base rates for properties in each LPT valuation band are available on the Revenue website.

The manual outlines in detail when VHT applies, when properties are outside the scope of the tax, the obligations on chargeable persons, Revenue powers and certain exemptions that can be claimed.

No. 192 Procedures for Requiring Security from Taxable Persons

Revenue has updated the manual "Procedures for Requiring Security from Taxable Persons". Section 99 VATCA 2010 allows Revenue to require a trader to submit security in certain circumstances where a VAT refund has been claimed. Section 109 VATCA 2010 allows Revenue to require a trader to submit security for any VAT that might become due, where Revenue feels that this is needed to protect its interest. The manual provides information for taxpayers where Revenue has requested the submission of security.

No. 193 VAT Treatment of Food and Drink Supplied by Wholesalers and Retailers

Revenue has amended the following VAT manuals to reflect the application of the 13.5% rate to supplies from 1 September 2023:

- "VAT Treatment of Food and Drink Supplied by Wholesalers and Retailers",
- "VAT Treatment of Restaurant and Catering Services",
- "VAT Treatment of Guest and Holiday Accommodation",
- "VAT Treatment of Admission Fees for Entry to Historic Houses and Gardens",
- "VAT Treatment of Admission to Amusement Parks and Fair Grounds",
- "VAT Treatment of Services Connected with Immovable Property" and
- "Supply of Printed Matter".

No. 194 Updates to the VIES and INTRASTAT Trader's Manual

Revenue has updated the "VIES and INTRASTAT Trader's Manual" as follows:

- Appendix 4 of the VIES appendices has been updated to include instructions on making VIES corrections online in ROS.

- Contact details have been updated to include a new telephone contact number for VIES and Intrastat enquiries. Previous contact numbers are currently being phased out.

No. 195 Submission of iXBRL Financial Statements

Revenue has updated the manual "Submission of iXBRL Financial Statements as Part of Corporation Tax Returns" at section 1.6, to reflect the withdrawal of older taxonomies and the acceptance of the 2023 taxonomies. Section 3.1.3 has also been updated to confirm the requirement for the "PrincipalCurrencyUsedInBusinessReport" tag in all iXBRL submissions from 2 September 2023.

No. 196 The Help to Buy – Summary Guide for Applicants Has Been Updated

"Help to Buy – Summary Guide for Applicants" now reflects recent changes to the Help to Buy (HTB) online system. The guide has been updated and refreshed, with new screengrabs added to provide clearer and/or more detailed guidance on the steps involved in making a HTB application.

No. 197 Enhanced Reporting Requirements

From 1 January 2024, employers who pay any of the following expenses/benefits to their employees will be required to report those benefits to Revenue:

- travel and subsistence,
- small benefit exemption and
- remote working daily allowance.

Revenue will be holding webinars in the coming weeks to give employers and agents an overview of the operation of enhanced reporting. This overview will include:

- requesting Employer Reporting Notifications,
- submitting expense/benefit details and
- viewing expense/benefit details.

The issuing of notices to ROS inboxes has commenced on a phased basis, with agents included in phase 1. Each notice includes a link to Eventbrite, where a ticket can be booked to attend a webinar on a date and at a time that suits. These webinars are scheduled to take place over the next eight weeks.

No. 198 Common Reporting Standard (CRS)

Revenue has updated the manual "Standard for Automatic Exchange of Financial Account Information in Tax Matters – The Common Reporting Standard (CRS)", which provides guidance on domestic implementation issues relating to the CRS. The manual has been updated to reflect editorial changes and delete obsolete material at paragraphs 18 and 19.

No. 199 Pensions Manual Amended

Revenue has updated Chapter 29 of the Pensions Manual, titled "Dual Private/Public Pension Scheme Encashment Option". Paragraph 2 clarifies who qualifies for the encashment option; paragraph 4 indicates how declarations should be submitted and updates the Revenue contact address.

No. 200 Special Assignee Relief Programme

Revenue has updated the "Special Assignee Relief Programme (SARP)" manual at paragraph 15 on the certification requirements of a relevant employer or associated company in respect of a relevant employee.

No. 201 Return of Payments – Banks, Building Societies, Credit Unions and Savings Banks

Revenue has published a new manual titled "Return of Payments – Banks, Building Societies, Credit Unions and Savings Banks: Guidance Notes for Financial Institutions", providing guidance for financial institutions in respect of their reporting obligations, and Regulations made by Revenue under the provisions of s891B TCA 1997.

The manual incorporates guidance previously contained in the manuals "Guidance Notes for

Financial Institutions on Return of Payments (Banks, Building Societies, Credit Unions and Savings Banks) Regulations 2008 (S.I. No. 136 of 2008)" and "Guidance Notes for Financial Institutions on Return of Payments (Banks, Building Societies, Credit Unions and Savings Banks) (Amendment) Regulations 2009 (S.I. No. 254 of 2009)", which were published by Revenue on 9 July 2009.

No. 202 Exchange of Information – Presence and Participation of Foreign Tax Officials in Administrative Enquiries

Revenue has published a new manual providing guidance on DAC7, titled "DAC Exchange of Information – Presence and Participation of Foreign Tax Officials in Administrative Enquiries".

No. 203 ROS Support for the 2023 Pay and File Period, Extended Opening Hours and Updating Your Bank Details

Revenue confirmed the extended opening hours for contacting the ROS Technical Helpdesk, Business Taxes (Income Tax Self-Assessed) Support and Collector-General's Division (including ROS Payment Support) in the days leading up to the ROS pay and file deadline of 15 November 2023.

- Friday, 10 November: The ROS Technical Helpdesk and Business Taxes (Income Tax only) phone lines will remain open until 5pm. The Collector-General's phone lines (including ROS Payment Support) will operate from 9.30am until 1.30pm.
- Monday, 13, and Tuesday, 14 November: All three phone lines will operate until 8pm on these days.
- Wednesday, 15 November: The ROS Technical Helpdesk and Business Taxes (Income Tax only) phone lines will operate until midnight. The Collector-General's phone lines (including ROS Payment Support) will operate until 8pm.

Revenue also reminds taxpayers that some may need to update their bank account details for a tax payment or refund if they have recently changed to a new banking provider.

No. 204 Change to One of the Company Registration Office Documents Required for Excise Licences

The "Guide to Excise Licences" manual has been amended to reflect a change by the Companies Registration Office (CRO) to one of the documents required for relevant excise licences. A CRO Short Certificate of Incorporation is no longer available, and instead excise licence customers must provide a CRO Duplicate Certificate of Incorporation in support of their relevant excise licence application.

No. 205 Guidelines for Phased Payment Arrangements

Revenue has amended the "Guidelines for Phased Payment Arrangements" manual as follows:

- Paragraph 2, "Summary", includes an updated debt warehousing link to access information on payment options for warehoused debt repayments.
- Paragraph 4, "Phased Payment Application", confirms that completion of the ePPA1 form is a mandatory requirement for all applications. Changes to supporting documentation required, depending on the value of debt, are outlined. The threshold at which bank statements will be sought has increased to debt in excess of €50,000. Additional information will be sought where the debt exceeds €100,000, as outlined in the manual.
- Paragraph 14, "Personal Insolvency Arrangements", has been updated to reflect current work practices.
- The "Letter to Personal Insolvency Practitioner", previously included at Appendix 5, has been removed as it is no longer in use.

No. 206 Update to Stamp Duty Manual Part 7 at Section 86A – Exemptions and Reliefs from Stamp Duty

Revenue's Stamp Duty Manual titled "Part 7: Exemptions and Reliefs from Stamp Duty" has been updated at paragraph 18 to reflect the fact that the exemption available under s86A Stamp Duties Consolidation Act 1999 is an EU State Aid, granted under the general de minimus regulation. Therefore, the section must comply with the rules set out in that regulation.

No. 207 eCG50 – Guide for Applicants

Revenue has updated the "eCG50 – Guide for Applicants" manual at paragraph 4 to advise users how to split or compress files that exceed the maximum file upload size of 11MB. Paragraph 4 provides more details on using this facility.

- Paragraph 4.7.1 has been updated to add "zip" as a file format for supporting documents.
- Paragraph 4.7.2 confirms that the maximum file size has been updated to 11MB.
- Paragraphs 4.7.3 and 4.7.4 include guidelines on using compression utility 7-Zip to compress files.
- Screenshots have been added to paragraph 4:
  - Figure 8: Using compression tool to split file specifying 10Mb and Zip file type for CG50A application,
  - Figure 9: Large PDF file being split into two smaller ZIP files under 10MB for CG50A application and
  - Figure 10: Uploading two ZIP files for one contract.

No. 208 Access Supports Marker

A new Revenue manual titled "Guidelines for Use of the Access Supports Marker" has been released. This includes guidance on the application and use of the opt-in "Access Supports Marker" for taxpayers who have difficulty in accessing Revenue's digital services.

Revenue notes that the application of this Marker does not automatically entail an exemption from mandatory e-filing, where applicable. Obtaining exemption from e-filing is a separate process, and an application for exemption must be approved by Revenue.

No. 209 Expiry of Time Limit for Claiming under the Temporary Business Energy Support Scheme (TBESS)

Revenue has updated the "Guidelines on the Operation of the Temporary Business Energy Support Scheme (TBESS)" to confirm that the time limit to claim under the scheme expired on 30 September 2023.

No. 210 Customs Transit – General Part 1 Amendments

Revenue's manual "Customs Transit – General Part 1" has been amended to reflect new Revenue Customs systems in place with reference to CDS (Customs Decisions System), NCTS Phase 5 and Pre-Boarding Notification (PBN) Ro-Ro system.

No. 211 Stamp Duty Manual – "Section 83DA: Repayment of Stamp Duty under Affordable Dwelling Purchase Arrangements" – Updated

Revenue's Stamp Duty Manual "Part 7: Section 83DA – Repayment of Stamp Duty under Affordable Dwelling Purchase Arrangements" has been updated to include step-by-step guidance on how to make a repayment claim using Revenue's eRepayments system (accessible through ROS or myAccount).

Finance Act 2022 introduced s83DA of the Stamp Duties Consolidation Act 1999 (SDCA 1999), which came into effect on 1 June 2023. It 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 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. 212 Enhanced Reporting Requirements – Revenue Online Events

Revenue updated its "Enhanced Reporting Requirements from 1 January 2024" hub to note registration information for online Enhanced Reporting Requirements (ERR) Webinars with Business, Medium Enterprises and Large Cases Divisions. By selecting the link to Revenue's "Eventbrite webpage", tickets can be booked for the relevant event and date that suits.

The webinars will cover:

- requesting Employer Reporting Notifications (ERN), submitting expense/benefit details through ROS by file upload or by online form;
- viewing expenses/benefits by submission type, and
- an employee's view in myAccount of submissions made by their employer.

A Q&A session will follow each presentation. Revenue advised that questions arising will help to inform guidance currently being developed on the ERR.

No. 213 PAYE Services: Online Unemployment Repayments

Revenue's manual "PAYE Services: Online Unemployment Repayments" has been updated to include screenshots of myAccount and ROS screens.

No. 214 Budget 2024 Excise Duty Rates

Revenue's "Excise Duty Rates" manual has been updated to reflect changes in certain excise duty rates announced in Budget 2024. The manual includes new rates of mineral oil tax and tobacco products tax, which are effective from 11 October 2023. The manual "Excise Duty Rates Energy Products and Electricity Taxes" has also been updated to reflect announcements in the Budget.

No. 215 VAT Treatment of Medical Equipment and Appliances

Revenue has published a new manual titled "VAT Treatment of Medical Equipment and Appliances". VAT guidance on rollators has been moved to this new manual; therefore the manual "VAT Treatment of Rollators" has been marked as no longer relevant.

No. 216 Customs and Excise Enforcement Procedures Manual

Revenue's manual "Customs and Excise Enforcement Procedures" has been updated to incorporate changes in legislation after the introduction of the Customs Act 2015. The manual also consolidates Chapters 1 to 5 of the previous manual on Customs and Excise enforcement procedures and procedures surrounding accompanying arrested or detained persons in a single document.

No. 217 AVC Claims in myAccount

Revenue confirms that taxpayers who are submitting a claim for tax relief on additional voluntary contributions (AVCs) through myAccount are required to upload their AVC certificate. However, if the AVC certificate is not available at the time of submitting their claim, the taxpayer may supply a document that contains the following information:

- date of payment,
- total amount paid,
- type of pension (e.g. PRSA AVC),
- policy number (if available),
- name and address of the taxpayer and
- name and address of the policy provider.

This information may be uploaded via myAccount in a Word, Excel or PDF document.

No. 218 Commercial Importation of Live Animals and Products of Animal Origin

Revenue has updated the manual "Commercial Importation of Live Animals and Products of Animal Origin" to include updated contact details for Border Control Posts, in the Annex.

No. 219 Importation and Exportation of Medicinal Products and Unauthorised or Falsified (Counterfeit) Medical Products

Revenue has updated the manual "Importation and Exportation of Medicinal Products and Unauthorised or Falsified (Counterfeit) Medical Preparations" to reflect the implementation of Article 75 of the Schengen Acquis. Schengen residents travelling into Ireland with prescribed narcotics/psychotropic substances containing active substances, found in Schedules 2 and 3 of the Misuse of Drugs Regulations 2017 (SI 173 of 2017), must carry an Article 75 Certificate. A separate certificate is required for each prescribed product. The Article 75 Certificate is for a maximum 30-day supply of the prescribed products for personal use.

No. 220 Help to Buy (HTB)

Revenue's "Help to Buy (HTB)" manual has been updated to reflect changes to the HTB scheme to enhance its interaction with the Local Authority Affordable Purchase Scheme. The changes, which were announced in Budget 2024, are effective from 11 October 2023. The main updates to the manual are:

- A new paragraph 7.4.1, "Affordable Dwelling Contribution", outlines how the loan-to-value ratio is calculated for HTB applicants also participating in the Local Authority Affordable Purchase Scheme. Examples 12 and 13 have been updated to reflect the new rules, which apply for those who have signed contracts to purchase a qualifying property on or after 11 October 2023.
- Paragraph 11.2, "Claim Stage", clarifies the documents that are required to be uploaded by a HTB applicant at claim stage of the HTB process.

No. 221 Stamp Duty Manual – Section 83DB: Repayment of Stamp Duty in Respect of Certain Residential Units Updated

Revenue's Stamp Duty Manual "Part 7: Section 83DB – Repayment of Stamp Duty in Respect of Certain Residential Units" has been updated at section 8 and includes a new appendix to provide step-by-step guidance on how to make a repayment claim under s83DB of the Stamp Duties Consolidation Act 1999 (SDCA 1999) (using Revenue's eRepayments system).

Finance Act 2022 introduced s83DB TCA 1997, which came into effect on 1 June 2023. The section provides for a partial repayment of stamp duty paid on the acquisition of residential property at the higher rate of 10% where the 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 a children's residential centre under the Child Care Act 1991, which provides homes for children in care.

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

No. 222 Tax and Duty Manual on the Control and Examination of Baggage

Revenue's manual "Control and Examination of Baggage" now reflects the Budget 2024 changes in excise duty to be charged on imported tobacco products in a traveller's baggage.

No. 223 Online Payments of Tax

Revenue has updated the manual "Using Online Methods to Make a Payment to Revenue" to note that commercial credit cards are no longer available as a payment option (since 1 October 2023).

Revenue continues to accept personal debit and credit cards, in addition to commercial debit cards. Where a taxpayer is unsure of their card type, they are advised to contact their card provider to confirm the card type.

In addition, the list of European Economic Area (EEA) SEPA countries and of non-EEA SEPA countries is now included in the manual.

No. 224 VRT Online Payments in ROS and myAccount

Revenue has updated the manual "Vehicle Registration Tax (VRT) Online Payments in ROS and myAccount" to note that commercial credit cards are no longer available as a payment option (since 1 October 2023).

No. 225 PAYE Directions for Non-resident Employees of Irish Private Sector Employments

Revenue's "PAYE Exclusion Orders" manual has been amended to insert a new paragraph 5.7 relating to the treatment of employment income paid to non-resident employees of Irish private sector employers who perform duties both inside and outside the State.

The new paragraph provides that, subject to conditions, an Irish private sector employer may seek a direction from Revenue allowing it to withhold PAYE on the employment income relating to the non-resident employee's Irish workdays only. An illustrative example has also been included.

No. 226 District Court (Districts) Order

Revenue has advised that the manual "District Court (Districts) Order" is no longer relevant. Information on District Court Districts is available in Statutory Instrument 182 of 2017.

No. 227 Form 1 (IREF) 2022 Filing Deadline Extension

Revenue has confirmed that the return filing and payment date for Irish real estate funds (IREFs), with an obligation to submit the Form 1 (IREF) 2022 via MyEnquiries, is Wednesday, 15 November 2023. The Form 1 (IREF) 2022 is available on the collective investment vehicles webpage on the Revenue website. The Form 1 (IREF) 2022 does not contain any new updates.

No. 228 Defective Concrete Products Levy

Revenue's manual "Defective Concrete Products Levy (DCPL)" has been updated to confirm that autoclaved aerated concrete masonry units made to the European Standard EN 771-4:2011+A1:2015 are not currently within scope of the DCPL.

The updated manual also notes that Finance (No. 2) Bill 2023 contains a proposed amendment to the definition of concrete for the purposes of the DCPL. The proposed amended definition provides that fine or coarse aggregate, or a combination of both, may be used in the production of concrete. Should the amendment pass through the Houses of the Oireachtas and become law, it will come into effect on the date of passing of the Finance Act.

No. 229 Customs and Excise Enforcement Manual – Chapter 1

The following manuals have been incorporated into Revenue's "Customs and Excise Enforcement Procedures" manual:

- Customs and Excise: Accompanying Arrested or Detained Persons,
- Customs and Excise Enforcement Manual – Chapter 1 Law,
- Customs and Excise Enforcement Manual – Chapter 2 General Guidelines and Best Practices,
- Customs and Excise Enforcement Manual – Chapter 3 Powers,
- Customs and Excise Enforcement Manual – Chapter 4 Customs and Excise Offences,
- Customs and Excise Enforcement Manual – Chapter 5 VRT Guidelines and Proofs and
- Customs and Excise Enforcement Procedures Manual – Appendices.

No. 230 Taxation Issues for Registered Farm Partnerships

Revenue's manual "Taxation Issues for Registered Farm Partnerships" has been

updated to reflect the amendment in Finance Act 2022 providing that in order for young trained farmers to avail of the enhanced stock relief rate of 100%, they must be the holder of a trained farmer qualification within the meaning of s654A TCA 1997. The manual has also been updated to reflect the amendment in Finance Act 2023 to extend the availability of the relief to accounting periods ending on or before 31 December 2024.

No. 231 EU Reporting Obligations for Platform Operators

Revenue has updated the manual "EU Reporting Obligations for Platform Operators" to include:

- confirmation of the average annual foreign exchange conversion rate to be used;
- insertion of an example of a business model indirectly connecting sellers and users on their platform;
- confirmation that the registration portal for platform operators will open on 1 November 2023;
- updates to the obligations on platform operators in relation to elections in Ireland, de-registrations in Ireland and de-registrations in other Member States;
- clarifications with respect to a platform operator's data protection obligations; and
- insertion of Appendix III, which contains a schedule of material changes to the guidance.

No. 232 Enhanced Reporting Requirements

Revenue outlines the enhanced reporting requirements (ERR) permissions that employers and agents will need to have on ROS to report the information on the three categories of payments/benefits specified in s897C TCA 1997 from 1 January 2024 (i.e. the remote working daily allowance, benefits provided under the small benefit exemption, and travel and subsistence payments where no tax is deducted).

Employers

Employers will automatically be assigned ERR permissions via their existing ROS certificate. ERR permissions will not automatically apply to any sub-certificates under the employer certificate. Therefore, employers must log in to their ROS permissions screen to assign ERR accessibility to any sub-certificate.

Agents

An additional agent permission has been created to allow agents to report ERR on behalf of their clients. Financial agents will receive the ERR permissions automatically via their existing ROS certificate. Non-financial agents will have to apply to Revenue for the ERR Agent certificate under their existing TAIN. An agent who has ERR permissions will be able to assign sub-certificates to submit and view or view only ERR.

Revenue anticipates the following four different agent types under the PREM tax head:

- financial agent (has all permissions),
- payroll and ERR agent (can report payroll and ERR),
- payroll-only agent (can report only payroll) and
- ERR-only agent (can report only ERR).

Employers can have up to three different agents on file, but an agent type cannot be duplicated. For example, an employer cannot have a payroll and ERR agent along with an ERR-only agent. The eBrief provides information to assist employers and agents who want to set up the appropriate permissions before the ERR platform goes live on ROS.

No. 233 Pensions Manual Amended

Revenue has updated section 1 of the Pensions Manual, titled "Useful Contacts", to include the new address for Revenue's Large Cases – High Wealth Individuals Division Pensions Branch, which is Castle View, South Great George's Street, Dublin 2.

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

Mark Ludlow
Senior Associate – Tax, RDJ LLP

	Topic	Court
01	**Employment Taxes: The Test for Determining Employment Status – *Revenue Commissioners v Karshan (Midlands) Ltd T/A Domino's Pizza***	Supreme Court
02	**CGT: Entrepreneur Relief and Salaried Partners**	Tax Appeals Commission
03	**Income Tax: Transfer of Share Rights**	Tax Appeals Commission
04	**CGT: Apportionment of Consideration**	Tax Appeals Commission
05	**Income Tax: Wages Paid to Family**	Tax Appeals Commission

01 Employment Taxes: The Test for Determining Employment Status – Revenue Commissioners v Karshan (Midlands) Ltd T/A Domino's Pizza

The Supreme Court considered the self-employed vs employed (contract for services vs contract of service) distinction in ***Revenue Commissioners v Karshan (Midlands) Ltd T/A Domino's Pizza*** [2023] IESC 24. (See also article by Julie Galbraith & Robert Dever "title of article", in this issue). The respondent ("Karshan") operated a pizza takeaway. It engaged individuals as delivery drivers under contract that described them as self-employed contractors. The written agreements between Karshan and the delivery drivers expressly provided (among other things) that:

- The driver was to provide the delivery service and the promotional service (wearing Domino's-branded clothes) to Karshan as an independent contractor.
- The driver was to provide his/her own insured vehicle (but Karshan was prepared to offer insurance or a rental vehicle).
- The driver could engage a substitute contractor if he/she was unavailable at short notice.
- Karshan was not obliged to use the driver's services at all.
- The driver agreed to notify the Karshan in advance if he/she became unavailable to perform a previously agreed service.

Revenue raised PAYE assessments against Karshan in respect of payments made to the pizza delivery drivers. Karshan appealed those assessments to the Tax Appeals

Commission (TAC), arguing that the drivers were self-employed contractors rather than its employees. Karshan was unsuccessful before the TAC, and unsuccessful again before the High Court on appeal. Karshan appealed once more, to the Court of Appeal, which found in its favour (see "Direct Tax Cases: Decisions from the Irish Courts and Tax Appeals Commission Determinations", *Irish Tax Review*, Issue 3, 2022). The majority at the Court of Appeal held that the test of mutuality of obligation was paramount and that, for an employment relationship to exist, one party must be under an obligation to provide work and the other party must be under an obligation to perform that work, which the court held was not present on the facts. Revenue appealed that decision to the Supreme Court.

The question before the Supreme Court concerned the test for determining whether an individual is self-employed (and taxable under Schedule D) or an employee (and taxable under Schedule E). Murray J delivered the lengthy judgment of the Supreme Court. After reviewing the history of the case law on employment status:

- He rejected Karshan's contention that the concept of "mutuality of obligation" requires that one party take on an ongoing obligation to provide work to the other (i.e. the court held that there is no requirement for "continuity" or "future looking"). Rather, "mutuality of obligation" should be confined to its narrowest interpretation, the so-called wage/work bargain, whereby in exchange for a worker's providing his/her work, the employer provides pay.
- He disapproved of the concept of a separate "integration test", stating that it should not be viewed as a separate test but, rather, as part of the overall analysis of the full facts and circumstances of the particular situation, and as part of the test that the court then outlined.
- He set out the "test" that should be applied (the basis for which was the decision in *Ready Mixed Concrete (South East) Ltd. v Minister for Pensions and National Insurance* [1968] 2 QB 497).

The court held that "test" that should be applied consists of the following five questions:

"(i) Does the contract involve the exchange of wage or other remuneration for work?

(ii) If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer? [However, at paragraph 224 the court recognised that "some degree of limited substitution is permissible".]

(iii) If so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement?

(iv) If these three requirements are met the decision maker must then determine whether the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.

(v) Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing."

Applying the above test to the facts of the case (as determined by the TAC), the court allowed Revenue's appeal, holding that the drivers were employees of Karshan while they were working. In particular, it noted:

- The employees received a payment (in respect of branding and marketing for wearing the uniform) for attending work for their rostered shift, in addition to the per-delivery fee.
- Although the contract contained a substitution clause, it was so limited as to maintain the element of personal service.
- Karshan exercised the necessary control over the drivers (e.g. how they dressed, the time they were to attend work, the number and extent of deliveries, preparing invoices for the drivers; and the court also pointed to instances where drivers were required to prepare pizza boxes while waiting for deliveries).
- Having regard to all of the facts, the court found that the drivers were not in business on their own account as they did not take calls from customers, could not employ others to do the work, took no economic risk and worked exclusively for Karshan's premises and their ability to maximise their own profits was constrained by the control exercised over them by Karshan's managers. "In short, their economic activities were so restricted by the terms and conditions imposed by Karshan that they could not be said to have been engaged in their own business: their work was in every sense work for Karshan and was directed towards advancing its business, not their own." Although the court recognised that the fact that the drivers had to provide their own vehicles, telephones and insurance was relevant, it held that the Commissioner had been entitled to find that those matters did not outweigh the other factors.

02 CGT: Entrepreneur Relief and Salaried Partners – 111TACD2023

In tax appeal **111TACD2023** the question before the TAC was to the determine the date when the appellant should be considered to have acquired an interest in a business of which she was a partner.

The facts of the matter were that the appellant (a GP) had been admitted as a partner in a GP's practice on 1 July 2015 (the "commencement date"). However, the terms of the partnership agreement provided that until the "vesting date" in 2019, she would receive a "fixed profit share" equal to her previous salary, which would continue to be subject to PAYE. After the "vesting date", on 1 July 2019, she would receive a percentage share in the partnership's profits. The other partners also agreed to indemnify her against any liabilities of the partnership before the vesting date. The appellant did not appear on the partnership's Form 1 tax returns until 2019 and 2020.

The practice was sold in 2020, and the appellant claimed entrepreneur relief (597AA TCA 1997) on the gain arising. She included an expression of doubt in her tax return, which made reference to the fact that although she had joined the partnership in 2015, she had become self-employed only in 2019.

Revenue formed the view that the appellant had obtained an interest in the business only in 2019 (when her obligations became joint and several with those of the other partners) and that therefore she had not held an interest in the business for the requisite three-year period for entrepreneur relief. Accordingly, Revenue raised an amended assessment to withdraw the relief.

The Commissioner reviewed the law on partnerships and noted that no evidence was provided to the TAC regarding whether the appellant had been held out (to the public) as being a partner from the commencement date, or regarding what title or label was placed on the appellant's position after the signing of the agreement. The Commissioner noted that the only evidence presented to the TAC concerning the appellant's position within the partnership was that she was not included in the Form 1 partnership returns until 2019. She further

noted that no evidence was presented regarding whether the appellant entered into any contracts on behalf of the partnership. The Commissioner concluded that the appellant assumed an ownership interest only on the vesting date (2019), when she became a full partner. It followed that in 2020 she had not held the chargeable assets for the requisite three years to qualify for entrepreneur relief, and so her appeal was dismissed.

03 Income Tax: Transfer of Share Rights – 120TACD2023

On 28 November 2007 a company ("X") was incorporated. On 6 December 2007 another company ("Y") subscribed for 100 ordinary shares of €1.00 each in the share capital of X at a premium of €77,999 per share (i.e. €7,800,000), and at the same time other parties (it is not quite clear from the redacted determination whether these others were the individual appellants or trusts of which they may have been beneficiaries) subscribed for 156 "A" shares of €1.00 in the share capital of X at their nominal value (i.e. €156).

On 12 December 2007 the shareholders of X passed a special resolution the effect of which was (1) to transfer all voting rights from the ordinary shares to the A shares and (2) to provide that on a winding-up of the company all of its value would be distributed to the A shareholders. On 21 December a further resolution was passed, putting the company into a members' voluntary liquidation, and X's assets were then distributed to the A shareholders.

Revenue subsequently raised an assessment to income tax on the appellants on the basis that they had received a distribution per s130(3)(a) TCA 1997. Section 130(3)(a) deems a distribution to arise where a company transfers an asset to its members and does not receive full consideration in return.

The question before the TAC in appeal **120TACD2023** was whether the movement in the rights attaching to the shares between the ordinary shares and the A shares was a transaction chargeable to income tax as a distribution pursuant to s130(3)(a).

The Commissioner held, in dismissing the appellants' appeal, that:

- Share rights are legally separable and distinct from the shares to which they attach and are an "asset" for the purposes of s130(3)(a) TCA 1997.
- The passing of the special resolution that shifted those share rights from the ordinary shares to the A shares constituted a "transfer" for the purposes of s130(3)(a).
- As regards the question of whether the asset had been transferred to its "members", the Commissioner noted that the appellants bore the burden of proof in the tax appeal and had failed to discharge their burden in this regard. She commented on the "deficiency in records and documentation relating to the shareholding in these companies".
- The Commissioner also rejected the contention that the diminution in value of company Y (after it had transferred the value from its ordinary shares to the A shares) and the corresponding diminution in the value of the appellants' shareholdings in Y's shares should be treated as the provision of consideration by the appellants for the transfer of the assets.

04 CGT: Apportionment of Consideration – 127TACD2023

In tax appeal **127TACD2023**, the appellant company had purchased a property for its trade for the sum of €15,080,129. It used it for its trade for a period of time and then let it out as an investment property for a further period of time, before eventually selling it for €22,500,000. It calculated a gain of €7,424,155, on which it paid tax. The appellant made no apportionment between the value of the land and buildings and the value of plant and machinery that had been included in the sale.

Revenue subsequently reviewed the matter and formed the view that the sale proceeds should have been apportioned between (1) the value of the land and buildings and (2) the value of the plant and machinery, with each requiring a separate CGT computation per s561(2) TCA 1997. Revenue used information in the company's financial statements and details of capital allowances claimed to apportion the proceeds between the land and the plant and machinery. Revenue calculated that the appellant made a loss on the sale of the plant and machinery, which per s555 could not be allowed against the gain on the land and buildings, thereby increasing the chargeable gain to €8,890,816.

The Commissioner held, in dismissing the appeal, that;

- Section 561(2) makes apportionment mandatory in the circumstances where an asset is used partly for trade and partly for non-trade use.
- The appellant bore the burden of proof and had not provided any direct evidence to support an alternative apportionment to that calculated by Revenue.

In regard to the second point, the extent to which the appellant is obliged to discharge the burden of proof is illustrated by the following passage from the determination:

"The appellant's solicitor referred to corporation tax computations of the appellant which particularised the capital allowances in respect of various elements of plant and machinery (e.g. carpets, sanitary fittings, fire alarms, telecommunications installations etc.), and, as the Commissioner understands it, invited him to conclude that some of these elements should be considered integral and excluded from the computation. However, the Commissioner considers that, in the absence of any evidentiary basis for such conclusions, this would require him to, in effect, guess at what elements should be excluded or not. He is satisfied that to do so would be impermissible, given that the burden of proof rests on the appellant to demonstrate that the respondent's assessment was incorrect, and furthermore given that he is satisfied that the respondent's computation was prima facie just and reasonable." [52]

05 Income Tax: Wages Paid to Family – 133TACD2023

In tax appeal **133TACD2023** the appellant (a medical consultant) was a director and shareholder of a company. The company provided the appellant's services to hospitals via locum agencies. The appellant's wife was also a director of the company, and their sons were employed by the company.

Revenue formed the view that (all but €5,198 of) the sums paid to the appellant's wife and sons (€80,000 over the course of two years) should be assessed on the appellant. Revenue also raised assessments in respect of sums paid to the appellant in the form of travel and subsistence expenses.

The question before the TAC was whether emoluments of the appellant's wife and sons should be assessed on the appellant.

The Commissioner reviewed UK case law: *RFC 2012 Plc (in liquidation) (formerly Rangers Football Club Plc) v Advocate General for Scotland* [2017] UKSC 45 and *Murray Group Holdings Ltd and others v Revenue and Customs Commissioners* [2016] STC 468, which are authorities for the proposition that where employees ask their employer to direct some of their earnings to their spouse or another individual, the employee can be assessed on such sums.

The Commissioner noted that:

- No written contracts of employment existed.
- No documentary evidence was provided to support that actual work was carried out by the appellant's wife and sons (such as the product of the workplace, emails or other written correspondence).
- No company email accounts existed. The appellant's wife said that she used the appellant's email address in any correspondence.
- The company did not make payments directly to the sons; rather, sums were paid to them by the appellant in cash or transferred for their benefit from his personal bank account.

The Commissioner held, in dismissing the appeal, that:

- The appellant had the burden of proof to establish that the payments were *bona fide* payments made to remunerate his wife and sons for work done rather than redirected payments due to the appellant.
- Having regard to the lack of evidence relating to the employment of the appellant's wife and sons, the Commissioner considered that there was no genuine employment.
- There was also no credible evidence to support the deductibility of the expense payments.

Direct Tax Cases: Decisions from the UK and European Courts

Stephen Ruane Partner and Leader, Tax Solutions Centre, PwC Ireland
Patrick Lawless Director, Tax Solutions Centre, PwC Ireland

	Topic	Court
01	**Capital Gains Tax – PPR Relief**	UK Upper Tribunal
02	**Capital Gains Tax – Share Disposal**	UK Upper Tribunal
03	**Corporation Tax – Deductibility of Penalty Payments**	UK Upper Tribunal
04	**Capital Allowances – Wind Farm Expenditure**	UK Upper Tribunal
05	**Capital Gains Tax – Roll-over Relief**	UK First-tier Tribunal
06	**EU Fundamental Freedoms – Italian Participation Exemption**	Italian Supreme Court

01 Capital Gains Tax – PPR Relief

In ***HMRC v G Lee and another*** [2023] UKUT 242 (TCC) (29 September 2023) the Upper Tribunal (UT) affirmed a decision of the First-tier Tribunal (FTT). Both judgments held that the calculation of principal private residence (PPR) relief was by reference to the ownership of a dwelling-house rather than the land on which it was constructed.

The facts of the case at hand were:

- In October 2010 the appellants purchased a residential property with attached land. They did not move in at that time.
- Between October 2010 and March 2013 the original property was demolished and a new, replacement house was built.
- From March 2013 the appellants took up residence in the new house, occupying and enjoying the garden and grounds of that dwelling.
- The appellants sold the property for £5,995,000 in May 2014.

The appellants filed their tax returns in January 2016 on the basis that the whole of the gain was relieved by PPR relief. HMRC opened an enquiry in January 2017 and subsequently contended that the calculation of PPR had been done on an incorrect basis, as the taxpayers had not lived on the property for the first 29 months of ownership of the land.

The position in the UK, as in Ireland, is that pro rata relief may apply. In such a scenario the fraction of the gain covered is calculated as follows:

$$\frac{\textit{The length of time the dwelling house was occupied as a main residence}}{\textit{The length of the period of ownership}}$$

The appeal focussed on what “period of ownership” meant and, particularly, ownership of what – the land (which would determine the relief by reference to October 2010) or the newly constructed dwelling-house (which would determine the relief by reference to March 2013).

The UT held that, as a matter of straightforward textual interpretation, the taxpayer’s interpretation was plainly correct. Taking account of the surrounding statutory context, the period of ownership could refer only to the ownership of the dwelling-house in question. There was no concept of ownership of anything else in the legislative section. The UT noted that the taxpayer’s reading captured the mainstream case where the dwelling-house bought is not the taxpayer’s main residence for all of the time it is owned, and did so sensibly. So where, for example, a house is owned for ten years but lived in as a main residence for only the last five years, the taxpayer gets 50% relief on the gain rather than 100%.

The UT rejected HMRC’s arguments based on the proposition that a dwelling-house is not capable of ownership separately from the ground on which its stands. The taxpayers’ interpretation did not involve the idea of separate interests in the land and the dwelling-house. The crucial and straightforward feature that distinguishes an ownership interest in a dwelling-house in this context from an ownership interest in real property more generally (which will cover ownership of any building on it) is that an ownership interest in a dwelling-house requires that a dwelling-house exists. The PPR legislation in the UK refers to an “interest in a dwelling house”, as does s604 TCA 1997.

HMRC’s appeal was, therefore, dismissed.

02 Capital Gains Tax – Share Disposal

In ***McEnroe & Newman v HMRC*** [2023] UKUT 255 the Upper Tribunal (UT) dismissed an appeal that the First-tier Tribunal (FTT) had erred in law when it rejected an appeal concerning the determination of CGT proceeds on the disposal of shares in a business sale.

Ms McEnroe and Ms Newman were the sole shareholders in Kingly Care Partnership Limited, holding one ordinary share each. In October 2013 they entered into a share sale and purchase agreement (“the SPA”) by which they agreed to sell the shares to Active Assistance Finance Limited. The consideration, as defined in the SPA, was £8m.

Kingly had bank debt of £1.1m, which the buyer’s solicitors paid to the bank on completion of the sale. Ms McEnroe and Ms Newman reported their capital gain to HMRC as the £6.9m that they received directly from the buyer. HMRC opened an enquiry into their tax returns and contended that the consideration should be £8m.

Ms McEnroe and Ms Newman appealed to the FTT. The only point in dispute was whether the consideration for the shares was £8m, or £8m less the bank loan.

The FTT found that there was no ambiguity in the contract itself. The sale and purchase agreement stated that the sellers agreed to sell the two shares in issue to the buyer. The consideration for the sale and purchase of the shares was fixed in the contract to be £8m. No reference to the bank debt was made in any clause relevant to the consideration for the purchase of the shares.

The FTT therefore did not agree with the taxpayers’ argument that the contract was

for the sale of the shares and the discharge of the debt. Although the SPA alluded to the fact that the bank debt would be discharged, it did not say anything about how this was to be done and did not refer to the £8m being anything other than consideration for the shares.

The appellants appealed to the UT, where they argued, *inter alia*, that the FTT had erred by failing to consider the application of a clause of the SPA on completion accounts. The UT rejected this submission, noting that the FTT had demonstrated its awareness of that clause's provisions. As neither party argued that the clause on completion accounts did or should adjust the consideration, the UT found that it was reasonable for the FTT not to have given further consideration to this point.

Furthermore, in relation to the arguments that the FTT had erred in failing to consider of its own motion whether an adjustment to the consideration was required under clause 3.3 for the bank loan, the UT concluded that there was no such obligation on the FTT on the facts of this case.

Finally, the UT agreed with HMRC that the argument amounted to a disguised attack on the FTT's findings of fact, and found that the FTT had made no error of law in its decision that the appellants had not discharged their burden of proof to displace HMRC's assessment.

03 Corporation Tax – Deductibility of Penalty Payments

In ***Scottish Power & Ors v HMRC*** [2023] UKUT 218 the Upper Tribunal (UT) held that £28m of consumer settlements payable by a power provider was in lieu of penalties. Accordingly, a corporation tax deduction was denied.

ScottishPower (SP), as a supplier and generator of electricity and gas, was regulated by Ofgem. Under various settlement agreements, made between October 2013 to April 2016, SP paid sums called "penalties" in nominal amounts (£1), together with payments to consumers, consumer groups and charities, totalling approximately £28m. In each case, after Ofgem's opening of the investigation, Ofgem proposed penalties. Negotiations ensued, and a settlement agreement was ultimately reached.

SP sought to deduct the £28m for corporation tax purposes, but HMRC rejected the claim. HMRC contended that the payments were not deductible based on the principles derived from the House of Lords decision in *McKnight v Sheppard* [1999] 1 WLR 1333 (HL). In that case, the taxpayer sought to deduct fines imposed by the Stock Exchange on the taxpayer stockbroker for breaches of the Stock Exchange Council's rules and his legal costs of challenging those fines. The House of Lords determined that payments made in the nature of penalties are not deductible.

The taxpayer appealed. The appeal was largely determined in favour of HMRC, with the FTT's holding that only the £554,013 paid to affected consumers under the mis-selling settlement was compensatory and therefore deductible.

SP appealed the decision of the FTT. The taxpayer disputed both the scope of the principles to be derived from *McKnight* and (in any event) their applicability to the settlement payments to consumers and others in issue here. The taxpayer argued that the discussion of deductibility in *McKnight* was *obiter* (the question before the House of Lords concerned only the disputed deduction for legal costs) and that the exclusionary rule was no longer applicable anyway after the enactment of the UK equivalent of s76A TCA 1997.

The UT rejected these arguments. It considered the decision in *McKnight* and determined that the case turned on the

interpretation of the words "the purposes of the trade" in the UK equivalent of s81 TCA 1997. Lord Hoffmann had held that a payment made by way of fine was not made "for the purposes of the trade". Its purpose is to punish the taxpayer, and legislative policy would be diluted if the taxpayer were allowed to share the burden with the rest of the community by a deduction for the purposes of tax. The UT held that expenses incurred in the course of the trade might not necessarily be incurred "for the purposes of" the trade.

Accordingly, SP's contention that the principle in *McKnight* led to an unlawful "adjustment required or authorised by law" in calculating the profits for corporation tax purposes under the UK equivalent of s76A TCA 1997 was dismissed. Instead, the correct analysis was that such payments fell within the scope of those expenses in the UK equivalent of s81 TCA 1997 that were not "incurred wholly and exclusively for the purposes of the trade". The UT also rejected the suggestion that this part of the analysis in *McKnight* was *obiter*.

Furthermore, based on the correct reasoning regarding the principle in *McKnight*, the UT determined that the same approach should be applied to payments that were made in lieu of penalties. It was clear from the way in which the compensation agreements were reached in this case that those payments were made in lieu of penalties – had SP not agreed to those payments, it was clear that penalties of at least the same amount would have been imposed. The reasoning in *McKnight*, based, as it was, on the objective of not diluting the relevant rules that led to the payment, was held to apply to all payments with a punitive nature or character. The reference to the "character" of the payment in *McKnight* demonstrates that the principle is to be applied by reference to substance rather than form.

Finally, the UT held that the FTT had been incorrect to consider separately each of the payments and ascertain if they were punitive or compensatory. The emphasis should have been on whether overall the payments bore the necessary punitive character. Where, as here, the payments were part of an overall package, the proper approach is to ask whether, on a global assessment of the evidence, the relevant payment has a punitive character. Once an assessment has been made of the characterisation of the overall package (taking into account the separate elements), one should not go back and consider whether individual elements are more compensatory or punitive.

As a result, the UT determined that the FTT had been incorrect to isolate the payment of £554,013 to customers impacted by mis-selling. The £554K payment was not in any real sense additional to the other payments but was part of a global payment of £8.5m that was in lieu of a penalty.

Accordingly, all of the payments were determined to be non-deductible, notwithstanding the fact that some payments had characteristics of compensation.

04 Capital Allowances – Wind Farm Expenditure

In ***Gunfleet Sands Ltd & Ors v HMRC*** [2023] UKUT 260 (TCC) the Upper Tribunal (UT) delivered a judgment in an appeal by subsidiaries of Ørsted, a Danish energy group, and a cross-appeal by HMRC in respect of capital allowances claimed on certain expenditure relating to offshore windfarms. The UT partly confirmed the decision of the First-tier Tribunal (FTT) but overturned the FTT's significant findings on what constitutes qualifying expenditure.

The first issue to be decided was whether the wind farms comprised a single item of plant and machinery for capital allowances purposes. The appellants had claimed expenditure in relation to the wind farms on the basis it was "on the provision of plant". The important point

was that if the wind farms were considered a single item of plant, it would obviate the need to assess each component – such as turbines and substations – separately.

The FTT determined that the "generation assets" (the wind turbines and array cables) comprised a single item of plant, explaining that their purpose was "directed to the single purpose of generating electricity". The FTT went on to make a finding in the alternative that "each wind turbine is an item of plant as, too, are the array cables". The UT held that the FTT had not erred in law as it took the right approach of considering whether there was a single operational function (i.e. generating electricity).

In relation to the second issue, the UT noted that the FTT had analysed each item of expenditure incurred and considered whether it constituted qualifying expenditure. The FTT held that some of the items claimed by the companies qualified for capital allowances – such as fish and shellfish studies, marine mammal studies, metocean studies, and geophysical and geotechnical studies – as they related to the design of the windfarms, without which they would be operationally useless. Other studies, such as socio-economic and tourism studies and noise assessment studies, were not held to qualify as they had no impact on the necessary design of the windfarm or the wind turbines.

The UT concluded that the FTT was wrong to adopt a safe-and-effective installation test.

On that basis, expenditure on the environmental impact and other technical studies was not incurred "on the provision of plant". The UT therefore disallowed expenditure on most of the studies but granted relief for costs on project management and "preliminaries". Preliminaries included the costs of negotiating contracts with the manufacturers of the component parts of the wind turbines and with the installation vessel providers and costs of overseeing the fabrication of those component parts and the installation of the wind turbines in their specific positions in the windfarms.

The key test applied by the UT was that expenditure on the construction, transport and installation of plant could be qualifying provided that the effect of the expenditure was the provision of plant. The FTT's test of necessity did not comply with that test, as expenditure could be necessary but not have the effect of providing the plant. The application of this test meant that certain expenditure was considered to create the environment or "position" to provide plant rather than effect the actual provision of plant.

Finally, the taxpayers argued that non-qualifying expenditure for capital allowances purposes qualified for relief as revenue expenditure. The UT upheld the FTT's decision that such relief was not available on the items in question. The fact that expenditure was not incurred "on the provision of plant and machinery" did not mean that it was revenue in nature. In this case, the expenditure was capital in nature, and relief was denied.

05 Capital Gains Tax – Roll-over Relief

In ***Wilkinson and others v HMRC*** [2023] UKFTT 695 (TC) the First-tier Tribunal (FTT) allowed the taxpayers' appeals on the basis that an exchange of shares in one company for loan notes and shares in another company did not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, was avoidance of liability to CGT.

A number of individuals were shareholders of a company. Mr and Mrs Wilkinson, husband and wife, held 58% of the company. As part of a plan to sell their shareholding, Mrs Wilkinson transferred ordinary shares in the company to their daughters. The plan was to avail of the £30m aggregate entrepreneurs' relief lifetime limit of Mr and Mrs Wilkinson's three daughters.

The company was sold shortly after the transfer to the daughters. Under the terms of the sale, the daughters exchanged those shares for consideration of £10m "nil rate deferred payment A loan notes" and 500 B ordinary shares in the acquiring company (the daughters being the only shareholders to get either "nil rate deferred payment A loan notes" or B ordinary shares). The daughters were also made directors of the acquiring company. Exactly a year and a day later, the daughters redeemed their nil rate deferred payment A loan notes for £10m. On the same day, the daughters sold their 500 ordinary B shares at their nominal value (£50). On the following day, the daughters resigned their directorships. Entrepreneurs' relief was claimed on the disposals.

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

Having established the scope of the arrangements, the FTT found that although transferring the shares to the daughters just before the share sale was an avoidance measure and constituted "a" purpose of the deal, it was not that the "main purpose" or "one of the main purposes". The FTT made this decision based on a number of factors, including the fact that Mr and Mrs Wilkinson would have gone ahead with the sale even if the daughters had not been able to claim entrepreneurs' relief. Furthermore, the tax saving represented a small proportion of the total deal value.

The appeal was, therefore, allowed.

06 EU Fundamental Freedoms – Italian Participation Exemption

In decision n. 21261 the Italian Supreme Court held that, based on European Union (EU) fundamental freedoms, non-resident companies without an Italian permanent establishment (PE) qualify for the Italian 95% participation exemption regime for gains on the sale of shares in an Italian company, provided that the requirements for the regime are met.

The case concerned a French company without a PE in Italy that disposed of a shareholding in an Italian company in 2013. The French company argued that the gain should qualify for the participation exemption that is available to resident companies and to non-resident companies with a PE in Italy.

The Supreme Court, affirming the decisions of the lower courts, found in favour of the taxpayer and confirmed the right to access the Italian participation exemption regime. The Supreme Court concluded that denying the French company access to the regime would constitute discriminatory treatment inconsistent with the EU fundamental freedoms.

International Tax Update

Louise Kelly
Tax Partner, Deloitte Ireland LLP

Claire McCarrick *(not pictured)*
Tax Senior Manager, Deloitte Ireland LLP

01 BEPS: Pillar One and Pillar Two Recent Developments

02 US Tax Developments

03 EU Tax Developments

04 Malaysia: Incentives Relating to Relocation of Manufacturing Operations to Malaysia

05 Hong Kong: Draft Law To Refine FSIE Regime for Disposal Gains Submitted to Legislative Council

06 Papua New Guinea: MLI Ratification

01 BEPS: Pillar One and Pillar Two Recent Developments

Irish implementation of Pillar Two

The Finance (No. 2) Bill 2023, released in October, contained the draft legislation to implement Pillar Two. The Bill will be enacted in December, ahead of the 31 December deadline for adoption the of EU Pillar Two Directive. The Minister for Finance, Michael McGrath TD, has described the Pillar Two implementation as a "once-in-a-generation reform" for Ireland's corporation tax system.

While the 12.5% corporate tax rate would persist for all Irish trading companies (alongside the 25% rate for non-trading income), the incorporation of Pillar Two rules would establish a minimum effective tax rate of 15% for companies within the scope of Pillar Two and part of groups with global annual revenues exceeding €750m. Ireland is set to implement a qualifying domestic minimum top-up tax (QDMTT) in accordance with the Pillar Two provisions. This mechanism will ascertain the necessary amount, if any, of top-up tax payable in Ireland to achieve a Pillar Two effective tax rate of 15%.

It is noteworthy that the imposition of a QDMTT charge may be influenced by the potential application of Pillar Two temporary safe harbours. In addition, the default position for the calculation of the QDMTT is local accounting standards rather than the accounting standards of the ultimate parent entity, except in certain circumstances (e.g. where the accounting periods of the Irish entity/entities and the consolidated accounts of the multinational group do not align).

Luxembourg: Pillar Two draft law

On 4 August 2023 the proposed legislation for the incorporation of the EU Pillar Two Directive was presented by the Luxembourg Government to the Luxembourg Parliament. This draft is currently in the legislative process and must be enacted by 31 December 2023 to adhere to the EU deadline.

The calculation of the top-up tax will be executed through the introduction of three newly proposed taxes, as detailed in the draft. These taxes pertain to the income inclusion rule, the undertaxed profits rule and the qualified domestic top-up tax (QDMTT). Similar to Ireland, the QDMTT should be based on local accounting standards rather than the accounting standards of the ultimate parent entity, subject to some exceptions.

The draft also incorporates specific provisions to potentially defer the application of the Pillar Two Regulations for certain multinational groups and domestic groups within their scope. These provisions outline exclusions from the application of the Pillar Two rules based on criteria such as the group's being in its initial phase of international expansion or its meeting specific parameters, such as revenue or profit.

The finalisation of the draft is anticipated by the end of 2023.

Minimum tax implementation handbook published

As part of the ongoing efforts of the OECD/G20 Inclusive Framework on Pillar Two, the OECD announced the release of the *Minimum Tax Implementation Handbook (Pillar Two)* on 11 October 2023. This handbook offers an overview of the crucial provisions in the Pillar Two global minimum tax model rules, providing jurisdictions with guidance on incorporating these rules into their domestic legislation. It also offers insights for tax policy and administration officials, as well as other stakeholders, to consider when evaluating implementation options.

As outlined in the implementation handbook, "while the rules of the global minimum tax are necessarily rather technical, there is also a need for a higher level, straightforward entry point into the overall design and operation of the rules as well as a starting point for considering implementation options. This is what the Implementation Handbook is intended to provide." It is important to note that the implementation handbook does not seek to alter the application or interpretation of any aspects of the model rules or the commentary or administrative guidance.

Sweden implements EU Pillar Two Directive

On 26 October 2023 the Swedish Government disclosed the final legislative proposal for its implementation of the EU Pillar Two Directive. The proposal is now available on the Government's website, marking the next phase in the enactment process, with the Swedish Parliament slated to discuss and vote on the Bill.

The Bill, spanning more than 1,100 pages, including appendices, was accompanied by a press release stating that the proposals remain largely unchanged from the committee's initial draft, which underwent analysis for Pillar Two implementation in Sweden and was subsequently referred by the Legislative Council. Noteworthy is that there have been only editorial changes and the previously suggested rules concerning personal liability for representatives (referred to as *företrädaransvar* in Swedish) have been removed. This alteration may be indicative of the time constraints, given the legislation's requirement to be enacted by 1 January 2024, leaving little room for further amendments.

The Bill follows criticism of the initial draft by the Legislative Council, which recommended a future review of the legislation. This recommendation persists as the legislative proposal still lacks several new provisions necessitated by the OECD's ongoing development of the Pillar Two framework in 2023.

UK HMRC publishes further draft amendments to Pillar Two global minimum tax legislation

On 27 September 2023 the UK's tax authority, HM Revenue & Customs (HMRC), released additional updated draft legislation for technical consultation regarding the UK's adoption of the OECD/G20 Inclusive Framework's Pillar Two model rules. The consultation period ran until 25 October 2023.

The supplementary draft legislation incorporated amendments designed to align with the most recent administrative guidance issued by the OECD Inclusive Framework, in July 2023. These adjustments cover areas such as further agreed safe harbours, the treatment of tax credits and transitional simplified jurisdictional reporting rules for Pillar Two information returns.

In tandem with these developments, HMRC has introduced a dedicated Pillar Two Compliance Team to oversee the administration and implementation of the Pillar Two global minimum tax rules in the UK. This team aims to assist businesses in fulfilling their UK obligations by providing regular updates on Pillar Two developments and events.

OECD/G20 Inclusive Framework releases new multilateral convention to address tax challenges of globalisation and digitalisation

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has disclosed the content of a new multilateral convention aimed at implementing Amount A of Pillar One. This update seeks to coordinate the redistribution of taxing rights to market jurisdictions, enhance tax certainty and eliminate digital services taxes.

Published as the Multilateral Convention to Implement Amount A of Pillar One (MLC), the document mirrors the existing consensus among Inclusive Framework members. Amount A of Pillar One orchestrates the redistribution of taxing rights to market jurisdictions concerning a portion of profits generated by the largest and most profitable multinational enterprises in their markets, irrespective of physical presence. Additionally, it facilitates the repeal and prevention of digital services taxes and similar measures, establishes mechanisms to avoid double taxation, and bolsters stability and certainty in the international tax system.

The MLC's release marks significant progress toward the practical implementation of the October 2021 landmark agreement, ushering international tax policy into the 21st century. While acknowledging differing perspectives on specific items noted in footnotes by a few jurisdictions, the MLC indicates that constructive engagement is ongoing to resolve these differences.

Scheduled to be presented to G20 Finance Ministers and Central Bank Governors in an OECD Secretary-General Tax Report ahead of their meeting in Morocco, the MLC signifies a collaborative effort to address technical issues and reform international taxation comprehensively. The OECD Secretary-General, Mathias Cormann, emphasised the text's provision as the basis for coordinated implementation, paving the way for swift steps toward signature and ratification. The goal is to make the international tax system fairer and more effective in the digitalised world.

Accompanied by an Explanatory Statement and the Understanding on the Application of Certainty for Amount A, the MLC establishes a coordinated taxation system, outlining the necessary features for signature readiness, including scope and operation. The document incorporates provisions tailored to address the unique circumstances of developing Inclusive Framework members.

Public comments on "Amount B" under Pillar One published

On 20 September 2023 the OECD made an announcement regarding the release of responses received in connection with its invitation for public comments on "Amount B" of Pillar One, issued on 17 July 2023. This invitation sought input on a consultation

document focused on streamlining transfer pricing rules. The consultation document presents refined design elements for "Amount B" of Pillar One and introduces a new framework for pricing baseline marketing and distribution activities in alignment with the arm's-length principle.

A diverse range of stakeholders, including businesses, industry and trade associations, and professional services organisations, provided more than 70 responses, all of which have been made publicly available. These comments can be accessed through the OECD website and are downloadable in a ZIP file.

02 US Tax Developments

Additional CAMT guidance provided by Notice 2023-64

On 12 September 2023 the US Treasury and the Internal Revenue Service released Notice 2023-64, which provides additional interim guidance to clarify the application of the corporate alternative minimum tax (CAMT). The US Inflation Reduction Act of 2022 introduced the 15% CAMT on adjusted financial statement income of applicable corporations, effective from 31 December 2022.

The US Government is expected to publish proposed regulations on the application of the CAMT that would include rules consistent with the interim guidance. It is expected that these regulations would apply for periods beginning on or after 1 January 2024 and that taxpayers may rely on the interim guidance for any taxable year that begins before 1 January 2024.

03 EU Tax Developments

European Commission package of measures published

On 12 September the European Commission adopted a key package of initiatives (three initiatives, the SME relief package being one of them) to reduce the tax compliance cost for cross-border businesses.

Directive on Business in Europe: Framework for Income Taxation (BEFIT)

The package included the highly anticipated Directive proposal, presenting a unified framework for corporate income taxation across the European Union. Titled "Proposal for a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT)", this proposal replaces prior suggestions involving a common (consolidated) corporate tax base (CCTB and CCCTB), which have now been withdrawn. If accepted in its current form, the proposed Directive is set to be implemented by 1 January 2028 and would come into effect from 1 July 2028.

According to the Commission, the BEFIT proposal aims to decrease compliance costs for large businesses operating in multiple EU Member States and streamline the determination by national tax authorities of taxes owed. The Commission anticipates that the implementation of the BEFIT proposal could lead to a reduction in tax compliance costs of up to 65% for businesses falling within its scope.

The BEFIT Directive proposal is set to undergo scrutiny by both the European Parliament and the European Council. The European Parliament holds a consultative role, providing recommendations for potential amendments, but the European Council is not obligated to

adopt these suggestions. Technical discussions on the proposal will involve the Council of the European Union and its working parties, aiming to reach a political consensus on the revised BEFIT proposal. The Member States within the Economic and Financial Affairs Council (ECOFIN) configuration of the Council of the European Union would be responsible for revising and amending the proposal.

Transfer Pricing Directive

The "Proposal for a Council Directive on Transfer Pricing", as part of the BEFIT initiative, seeks to standardise transfer pricing regulations across the EU. Although several EU Member States have already partially or wholly adopted OECD transfer pricing rules, the European Commission aims to establish consistent standards for all Member States. If the proposed form is adopted, the new Regulations are expected to be in effect by 31 December 2025, with application starting from 1 January 2026.

As the proposed Transfer Pricing Directive falls in the realm of direct taxation, obtaining unanimity within the European Council is imperative. Taxation remains a sovereign element of Member States, with each EU member granted the authority to wield veto power, potentially obstructing the approval of the Directive. Previous encounters with proposals in the field of direct taxation, particularly those focused on aligning corporate income taxation regulations, have demonstrated the likelihood of prolonged delays at Council level due to a lack of unanimous agreement and political impetus, given the sensitive nature of taxation. It is noteworthy that several factors, including upcoming European Parliament elections, fiscal requirements of individual Member States, prevailing risks and uncertainties impacting the EU economy, as well as the momentum of EU growth, could influence the potential adoption of the proposed Transfer Pricing Directive.

Head-office tax system for SMEs

A proposed Directive would introduce a head-office tax system tailored to micro, small and medium-sized enterprises (SMEs). This Directive suggests that SMEs undergoing cross-border growth via permanent establishments (PEs) to choose to apply the tax rules of the EU Member State where their head office is located to calculate the taxable results of their PEs in other Member States. Consequently, they would not be obligated to adhere to the local tax rules in the Member State hosting the PE.

The selective application of these rules might introduce occasional competition imbalances due to differing tax regulations for comparable businesses, but the proposed Directive aims to mitigate these risks. According to the European Commission, the advantages include substantial reductions in tax compliance expenses for SMEs with PEs, rendering the system overall beneficial.

Should the proposed Directive be adopted in its current form, Member States would need to transpose it into domestic legislation by 31 December 2025, with implementation commencing on 1 January 2026.

Italian decree encompassing noteworthy international tax measures

In October 2023 the Italian Council of Ministers endorsed a preliminary legislative decree outlining the adoption of the EU Pillar Two Directive into the Italian domestic tax law framework. The draft decree encompasses various other substantial provisions related to international tax matters, including the criteria for determining the tax residence of corporate entities, modifications to the controlled foreign company (CFC) regime relevant for participation exemption regimes and the introduction of a tax incentive aimed at encouraging the relocation of economic activities to Italy from non-EU/European Economic Area (EEA) jurisdictions.

Scheduled to take effect from 1 January 2024, the decree, currently in draft form, allows for potential adjustments before its final approval by the Italian Parliament.

EU Pillar Two Directive implementation

The draft decree integrates provisions designed to implement the EU Pillar Two Directive,

aligning generally with the version initially published by the Italian Government for public consultation on 11 September 2023, albeit with certain modifications. These adjustments include the incorporation of an option for taxpayers to seek a mutual agreement procedure (MAP) for addressing queries regarding the interpretation or application of the Pillar Two rules. This option is based on the EU Pillar Two Directive and the OECD Pillar Two model rules, with the implementation rules for the MAP to be provided through a decree from the Italian Ministry of Finance.

Determination of tax residence for corporate entities

The existing criteria for determining tax residence in Italy – including factors such as the registered office, place of administration and "main business purpose" – would undergo modifications under the draft decree. The proposed changes involve replacing the "place of administration" with the "place of effective management" and the "main business purpose" with the "place of day-to-day executive management". The "place of effective management" refers to where strategic decisions for the corporate entity are continually and co-ordinately made, and the "place of day-to-day executive management" pertains to the location where the ongoing and coordinated daily management activities of the corporate entity occur.

Amendments to CFC and participation exemption regimes

The draft decree introduces amendments aiming to streamline the CFC regime and align it with the forthcoming Pillar Two provisions. Notably, the effective tax rate test for non-Italian entities under the CFC regime would undergo changes for audited foreign entities, with the effective tax rate calculated based on financial statement data. For both audited and non-audited foreign entities, the draft decree outlines considerations for the qualified domestic minimum top-up tax (QDMTT) in the effective tax rate test. Additionally, audited foreign entities have the option to elect a substitute tax at a 15% rate for three fiscal years, applicable to all entities subject to the CFC regime.

The amendments to the CFC regime would have implications for the Italian participation exemption regimes concerning dividends and capital gains from participations in non-EU-controlled entities. Further evaluation is necessary, particularly regarding the "look-back" period for the application of the effective tax rate test under the participation exemption regime for capital gains from participations.

Reshoring of business activities

To incentivise economic activities within Italy, the draft decree proposes partial exemption from Italian corporate income tax and the regional tax on productive activities when business activities performed in non-EU/EEA jurisdictions are relocated to Italy. Specifically, only 50% of the income from these activities would be subject to tax. The reshoring incentive is applicable for the fiscal year of relocation and the subsequent five fiscal years, subject to recapture through a "clawback" provision if the activity is relocated outside Italy to a non-EU/EEA jurisdiction. Large enterprises, as defined in Commission Recommendation 2003/361/EC, would face an extended clawback period of ten fiscal years, accompanied by late-payment interest and penalties in cases of relocation.

DAC7: Closure of infringement proceedings for non-transposition by four EU Member States

On 18 October 2023 the European Commission declared the conclusion of infringement proceedings against Italy (INFR(2023)0023), Lithuania (INFR(2023)0024), Luxembourg (INFR(2023)0026) and Romania (INFR(2023)0035) due to their failure to fully (or partially, in the case of Lithuania) transpose Council Directive (EU) 2021/514, dated 22 March 2021, amending Directive 2011/16/EU on administrative cooperation in taxation, commonly known as "DAC 7", into their domestic legislation. The Directive mandates digital platform operators to gather and report information on the income generated by sellers when the platform facilitates

connections between sellers and customers for the provision of:

- the sale of goods;
- the rental of immovable property (e.g. accommodation);
- personal services (time- or task-based work conducted either online or physically offline after being facilitated via a platform); and
- the rental of any mode of transport.

These Regulations came into effect on 1 January 2023.

Infringement proceedings were initiated against the four EU Member States on 27 January 2023, through a letter of formal notice.

Greece: DAC 7 Directive transposed into domestic law

The Greek Parliament adopted Law 5047/2023 on 4 September 2023, transposing DAC 7 into domestic law. The law is aimed at improving the information-exchange process between the tax authorities of the EU Member States, thereby enhancing administrative cooperation. The law also introduces a reporting obligation requiring platform operators operating within the EU to collect and submit to the tax authorities data about reportable sellers. This information will be provided by the Greek competent authority and exchanged automatically with the competent authority of the Member State of residence of the reportable seller.

DAC 8 on crypto-assets formally adopted by EU Member States

On 17 October 2023 the Council of the European Union officially approved, with unanimity, the Council Directive Proposal that amends Directive 2011/16/EU on administrative cooperation in taxation, commonly known as “DAC 8”. This marks the concluding step in the legislative process for this EU legislation. Although the Council had reached an agreement on its position regarding the Directive on 16 May 2023, formal adoption awaited the European Parliament’s consultative opinion, which was granted on 13 September 2023.

DAC 8 was officially published in the *Official Journal of the European Union* on 24 October 2023, and its provisions will become effective on the 20th day after publication.

The primary objective of DAC 8 is to implement new regulations governing the reporting and exchange of information for tax purposes related to e-money and crypto-assets. It builds on the definitions established in the Regulation on Markets in Crypto-assets (MiCA) and covers the exchange of information on cross-border rulings concerning high-net-worth individuals, penalties and compliance measures for the various reporting obligations in the DAC framework.

Belgium: Increased investment deduction/credit for qualifying investments for 2024

Belgium has announced a 7% increase in the rate of the increased investment deduction applicable to eligible capital investments by companies during financial year 2023 (tax year 2024). This increase is owed to high inflation rates in 2022. Expenditure eligible for the deduction includes mainly energy-saving and environmentally friendly investments in research and development, investments in security and expenditure on patents.

EU non-cooperative jurisdictions list updated

The European Council added Antigua and Barbuda, Belize and the Seychelles to the EU list of non-cooperative jurisdictions for tax purposes on 17 October 2023, as the jurisdictions were found to be lacking with regard to the exchange of tax information on request. The Council also removed the British Virgin Islands, Costa Rica and the Marshall Islands from the list on the same date. The next revision of the list is scheduled for February 2024.

In addition to the list of non-cooperative tax jurisdictions, the Council approved the usual state-of-play document, reflecting the ongoing EU cooperation with its international partners. Jordan and Qatar were removed from the state-of-play document, as the jurisdictions fulfilled their commitments by amending a harmful tax regime, and Montserrat and Thailand were also removed, as the jurisdictions fulfilled all of their pending commitments related to country-by-country reporting of taxes paid.

This list is relevant for a number of Irish tax provisions, e.g. controlled foreign company rules and the changes to withholding taxes for interest, royalties and dividends in Finance (No. 2) Bill 2023.

Ireland: Effective tax rate of Knowledge Development Box increased to 10%

From 1 October 2023 the effective tax rate of the KDB increased from 5% to 10%. The change was legislated for in Finance Act 2022 and was given effect by a Ministerial Order. The KDB is an OECD-compliant intellectual property regime. It will be impacted by the Pillar Two ssubject-to-tax rule, which should allow for additional tax to be levied on certain connected-party payments that are not subject to an adjusted nominal rate of at least 9% in the jurisdiction in which the recipient is tax resident.

Ireland: Roadmap for participation exemption on dividend income and foreign branch profits exemption

In September the Minister for Finance published a “Roadmap for the Introduction of a Participation Exemption to Irish Corporation Tax”, which includes technical consultation open until 13 December 2023. Ireland is the only EU country that does not have a form of participation exemption for foreign dividends. In Ireland foreign dividend income is taxed, with relief available for double taxation. It is expected that introduction of the new system would be legislated for in Finance Bill 2024. The Roadmap also includes a consultation on a foreign branch profits exemption, also open until 13 December 2023. No commitment on the timing of a foreign branch exemption has been provided to date.

04 Malaysia: Incentives Relating to Relocation of Manufacturing Operations to Malaysia

The Malaysian Government published the Income Tax (Exemption) Order 2023 (P.U.(A) 240/2023), the Income Tax (Relocation of Manufacturing Business Incentive Scheme) Rules 2023 (P.U.(A) 241/2023) and the Income Tax (For an Individual Resident Who is not a Citizen and Holds C Suite Position in an Approved Company) Rules 2023 (P.U.(A) 242/2023) on 15 August 2023. This was in order to legislate for specified measures previously announced by the Malaysian Government that were set out to attract foreign direct investments in Malaysia. Qualifying companies that relocate existing manufacturing operations to Malaysia or establish new manufacturing operations in Malaysia could be eligible for an exemption with respect to corporate income tax for certain income or a 0% income tax rate on chargeable income for a specified period. Furthermore, non-citizen individuals who hold a “C-suite” position in such a company may be eligible for special tax treatment. The published order and rules are believed to be effective retroactively from the year of assessment 2021, and the tax incentives are generally available regarding applications received by the Malaysian Investment Development Authority up to 31 December 2024.

05 Hong Kong: Draft Law To Refine FSIE Regime for Disposal Gains Submitted to Legislative Council

Proposed legislation refining Hong Kong SAR's foreign-sourced income exemption (FSIE) regime, with a focus on broadening the coverage of foreign-sourced disposal gains, was officially published on 13 October 2023. It was then presented to the Legislative Council for consideration on 18 October 2023. The Inland Revenue (Amendment) (Taxation on Foreign-sourced Disposal Gains) Bill 2023 aims to align the FSIE regime with the updated guidance on such frameworks issued by the European Union in December 2022. The key adjustments include the extension of the scope of foreign-sourced disposal gains to encompass all asset types, excluding gains of traders. Additionally, a new intragroup transfer relief for foreign-sourced disposal gains is set to be introduced. The revised regime is targeted to take effect from 1 January 2024.

06 Papua New Guinea: MLI ratification

On 7 September 2023 the OECD declared that Papua New Guinea has officially ratified the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the MLI), commonly known as the "BEPS Convention". The deposit of Papua New Guinea's instrument of ratification with the OECD occurred on 31 August 2023. With representatives from a total of 100 jurisdictions having signed the MLI, and instruments of ratification, acceptance or approval covering 83 jurisdictions deposited with the OECD, the MLI is gaining widespread international acceptance.

Papua New Guinea, on depositing its ratification instrument, outlined its MLI position through a list of reservations and notifications. This document specifies 10 tax treaties that Papua New Guinea wishes to be encompassed by the convention. The MLI is slated to come into effect for Papua New Guinea three months after the deposit of its instrument of ratification, on 1 December 2023.

According to the OECD announcement, the MLI has extended its coverage to approximately 1,870 bilateral tax treaties. As of 1 September 2023, modifications have been applied to around 1,200 treaties concluded among the 83 jurisdictions that ratified, accepted or approved the MLI, with an additional 670 treaties earmarked for modification pending the MLI's ratification by all signatories.

VAT Cases and VAT News

Gabrielle Dillon
Director – VAT, PwC Ireland

VAT Cases

01 **Taxable Amount for Import of Goods and Related Transport Services**: CJEU Judgment C-461/21

02 **Reimbursement of Overpaid Tax**: CJEU Judgment C-453/22

03 **Subscription Gift – Supply for Consideration or Free-of-Charge Supply**: CJEU Judgment C-505/22

04 **Provision of Tours – Exempt or TAMS**: TAC Determination 109TACD2023

05 **Financial Services – Exempt or VATable**: TAC Determination 110TACD2023

06 **VAT Registration – Evidence of Trade**: TAC Determination 115TACD2023

01 Taxable Amount for Import of Goods and Related Transport Services: CJEU Judgment

The Court of Justice of the European Union (CJEU) delivered its judgment in the case of ***SC Cartrans Preda SRL m v Direcția Generală Regională a Finanțelor Publice Ploiești – Administrația Județeană a Finanțelor Publice Prahova*** C461/21 on 7 September 2023. The specific VAT issue under consideration was a requirement for Cartrans to pay an additional amount of VAT in respect of services relating to the carriage of goods intended to be imported to Romania. The legislative provisions requiring interpretation were Article 144 of the VAT Directive read in light of Article 86(1)(b) and (2). The case also dealt with the requirement to withhold tax at source on income paid by Cartrans to a non-resident co-contracting company for services relating to the recovery of VAT abroad. The first issue only is summarised herein.

Cartrans is established in Romania and provides transport services (carriage of goods by road). After an audit, a tax assessment was raised in relation to an invoice that Cartrans had issued to another company in respect of transport services provided between the Netherlands (where the goods had entered the EU) and Romania. Article 85 of the VAT Directive sets out the taxable amount in respect of the importation of goods, which is the value for customs purposes. Article 86 sets out the factors that are to be included in the taxable amount:

"(a) taxes, duties, levies and other charges due outside the Member State of importation, and those due by reason of importation, excluding the VAT to be levied; (b) incidental expenses, such

> as commission, packing, transport and insurance costs, incurred up to the first place of destination within the territory of the Member State of importation as well as those resulting from transport to another place of destination within the Community, if that other place is known when the chargeable event occurs."

The "first place of destination" is the place referred to on the consignment note or on any other document under which the goods are imported to the Member State of importation; if not mentioned, then it is the place of the first transfer of cargo in the Member State of importation. The supply of services relating to the importation of goods where the value of such services is included in the taxable amount in accordance with Article 86(1)(b) is exempt under Article 144.

The Romanian tax authority found that Cartrans had not submitted documents showing that the transport services were directly linked to the importation of the goods and that the value of the services was included in the taxable amount of the imported goods. It concluded that the entitlement to exemption had not been established. Cartrans argued that the tax authority erred in so far as it failed to permit the exemption of the transport services. It argued that the costs of carrying the goods to the place of destination were mandatorily included by the customs authorities in the customs value of the goods when they entered the territory of the EU. It argued that the costs were included in the taxable amount for VAT purposes of the imported goods under Article 86(1)(b), as the CMR consignment note and the transit summary declaration (which had the MRN number) referred to the location of the consignee, i.e. in Romania. Cartrans argued, therefore, that the conditions for exemption as per Article 144 were satisfied.

The first question posed was whether recording the import transaction means that the transport costs are included in the taxable amount of the imported goods in accordance with Articles 86(1)(b) and (2) and 144. The court noted that there are two conditions to be satisfied under Article 144 for exemption of the transport services to apply – (1) the supply must be connected with the importation of the goods concerned and (2) the value of that supply must be included in the taxable amount for VAT purposes of the imported goods. With regard to the taxable amount, Article 85 provides that the taxable amount is the value for customs purposes of those goods, and Article 86(1)(b)provides that that taxable amount must take account of incidental expenses (if not already included), which include the cost of transport to the first place of destination of the goods within the territory of the Member State of importation, as well as the cost of transport to another place of destination within the EU (where known when the chargeable event occurs).

Articles 85 and 86 read together indicate that the transport costs are not necessarily included in the value for customs purposes of imported goods. If Article 86 is not to be deprived of its effectiveness, the court noted that it cannot be held that the recording of an import transaction entails that the costs of that transport are included in the taxable amount for VAT purposes of the imported goods. If they are not already included in the value for customs purposes (which has to be verified), then the costs must be included in the taxable amount for VAT purposes of the imported goods as per Article 86(1)(b). So recording an import transaction does not mean that the transport costs are included in the customs value.

In addition, the existence of an MRN does not show that the costs in Article 86(1)(a) and (b) are included in the taxable amount of the imported goods. However, the CMR consignment note and transit document (drawn up on the basis of the transit declaration, as checked by the customs authority), the invoice and the transport contract constitute evidence that the tax authorities must, in principle, take into account to determine whether

there is a right to exemption, unless those authorities have precise reasons to doubt their authenticity or reliability. The court held that recording the import transaction does not mean that the transport costs are included in the taxable amount for VAT purposes of the imported goods.

The second question related to whether a Member State's practice of automatically refusing the exemption is precluded where the supplier of the service has not produced the documentation required by the national legislation but has provided other documents that are capable of establishing that the legislative conditions are satisfied. The court noted that Member State must observe principles of EU law in exercising its powers when setting down the conditions in which import transactions will be exempt. The principle of proportionality provides that a national measure goes further than is necessary to ensure the correct collection of the tax:

> "if, in essence, it makes the right of exemption from VAT subject to compliance with formal obligations, without any account being taken of the substantive conditions and, in particular, without it being necessary that any consideration be given as to whether those requirements have been satisfied."

With this principle taken into consideration, transactions should be taxed by taking into account their objective characteristics. The court stated that where the substantive conditions are satisfied, exemption should still be allowed even if some of the formal conditions are not complied with, as per the principle of fiscal neutrality.

This treatment can be overridden where the taxable person has intentionally participated in tax evasion and where the failure to comply with the formal requirements means that there is no conclusive evidence that the substantive requirements have been satisfied. It is up to the transport service provider to satisfy the two substantive conditions to qualify for exemption, but it is also up to the tax authorities to examine all of the information available to them. By contrast, those authorities cannot deduce that the substantive conditions have not been met from the mere fact that the person liable is unable to produce one or more of the specific documents required by national legislation.

There was no indication that Cartrans intentionally participated in tax evasion or that the competent authorities were prevented from determining whether the substantive conditions for the exemption were satisfied where Cartrans had not satisfied the formal requirements. It is for the national court and tax authority to determine if the substantive conditions are satisfied on the basis of all documents provided.

> "It is only if, having regard to the factual circumstances and despite the evidence supplied by the provider, the information necessary to check that the value of the services has been included in the taxable amount for VAT purposes of the imported goods is lacking, that the taxable person must be refused exemption from VAT".

The court held that a Member State's tax practice of automatically refusing the exemption from VAT for transport services connected with the importation of goods is precluded where the person liable has not produced the specific documents required by national legislation but has produced other documents (where there is no reason to doubt the authenticity and reliability of those documents) capable of establishing that the conditions for entitlement to exemption from VAT are satisfied. This case highlights the importance of having documentary evidence to support a claim for exemption for transport services related to the importation of goods. The difference between the customs value and the taxable amount for VAT purposes should be noted.

02 Reimbursement of Overpaid Tax: CJEU Judgment

The judgment in the case of ***Michael Schütte v Finanzamt Brilon*** C453/22 was delivered on 7 September 2023. Mr Schütte is a farmer and forester; he purchased timber from various suppliers and subsequently resold and delivered the timber to his customers as firewood. The suppliers applied VAT at 19% on their invoices, but Mr Schütte applied the reduced rate of 7% to his invoices. The VAT amounts were remitted by all parties to the German tax authorities, and Mr Schütte reclaimed VAT at the higher rate on foot of the invoices issued. The tax office concluded that the output transactions of Mr Schütte should have been subject not to the reduced VAT rate but to the standard rate. The finance court held that the output transactions of Mr Schütte were subject to the reduced VAT rate but took the view that the purchases made by him were also subject to the reduced rate of 7%. The deduction of input VAT by him was, as a result, reduced accordingly.

The tax office sought to recover the VAT due plus interest. Mr Schütte contacted his suppliers and requested that they correct the invoices issued to him and pay him the difference. However, the suppliers invoked the defence of limitation (German civil law provision) against him, so the invoices were not corrected and no repayments were received. He sought to have the additional VAT and interest discharged on grounds of equity, but this was rejected. Mr Schütte brought an action against that rejection decision, and in the course of those proceedings the court referred a question to the CJEU.

The question raised was whether the VAT Directive, the principle of fiscal neutrality and the principle of effectiveness must be interpreted as requiring that a purchaser has a right to claim directly from the tax authorities a refund of improperly invoiced VAT paid to suppliers and paid by those suppliers to the tax authority, together with related interest, in circumstances where the purchaser cannot be criticised for fraud, abuse or negligence but cannot claim that reimbursement from those suppliers due to the limitation period provided for by national law and where there is a procedural possibility of those suppliers claiming a refund after correcting the invoices.

The court noted that, in the absence of EU rules on applications for the repayment of taxes, it is for the domestic legal system of each Member State to lay down the conditions under which such applications may be made. Those conditions must observe the principles of equivalence and effectiveness. In principle, it also falls to the Member States to determine the conditions under which improperly invoiced VAT may be adjusted.

The court indicated that a system where a supplier who has paid VAT to the tax authority in error may seek to be reimbursed and the purchaser may bring a civil law action against that supplier for recovery of the sums paid but not due has been accepted and observes the principles of VAT neutrality and effectiveness. Therefore, the purchaser gets to reclaim the VAT that was improperly paid. But if reimbursement of the VAT becomes impossible or excessively difficult (e.g. insolvency of the supplier), the purchaser may be able to address its application for reimbursement to the tax authorities directly, which would be required under the principle of effectiveness. The detailed procedural rules must be set out by the Member State. Equally, if the refund is sought fraudulently or abusively, the right to refund may be refused.

The court noted that an absolute refusal of the right to a reimbursement of VAT that has been incorrectly invoiced and paid but is not due appears disproportionate where there is no evasion or risk to the public finances (even if the taxable person was negligent).

The court distinguished the *Zipvit* C-156-20 case as, based on the facts of that case, the court held that a taxable person cannot claim to deduct an amount of VAT where that person has not been charged for that amount and which it has therefore not passed on to the final consumer. With regard to the argument that there is a double reimbursement risk, it was noted that, in principle, the risk in the circumstances of this case was precluded.

Where a Member State has levied taxes in breach of the rules of EU law, the court has previously held that individuals are entitled to reimbursement not only of the tax unduly levied but also of the amounts paid to that State or retained by it that relate directly to that tax. In this case, Mr Schütte's input VAT was reduced from 19% to 7%, resulting in an economic burden on him where he had already paid that difference to the tax authority, and there was a failure to reimburse him within a reasonable time. The court held that he must be compensated by the payment of default interest.

03 Subscription Gift – Supply for Consideration or Free-of-Charge Supply: CJEU Judgment

The judgment in the case of ***Deco Proteste – Editores Lda v Autoridade Tributária e Aduaneira*** C505/22 was delivered on 5 October 2023 and concerned the interpretation of Article 2(1)(a) and Article 16 of the VAT Directive and the principles of neutrality, equal treatment, non-discrimination and proportionality. The Portuguese tax authority imposed VAT on the supply by Deco Proteste – Editores Lda (DPE) of tablets or smartphones to new subscribers to the magazines that it markets. DPE, established in Portugal, publishes and markets magazines and other documents providing information on consumer protection, which are sold only on subscription. Under its promotional campaigns aimed at attracting new customers, DPE gives new subscribers who sign up for a subscription plan a gift, which can be a tablet or a smartphone, the value of which is always below €50. The gift is sent by courier to the subscribers with their magazine after the first monthly subscription payment (all monthly subscription payments are the same). There is no minimum subscription period, and customers may keep the subscription gift without incurring any penalty after the first monthly payment even if the subscription is cancelled.

The tax authority noted that the invoices issued by DPE at the time of the new subscriptions showed a reduced rate of VAT of 6% and made no reference to the subscription gifts. The tax authority considered that the gifts were gifts as provided for under Portuguese legislation but that the amount exceeded the ceiling of 0.5% of the turnover of the previous calendar year (as per Portuguese legislation). It subjected the supply of those gifts to VAT using the purchase price as the taxable basis and the standard rate of 23% as the VAT rate. DPE paid the assessment amount plus interest (after some adjustments) and subsequently sought a refund of the VAT amount. DPE argued that the provision of subscription gifts to new subscribers did not constitute a free-of-charge supply. It was a commercial offer consisting of the provision of a service (the subscription) linked to a supply of goods (subscription gift) with a financial consideration included in the value of the magazine subscription. It also argued that even if the subscription gift were considered to be something "given", as its unit value is less than €50, it falls within the concept of a low-value gift. It argued that the ceiling of 0.5% is irrelevant to the low-value gift concept as it does not comply with Article 16 of the VAT Directive and also infringes the principles of proportionality, neutrality and equal treatment.

Article 16 of the VAT Directive provides that:

> "the application by a taxable person of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible. However, the application of goods for business use as samples or as gifts of small value shall not be treated as a supply of goods for consideration".

The question referred to the CJEU was whether Article 2(1)(a) and the first paragraph of Article 16 of the VAT Directive must be interpreted as meaning that the giving of a subscription gift in return for a subscription to periodicals falls within the concept of a "supply of goods for consideration", or whether the first paragraph of Article 16 must be interpreted as meaning that the giving of such a gift, constituting a transaction separate from the subscription transaction, should be regarded as a disposal of goods free of charge.

The court referred to the rules on single versus multiple supply, which need to be considered to ascertain the correct VAT treatment, and highlighted the need to identify the characteristic elements of the transaction in question from the perspective of the average consumer. After reference to the various factors to be considered, it noted that it is apparent that the provision of subscription gifts for all new subscribers is an integral part of the commercial strategy of DPE. It was also noted that the subscription costs are considerably higher when accompanied by subscription gifts. Therefore there was a clear link between the provision of a gift and the subscription to the magazines supplied by DPE. It will be for the referring court to examine whether that link is systematic and sufficiently close for those supplies to be considered indivisible.

In this case, the renewal of a subscription did not give rise to the provision of a new gift and DPE carried out promotional campaigns without offering subscription gifts, and these facts show that those services are not indivisible. The court was of the view that there appears to be a principal supply and an ancillary supply, which is ultimately to be determined by the referring court. The provision of a subscription gift to new subscribers only is an incentive to subscribe to the magazines, and therefore the main purpose is to increase the number of subscribers and, as a result, the profits. DPE takes account of the fact that subscribers could cancel the subscription after the first month without the requirement to give back the gift. The provision of such a gift therefore has no distinct purpose from the point of view of the average consumer, who agrees to pay at least one month's subscription to obtain the gift. The subscription gift offered enables new subscribers to read a digital version of the magazines using the tablet and smartphone.

The court held that:

> "Consequently, subject to examination by the referring court, it appears that the subscription to those magazines, on the one hand, and the offer of a tablet or a smartphone with a unit value of less than EUR 50 for each new subscription, on the other, form a whole, with the subscription constituting the principal supply and the gift an ancillary supply the sole purpose of which is to encourage the purchase of a subscription."

Therefore, the subscription gift in return for subscribing to the magazine is a supply of goods for consideration and is not regarded as a disposal of goods free of charge. This case is relevant when considering whether a supply is a single supply or multiple supplies for VAT purposes and the factors to be taken into account in making this determination.

04 Provision of Tours – Exempt or TAMS: TAC Determination

The Tax Appeals Commission determination in **109TACD2023**, dated 24 May 2023 was published on 18 August 2023. The appellant is a sole trader registered for VAT and was engaged in a number of activities. He operated a small tour business, was involved in the sale of advertising in a magazine and the retail of the magazine, and provided golf tours. The appellant regarded the tours that he provided as being exempt from VAT on the grounds that they related to courses taught regularly in schools or universities. The respondent did not agree that the exemption applied and raised an assessment.

The main issue was whether the tours that the appellant delivered were children's or young people's education, school or university education, or vocational training or retraining (including the supply of goods and services incidental to that provision, other than the supply of research services). The appellant claimed that the exemption from VAT pursuant to Schedule 1, paragraph 4(3), of VATCA 2010 applied. Tour itineraries were submitted to the TAC in support of the argument, and the appellant claimed that it was clear from the itineraries:

> "that the focus of my tour programmes are subjects, such as Literature, History, Performing Arts, Peace Studies. Education is clearly the purpose and focus of the tours. These subjects are also clearly subjects taught regularly in schools and universities. The itineraries also clearly show the teaching process and teacher / student relationship together with the organisational infrastructure to support the effective transfer of knowledge and skills between the teachers and students."

The Commissioner concluded that the itinerary that the appellant provided did not contain any items of academic value and appeared to contain mainly items of cultural and touristic value. The Commissioner noted that the majority of talks that were delivered as part of the tour were paid talks but that the appellant had not provided evidence of specific talks, classes or tuition delivered during the tour. The Commissioner found that the Travel Agents' Margin Scheme applied to the appellant's tour business and that the VAT liability should be calculated under the provisions of the scheme. The case is being referred to the High Court by way of case stated.

05 Financial Services – Exemption or VATable: TAC Determination

The determination in **110TACD2023** was published on 18 August 2023 and relates to a refund claim by the appellant that was refused by the respondent. The appellant treated its services as being liable to VAT and sought to reclaim input VAT on operating costs. The respondent refused the claim on the basis that the services supplied were exempt from VAT. The appellant provided sub-distribution services (part of fund management services). The services provided fell into two categories – it procured investors to subscribe for units in the funds; and it provided marketing, promotional and related services, as requested, and provided due diligence and "know your customer" services relating to any third-party placement or distribution agents appointed. The appellant would enter into further sub-distribution agreements with local third parties, e.g. banks, so that third-party distributors would distribute the funds via their own distribution networks. The appellant leveraged the local distributor's client base and network. The appellant had previously treated the services as VAT-exempt under the exemption for agency services relating to "dealing in...

shares" but changed the VAT treatment and applied VAT to its services.

A sub-distribution agreement was entered into for the purpose of procuring investors to subscribe for units in the funds. The various services and obligations of the appellant set out in the agreement were elements of the appellant's role in seeking to procure investors in the funds. The agreement allowed it to appoint sub-distributors. The appellant was paid an assets-based fee and was directly incentivised to work towards the success of the funds. The sub-sub-distributors were paid a commission/trail fee based on sales of units in the funds and thereby were incentivised by the appellant to procure investment in the funds.

The appellant was of the view that the services were fund management services, and to the extent that it was engaged in dealing in shares, it dealt only in new shares/securities, and the activity of dealing in new shares/securities was specifically excluded from exemption under paragraph 6(1)(a) and accordingly 7(1) of Part 2 of Schedule 1.

The respondent submitted that the appellant's activities fell within the exemption set out in paragraph 6(1)(b), which did not exclude the issuance of new shares or securities. There was no definition of or specific meaning given to the term "arranging for" in the context of the exemption, and therefore the word must be given its ordinary meaning in accordance with the principles of statutory interpretation. The respondent understood the services provided by the appellant were to arrange for investors to subscribe for shares in funds under management. Although the appellant could engage "sub-distributors", it retained responsibility for its contractual obligations as "global sub-distributor" and was paid for the distribution services provided by it and remunerated sub-distributors appointed by it. The distribution services provided went beyond "mere clerical formalities" and, consistent with the analysis of CJEU in *CSC* C-235/00 and *Ludwig* C-453/05, constituted "negotiation" within Article 135(1)(f) and agency services within paragraph 7(1) of Schedule 1, Part 2, VATCA 2010.

The Commissioner found that the appellant's services involved the procurement of investors in units in the funds and were not limited to identifying and procuring sub-sub-distributors. He considered the terms of the sub-distribution agreement between the appellant and [redacted], as well as the agreements between the appellant and the sub-sub-distributors. He noted that the fee structure was consistent with a business model where the appellant's role was to procure investors to buy units in the funds. He considered that the relationship between the appellant and the sub-sub-distributors could be considered to be a chain of distribution and that its role in that chain was essential. The Commissioner was satisfied that investment in the funds would not have been possible without the appellant. The services provided by the appellant therefore constituted exempt services under paragraph 6(1)(b) Schedule 1, Part 2, VATCA 2010.

06 Registration for VAT – Evidence of Trade: TAC Determination

The determination in **115TACD2023**, dated 20 June 2023, was published on 8 September 2023 and related to a refusal to register the appellant for VAT on the grounds that he was not an accountable person. The main issue was whether the appellant had provided sufficient evidence that he was a taxable person engaged in economic activity.

The appellant was a sole trader and indicated that he would be operating as a consulting business for quality management solutions in safety-critical industries such as medtech and automotive and had an expected turnover of €80,000. The intention was to supply services to other EU Member States and acquire services from the EU.

The respondent sought information from the appellant, which included a detailed description of the VATable activity being carried out by the business, confirmation of the correct business address and evidence that the business is currently trading. An agreement was submitted to the respondent evidencing that the appellant was engaged in a consultancy project, but some queries had not been responded to, and the respondent sought additional documentation to evidence the place of business and banking details to substantiate the commencement of activity. The respondent also visited the address provided by the appellant and was of the view that the address is used only as a virtual office for postal deliveries and that the business is not being operated from this premises, and it rejected the application.

The Commissioner found that the appellant failed to prove that he is a taxable person or that the economic activity that he indicates he wishes to carry out will be carried out from within the territory of the State.

VAT News

Ireland

On 13 October 2023 Revenue launched a public consultation on real-time digital reporting and electronic invoicing. The consultation document states that "Revenue is now embarking on a process to seek the input of taxpayers, agents, software providers, business associations, representative bodies and other stakeholders on modernising VAT administration for the future". The consultation document is the first engagement in that process. It notes that:

> "Revenue wants to stimulate discussion and garner views from across the full breadth of Ireland's VAT community about the benefits, challenges and opportunities presented by VAT administration modernisation. In every stage of this change cycle – planning, development, implementation and review – the real-life business experience of VAT-affected stakeholders will be a vital input, so Revenue intends that this present, early-stage consultation is just the first in a series of engagements on a VAT Modernisation programme over the coming years. Further consultations and other public engagement will follow, as reform proposals take clearer shape, are tested, refined and put into operation."

Revenue eBrief No. 193/23 was published on 1 September 2023 and highlighted the fact that amendments were made to a number of VAT Tax and Duty Manuals (TDMs) to reflect the application of the 13.5% VAT rate to supplies from 1 September 2023. The TDMs amended were "VAT Treatment of Food and Drink Supplied by Wholesalers and Retailers", "VAT Treatment of Restaurant and Catering Services", "VAT Treatment of Guest and Holiday Accommodation", "VAT Treatment of Admission Fees for Entry to Historic Houses and Gardens", "VAT Treatment of Admission to Amusement Parks and Fair Grounds", "VAT Treatment of Services Connected with Immovable Property" and "Supply of Printed Matter".

Revenue eBrief No. 194/23 was published on 5 September 2023 and highlighted the updates made to the "VIES and INTRASTAT Trader's Manual", which included an update to the VIES Appendices – Appendix 4, containing instructions on making VIES corrections online in ROS. Before this change, corrections could not be made online. Contact details have been updated to include a new telephone contact number for VIES and Intrastat enquiries. Previous contact numbers are currently being phased out.

Revenue eBrief No. 215/23, released on 13 October 2023, related to the VAT treatment

of medical equipment and appliances. The guidance sets out the VAT treatment of medical equipment and appliances, together with the VAT treatment of Covid-19 testing kits. In general, the supply of medical equipment and appliances is liable to VAT at the standard rate. However, the supply of certain medical equipment and appliances is liable to VAT at the zero rate. Covid-19 testing kits are also zero rated.

Revenue eBrief No. 231/23 was published on 23 October 2023 and related to EU reporting obligations for platform operators. The TDM Part 38-03-31 provides guidance on the EU reporting obligations for platform operators. This has been updated to include confirmation that the registration portal for platform operators will open on 1 November 2023; updates to the obligations on platform operators in relation to elections in Ireland, de-registrations in Ireland and de-registrations in other Member States; and the insertion of Appendix III, containing a schedule of material changes to the guidance.

Revenue eBrief No. 202/23, released on 28 September 2023, announced the publication of a new TDM, "DAC Exchange of Information – Presence and Participation of Foreign Tax Officials in Administrative Enquiries". The manual provides guidance on the presence and participation of foreign tax officials in administrative enquiries as part of an exchange-of-information request under Council Directive 2011/16/EU, as amended by Council Directive (EU) 2021/514, referred to as DAC 7.

EU

The European Commission issued a press release on 24 October 2023 in relation to progress made by Member States on VAT compliance in 2021 and the reduction in the "VAT gap" from €99bn in 2020 to €61bn in 2021. The VAT gap represents revenues lost mainly to VAT fraud, evasion and avoidance; non-fraudulent bankruptcies; miscalculations; and financial insolvencies.

The Commission welcomed the:

> "progress in enforcing VAT compliance as lost VAT revenues can have an extremely negative impact on governments' capacity to fund the public goods and services upon which we all depend, such as schools, hospitals and transport. The latest report shows that targeted policy responses made a difference, particularly those related to digitalisation of tax systems, real-time reporting of transactions and e-invoicing. At the same time, temporary factors such as government support measures implemented during the COVID-19 pandemic, which were often contingent on paying taxes, may also have played a role in driving this positive change."

UK

HMRC published Revenue and Customs Brief 7 (2023), highlighting changes to the VAT treatment of drugs and medicines supplied under patient group direction. The change will take effect from 9 October 2023 and will apply up to 31 March 2027. It will apply to drugs and medicines supplied pursuant to a patient group direction during this period. The Brief indicates that the scope of the VAT zero rate for supplies of drugs and medicines dispensed to individuals for their personal use is being temporarily extended to include the supply of drugs and medicines that are dispensed in accordance with a patient group direction issued under the Human Medicines Regulation 2012. It explains that a patient group direction is a written instruction that allows healthcare professionals to supply and administer specified drugs and medicines to a predefined group of patients without a prescription. A temporary VAT zero rate will apply to drugs and medicines supplied under such patient group directions, bringing them into line with drugs and medicines dispensed on a prescription of a registered health professional.

Accounting Developments of Interest

Aidan Clifford
Advisory Services Manager, ACCA Ireland

Anti-Money-Laundering Authority

The Irish Government has applied to host the EU Centralised Anti-Money-Laundering Authority (AMLA) in Dublin. A successful bid will create around 600 new Irish jobs, although there may be some displacement of Central Bank of Ireland (CBI) staff for areas of supervision ceded to AMLA by the CBI. In addition to direct employment, a common EU rule book and a regulator located in Ireland will serve to attract the shared centralised AML compliance function of the big international banks to Ireland. This will create additional, indirect employment. Some of these banks already have their EU or worldwide centralised AML function in Dublin. it is easy to envisage additional employment arising directly and indirectly from a successful AMLA bid.

The EU has learned from weaknesses in the distributed nature of GDPR supervision. For the GDPR, every Member State regulates entities in its own country only, and then one small Member State ended up being responsible for the supervision of most of the big social media companies because they are headquartered here. AMLA will be located in one city but will regulate all of the large banks in every Member State.

IAASB Issues Proposed Sustainability Assurance Standard

The International Auditing and Assurance Standards Board (IAASB) has issued its proposed International Standard on Sustainability Assurance (ISSA) 5000, General Requirements for Sustainability Assurance Engagements. The largest audit firms will be providing assurance over sustainability disclosures in financial statements prepared in 2024 for their large public-interest clients. All audit firms, including small and medium practices, with large audit clients (large per the Companies Act 2014) will need to provide assurance over their clients' sustainability disclosures in 2025 financial statements.

ISSA 5000 is a principles-based, overarching standard suitable for both limited- and reasonable-assurance engagements on sustainability information reported in accordance with European Sustainability Reporting Standards or the IFRS Sustainability Disclosure Standards.

European Sustainable Reporting Standards

The European Commission has adopted the European Sustainability Reporting Standards (ESRS) for use by companies subject to the Corporate Sustainability Reporting Directive. These are the 12 reporting standards that will begin to be compulsory in Ireland over the next few years, depending on the size and status of the company. Large quoted companies come in scope in 2024 and large unquoted companies (large per s280H Companies Act 2014) in 2025. Because

these companies will be disclosing the sustainability information for their supply chains, SMEs and micro businesses selling to such businesses will end up effectively in scope as well or risk losing their customer.

ESRS are for businesses operating in the EU; a parallel set of sustainability reporting standards is being developed for use outside the EU by the International Sustainability Standards Board (ISSB). The main differentiating issue is that there is a "double materiality" requirement in ESRS whereas the ISSB standards have only single materiality. Single materiality is whether a matter is material to the company. Double materiality is whether a matter is material to the company or other stakeholders. Determining whether a matter is "doubly material" means communicating with customers, consumers and others to find out if a matter is material to them, a far more onerous process than an inward reflection required by single materiality.

The European Financial Reporting Advisory Group (EFRAG) will shortly publish non-binding technical advice on the standards and the materiality assessment. EFRAG will also continue its joint work with the ISSB on optimising the interoperability of overlapping ESRS and ISSB standards. The Commission has also published a questions-and-answers page related to the ESRS and their adoption here.

Charities Regulator Annual Report

So much public good and a lot of social protection and social policy is delivered in Ireland by charities. However, there have been som These Regulations set out the e high-profile failings in governance in the sector. The governance for these entities is usually in the hands of volunteers, and half of all Irish charities have no employees to support the volunteer directors/trustees. The regulatory burden attaching to many charity volunteers is akin to a full-time job. It is not surprising that so many are finding compliance difficult.

The Charities Regulator published its Annual Report for 2022. The report highlights the successes but also the failings in the sector.

Credit Union Life Insurance

All credit unions provide free life assurance for loans, and most also provide a free death benefit that can be up to €4,000 for members who have savings at the time of their death. The free life cover depends on a number of factors, including the credit union member's age and savings history and the particular group insurance policy option chosen by the credit union. In an unusual case the Workplace Relations Commission found that this insurance benefit was discriminatory on the basis of age and awarded the complainant €1,000 in compensation.

The credit union contended that the scheme was not "unlawful as it falls within an exemption provided under Section 21 (11) of the Equal Status Act, where the difference in the treatment of persons is not deemed to be discriminatory if it is effected by reference to actuarial or statistical data obtained from a source on which it is reasonable to rely, or other relevant underwriting or commercial factors, and is reasonable having regard to the data or other relevant factors". However, although a defence was made, the adjudicator found that the actuarial evidence was not from "a source on which it is reasonable to rely". The lack of "full details of the actuarial or statistical data that had guided their policy" was a contributory factor in the case.

Credit Union Approved Housing Body Investments

It falls squarely within the ethos of the credit union movement to invest some surplus funds in approved housing bodies (AHBs). AHBs purchase or build residential units, and local or central government leases these properties from the AHB for social hosing purposes. The lease payments give a lender's return to whomever provides the initial capital.

There is a misconception that because the AHBs are in receipt of Government funds the investments are effectively guaranteed. This may not be the case, and AHB investments could result in considerable volatility in both income and balance sheet value. AHB investments are non-simple and are valued under FRS 102 at fair value. It is true that these investments come with a capital guarantee, but that guarantee is being supplied by an AHB, and they are not immune to failure. Although the leasing income to cover the capital and expected return is coming from the Government, some of these AHBs have clauses in their lease contracts that mean that they do not receive payments if there are long-term voids. If the AHB cannot collect the lease income from the Government, it cannot pay it over to the credit union.

FRS 102 requires that AHB investments be valued at fair value, and although the risk of default noted above is an important determinant of fair value, the time value of money is also important. Small changes in interest rates on investments that have a 20-year investment horizon can have huge effects on the capital value today.

Companies Registration Office Annual Report

The CRO's 2022 Annual Report has been published. The report notes that 879 applications were made in 2022 to have a late annual return treated as being on time, thereby avoiding late-filing fees and the loss of audit exemption. Only one application was refused in 2022; five were withdrawn, four were adjourned to 2023, and all of the rest were successful. That level of success was probably partially driven by Covid-related delays proffered in court to explain the late filing; that kind of explanation for a delay is likely to be less successful in the future. There were 19 instances where auditors notified the CRO that their Auditor Registration Number was used to file auditors' reports without permission. There were 240,223 annual returns received in the CRO in 2022, and there was no enforcement of strike-off provisions for late filing during 2022 due to the Covid-19 pandemic. Enforcement against late filing has, however, recommenced in 2023. Four H4 forms were filed by auditors for failure by a company to maintain adequate accounting records.

Supply Chain Finance, Payables Finance or Reverse Factoring Arrangements

Supplier finance arrangements are often referred to as supply chain finance, payables finance or reverse factoring arrangements. These apply in a situation where a bank or finance house agrees to pay a company's creditors either based on standard contractual terms or early (say, to avail of an early payment discount), and then the company pays the finance house at some later date. These arrangements usually provide the entity with extended payment terms, or the entity's suppliers with early payment terms, compared to the related invoice payment due date.

The Financial Reporting Council has proposed a change to FRS 102 to include disclosure of such arrangements with effect from 1 January 2025. See this link for more information. This amendment would align the FRS 102 disclosures for these arrangements with IFRS.

IAASA Observations on Financial Reporting

Every year the Irish Auditing and Accounting Standards Authority produces an Observations Paper regarding matters that it has identified during its inspection of the financial statements of public-interest entities (mostly, the quoted companies). The areas identified in the paper include macro-economic impacts; IFRS 7 and IFRS 9 (financial instruments) disclosures; fair-value measurement and disclosures; IFRS 8: Operating Segments; Transparency Directive Regulations; alternative performance measures; IAS 36: Impairment of Assets; the European single electronic format; and amendments to IFRS.

Auditor External Confirmations

The Financial Reporting Council in the UK has published the revised ISA (UK) 505: External Confirmations. The Irish Auditing and Accounting Standards Authority is expected to issue an Irish version of this standard shortly. The revised standard deals with matters such as electronic external confirmations and negative confirmation requests

Solicitors Accounts Regulations 2023

The Solicitors Accounts Regulations 2023 govern the maintenance by solicitors of client accounts and relevant office account transactions. They also set out the requirements for reporting accountants to carry out an examination of the accounting records of the solicitor and to report to the Law Society of Ireland in accordance with the Regulations. The new Regulations are effective for solicitors' accounting periods commencing on or after 1 July 2023. Although the first reporting accountant reports under the new rules are not expected to be made until the end of 2024, solicitors will need to start implementing new client and office accounting procedures this year.

Legal Monitor

Philip McQueston
Of Counsel, A&L Goodbody

Selected Acts Signed into Law from 1 August to 31 October 2023

No Acts of note were signed into law during this period.

Selected Bills Initiated from 1 August to 31 October 2023

No. 65 of 2023: Energy (Windfall Gains in the Energy Sector) (Cap on Market Revenues) Bill 2023

This Bill aims to give full effect to Articles 6, 7, 8 and 10 of Council Regulation (EU) 2022/1854 of 6 October 2022, an emergency measure to address high energy prices. The Bill aims to impose a cap on market revenues, deriving from certain energy sources, received by energy producers, intermediaries and traders between 1 December 2022 and 30 June 2023. It provides for an obligation on such entities to pay a levy consisting of the revenues in excess of the market cap into a Market Cap Fund. The Bill aims to allow the Minister for Public Expenditure to make distributions from the fund to alleviate the impact of high energy prices during the relevant period.

No. 70 of 2023: Finance (No. 2) Bill 2023

This Bill aims to bring into effect the measures set out in Budget 2024. The Bill includes targeted measures to support households and businesses, such as mortgage interest relief, an increase of the threshold for the higher income tax band to €42,000, changes to USC and changes to the R&D tax credit. The Bill also contains further implementation of international tax reforms, including Ireland's implementation of the EU Pillar Two Directive and the introduction of certain measures relating to payments to associated entities in certain low- or no-tax jurisdictions.

No. 71 of 2023: Electricity Costs (Emergency Measures) Domestic Accounts Bill 2023

This Bill aims to establish two schemes– the Electricity Costs Emergency Benefit Scheme III and the Submeter Support Scheme – to support provide relief from high energy prices from the commencement of the Bill until 31 July 2024. The measures relating to the Electricity Costs Emergency Benefit Scheme III provide for electricity costs emergency benefit payments totalling €450 per electricity account, announced in Budget 2024. The provisions relating to the Submeter Support Scheme extend the benefit payments to electricity accounts using submeters.

No. 73 of 2023: Competition and Consumer Protection (Unfair Prices) Bill 2023

This Bill seeks to amend the Competition and Consumer Protection Act 2014 and to provide for related matters in order to enable the Competition and Consumer Protection Commission to better perform its functions in relation to protecting consumers from abuse by undertakings of a dominant position by imposing unfair purchase prices.

No. 75 of 2023: Developer Profits Transparency Bill 2023

This Bill aims to amend the Affordable Housing Act 2021 to introduce a requirement for property developers who are in receipt

of State subsidies to publish annual financial statements. The aim of this measure is to increase transparency regarding the profits of companies in receipt of State subsidies for the building of homes.

No. 76 of 2023: Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill 2023

This Bill aims to enhance the protection of employees in a collective redundancy in a way that does not unduly impede enterprises in the conduct of their business. It seeks to amend the Protection of Employment Act 1977, which governs collective redundancy rules; it provides for the establishment of a statutory Employment Law Review Group, which will allow for an ongoing assessment of employment and redundancy law to ensure that it is fit for purpose; and it seeks to amend the Companies Act 2014 to improve the quality and circulation of information to workers as creditors and ensure that certain remedies are more accessible to creditors.

Selected Statutory Instruments from 1 August to 31 October 2023

No. 406 of 2023: Circular Economy (Waste Recovery Levy) Regulations 2023

These Regulations provide for the introduction of a Waste Recovery Levy as provided for by s73A of the Waste Management Act 1996, as inserted by s29 of the Circular Economy and Miscellaneous Provisions Act 2022. The levy will be charged at a rate of €10 per tonne of municipal waste accepted for recovery. It will not apply in respect of certain waste, including construction and demolition waste, waste wood, hazardous waste, medical waste, and certain veterinary or agricultural waste.

No. 435 of 2023: Finance Act 2022 (Section 40) (Commencement of Certain Provisions) Order 2023

This Order provides for the commencement as of 1 October 2023 of parts (a) and (b) of sub-section (1) of s40 of the Finance Act 2022, which makes certain amendments to the Knowledge Development Box regime.

No. 448 of 2023: Competition (Amendment) Act 2022 (Commencement) Order 2023

This Order provides for the commencement of the Competition (Amendment) Act 2022, other than s26. The primary purpose of that Act is to implement the EU ECN+ Directive, which is intended to ensure that national competition authorities across the EU have similar powers of investigation and enforcement when applying EU anti-trust rules.

No. 469 of 2023: European Union (Cross-Border Conversions, Mergers and Divisions) (Amendment) Regulations 2023

These Regulations provide for penalties for breaches of the European Union (Cross-Border Conversions, Mergers and Divisions) Regulations 2023.

No. 474 of 2023: Companies Act 2014 (Section 682) Regulations 2023

These Regulations provide for the new form of the liquidator's report to the Corporate Enforcement Authority for the purposes of s682(2) of the Companies Act 2014.

No. 476 of 2023: Competition Act 2002 (Adjudication Officers) Regulations 2023

These Regulations set out the requirements governing certain independence and employment terms relating to the adjudication officers who will carry out functions under the Competition (Amendment) Act 2022. The Regulations provide clarity on eligibility for nomination as adjudication officers, the terms of appointment and under what circumstances such appointment can be revoked.

No. 477 of 2023: Credit Institutions Resolution Fund Levy (Amendment) Regulations 2023

These Regulations provide for the amendment of the Credit Institutions Resolution Fund Levy Regulations 2012 to extend the levy period until 30 September 2024.

No. 489 of 2023: Data Sharing and Governance Act 2019 (Allocation of Unique Business Identifier) Order 2023

This Order provides for the delegation of certain functions from the Minister for Public Expenditure, National Development Plan Delivery and Reform to the Revenue Commissioners, provided for by s35(1) of the Data Sharing and Governance Act 2019. Included in the delegated functions is the ability to allocate and issue a number (to be known as the “unique business identifier number”) to undertakings, for the purpose of being able to uniquely identify an undertaking.

Tax Appeals Commission Determinations

Catherine Dunne
Barrister-at-Law

Tax Appeals Commission Determinations Published from 1 August to 31 October 2023

Income Tax

116TACD2023

Appeal against an assessment to income tax in respect of partnership profits. The appellant contended that the returns submitted by his partner incorrectly reflected the value of the partnership's land and the status of way leave on the land. The appellant sought a full refund of the preliminary tax paid for 2008

s1008 TCA 1997

Case stated requested: Yes

120TACD2023

Appeal against income tax liabilities which were considered to arise on a distribution. The Respondent contended that as a result of a reorganization there was a transfer of assets, namely share rights, from a company to its members, in accordance with the provisions of s130(3)(a) TCA 1997.

s130(3)(a) TCA 1997; s135 TCA 1997; s543 TCA 1997

Case stated requested: Yes

133TACD2023

Appeal regarding deductible expenses and payments to family members by a medical locum doctor following an aspect query

s112 TCA 1997; s114 TCA 1997; s117 TCA 1997

Case stated requested: Unknown

See also article by Mark Ludlow "Direct Tax Cases: Decisions from the Irish Courts and Tax Appeals Commission Determinations" in this issue.

134TACD2023

Appeal regarding what entity operated a business following incorporation

s18(1) TCA 1997; Sch. D TCA 1997

Case stated requested: Yes

140TACD2023

Appeal regarding whether expenses incurred in exercising share options and selling the shares are to be considered expenses of employment, and the application of the four-year statutory limitation period

s114 TCA 1997; s128 TCA 1997; s959A TCA 1997; s865 TCA 1997

Case stated requested: Unknown

142TACD2023

Appeal regarding the application of the artists' exemption

s195 TCA 1997

Case stated requested: Unknown

Special Assignee Relief Programme

118TACD2023

Appeal regarding the refusal to grant relief under the SARP on the basis that the submission date was outside the 90-day time limit

s825C TCA 1997

Case stated requested: Unknown

143TACD2023

Appeal regarding the quantum of "relevant income" for the purposes of SARP

s825C TCA 1997

Case stated requested: Unknown

Corporation Tax

122TACD2023

Appeal considering whether a capital contribution was allowable as enhancement expenditure, whether a selling fee was an allowable cost and whether the sale of rights to dividends had the effect of transferring a base cost

s31 TCA 1997; s78 TCA 1997; s546A TCA 1997; s547 TCA 1997; s548 TCA 1997; s549 TCA 1997; s557 TCA 1997; s552 TCA 1997; s617 TCA 1997

Case stated requested: Yes

127TACD2023

Appeal regarding the amount of chargeable gains accruing to a company on the disposal of a property

S31 TCA 1997; s532 TCA 1997; s544 TCA 1997; s545 TCA 1997; s552 TCA 1997; s554 TCA 1997; s555 TCA 1997; s560 TCA 1997; s561 TCA 1997; s959AA TCA 1997

Case stated requested: Yes

See also article by Mark Ludlow "Direct Tax Cases: Decisions from the Irish Courts and Tax Appeals Commission Determinations" in this issue.

128TACD2023

Appeal regarding the treatment of foreign royalty withholding tax as a deductible expense

s77 TCA 1997; s81 TCA 1997; s826 TCA 1997; Sch. 24 TCA 1997

Case stated requested: Yes

Capital Gains Tax

111TACD2023

Appeal regarding the refusal to grant entrepreneur relief

s597AA TCA 1997

Case stated requested: Unknown

See also article by Mark Ludlow "Direct Tax Cases: Decisions from the Irish Courts and Tax Appeals Commission Determinations" in this issue.

VAT

109TACD2023

Appeal regarding the VAT treatment of educational tours

s59 VATCA 2010; s60 VATCA 2010; s61 VATCA 2010; s88 VATCA 2010; Sch 1 VATCA 2010

Case stated requested: Yes

See also article by Gabrielle Dillon "VAT Cases & VAT News" in this issue.

110TACD2023

Appeal regarding whether services provided were VAT exempt transactions

Sch. 1 VATCA 2010

Case stated requested: Unknown

See also article by Gabrielle Dillon "VAT Cases & VAT News" in this issue.

114TACD2023

Appeal regarding correct recording of sales in a cash business

s113 VATCA 2010; s955 TCA 1997; s956 TCA 1997; s30 VATA 1972

Case stated requested: Yes

115TACD2023

Appeal against a decision by Revenue that the appellant is not an "accountable

person" entitled to the assignment of a registration number

s119 VATCA 2010

Case stated requested: Unknown

See also article by Gabrielle Dillon "VAT Cases & VAT News" in this issue.

123TACD2023

Appeal regarding the imposition of customs duty and VAT on the import of a "collector's item" truck, as defined by EU law

Chapter 97 of Annex I to Council Regulation (EEC) 2658/87

Case stated requested: Unknown

124TACD2023

Appeal regarding the operation of the margin scheme where invoices were not correctly labelled as margin scheme

s87 VATCA 2010; SI 639 of 2010; Articles 312–325 EC Directive 2006/112/EC

Case stated requested: Unknown

145TACD2023

Appeal against a decision by Revenue that the appellant is not an "accountable person" entitled to the assignment of a registration number

s2 VATCA 2010; s5 VATCA 2010; s10 VATCA 2010; s65 VATCA 2010

Case stated requested: Unknown

Stamp Duty

113TACD2023

Appeal regarding the application of consanguinity relief

s30 SDCA 1999; s41 SDCA 1999

Case stated requested: Unknown

Employment Wage Subsidy Scheme

121TACD2023

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

Covid Restrictions Support Scheme

130TACD2023

Appeal regarding the eligibility criteria to avail of the CRSS

s484 TCA 1997; s485 TCA 1997

Case stated requested: Unknown

131TACD2023

Appeal regarding the eligibility criteria to avail of the CRSS

s484 TCA 1997; s485 TCA 1997

Case stated requested: Unknown

132TACD2023

Appeal regarding the eligibility criteria to avail of the CRSS

s484 TCA 1997; s485 TCA 1997

Case stated requested: Unknown

Domicile Levy

125TACD2023

Appeal regarding the assessment to the domicile levy on worldwide income and total income before the deduction of capital allowances on rental income

s531AA TCA 1997

Case stated requested: Yes

Relevant Contracts Tax

129TACD2023

Appeal regarding the refusal to apply the 0% rate of RCT

s530E TCA 1997; s530G TCA 1997

Case stated requested: Unknown

Owner-Occupier Relief Scheme

144TACD2023

Appeal against a decision by Revenue that the appellant is not entitled to owner-occupier relief as the work on the property was carried out more than 10 years ago

s372AL TCA 1997; s372AR TCA 1997; s865 TCA 1997

Case stated requested: Unknown

Four-year statutory limitation period

112TACD2023

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

s865 TCA 1997

Case stated requested: Unknown

117TACD2023

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

s865 TCA 1997

Case stated requested: Unknown

119TACD2023

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

s865 TCA 1997

Case stated requested: Unknown

126TACD2023

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

s865 TCA 1997

Case stated requested: Unknown

135TACD2023

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

s865 TCA 1997

Case stated requested: Unknown

137TACD2023

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

s865 TCA 1997

Case stated requested: Unknown

138TACD2023

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

s865 TCA 1997

Case stated requested: Unknown

141TACD2023

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

s865 TCA 1997

Case stated requested: Unknown

136TACD2023

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

s159A SDCA 1999

Case stated requested: Unknown

139TACD2023

Appeal regarding a claim for "young trained farmer" relief that was filed outside the statutory four-year time period

s81AA SDCA 1999; s159A SDCA 1999

Case stated requested: Unknown

Tax Technology Update – Winter 2023

Tim Duggan
Director, Tax Transformation and Technology, KPMG

Aileen Carroll
Director, FS Tax, KPMG

Corporation Tax Compliance: How Technology Can Help with Complexity, Data, and Pillar Two

As the dust settles on the 23 September corporate tax filing deadline, it is a good time to reflect. In this article we will focus on some efficiencies and technology improvements that could make the corporation tax compliance process easier. We will also look at some of the data and technology challenges that companies will be facing in 2024 in relation to BEPS 2.0 and what they should be doing now to get ahead of this fundamental change.

Why the need to make things better?

Corporation tax compliance has become significantly more complicated over the last five to ten years. A very simple illustration of this is the length of the Form CT1. The CT1 for filings in 2016 was 33 pages long – which, in itself, was a significant undertaking to complete. The 2022 Form CT1 was 56 pages in length, an increase of 23 pages of disclosures and filings in seven years. The 2023 CT1 is likely to increase again, with additional R&D panels being incorporated into it and other changes expected.

The additional information being asked for is increasingly complicated and of a highly technical nature. The 2022 CT1 saw the introduction of interest limitation rules, which were incredibly complicated for tax teams to calculate but also resulted in three pages of disclosure on the Form CT1. This leads to a lot of time spent by tax teams not only on working out the right tax technical position but also on obtaining the necessary data and completing these sections of the Form CT1.

How can teams make this easier?

The first and most obvious point is for tax teams to engage with these changes as early as possible. This work often cannot be done at the last minute and really requires detailed and specialist analysis well before the compliance deadline. This early identification of changes will also help tax teams to understand the data that they will need in order to comply with these changes.

Poor-quality data is causing significant inefficiencies in the process of preparing corporation tax computations and returns. Often, tax teams have had very little, if any, involvement in the implementation of the ERP (enterprise resource planning) system that they use to source the information for their tax computations and returns. This can lead to information being held in the system that is not of sufficient quality, or the data may simply not exist or not be obtainable at all for the tax teams to make the correct tax determination. Instead, tax teams are forced to undertake a lot of manual manipulation of data outside the source system to try to collate the correct tax data. This work is often done in Excel, and it can be mundane and repetitive, which introduces the risks of human error and key-person dependency.

Owing to the increased complexity of corporate tax compliance and the time and resources required to deal with this complexity, we are seeing companies trying to reduce manual intervention and the use of Excel in their compliance process. This can be achieved using data-wrangling tools for example Alteryx, or using RPA (robotic process automation) to assist in highly repetitive, mundane tasks

within the process. For example, robotics can help with the submission of tax returns or payslips, allowing more time for tax teams to review technical issues. Many companies have started ERP transformation or upgrade projects over the last few years. These projects are most commonly driven by the wider business and often do not involve tax. From a tax perspective, the most successful ERP transformation or upgrade projects are where the tax teams have been involved from the outset. These large projects present a vital opportunity for tax teams to address the data issues that directly lead to inefficient and excessive Excel manual manipulation of the source data when completing tax computations and returns. These changes present an opportunity to make the process more efficient (e.g. by tagging data within the ERP required for the corporate tax return).

What other things should companies be doing now, after filing season?

There can be a habit of getting through the deadline and forgetting about the challenges that it presented. When the next deadline season comes along, none of the issues that arose in the prior year will have been addressed. Now is the perfect time to step back and ask whether technology could help with the process.

Data analytics can help to identify the source of poor data in the system. Some of the fixes required can be implemented quickly – for example, more training might be required around data entry. More medium-term projects might involve changes to IT systems or source data collection. These changes to data entry in the source system can have a large impact on tax teams in terms of the quality of the data that they are working with and efficiency gains. Tax teams are also increasingly using data analytics to aid their review of tax computations and returns before submission. Having a dashboard version of the computation and return using data visualisation tools for example Power BI or Tableau makes it a simpler task to identify outliers and unexpected changes between years. Dashboards can also accelerate the review of returns by senior management.

Changes on the horizon?

Tax teams are under increased pressure to manage corporation tax compliance due to technical changes and the resulting data challenges. However, for impacted groups, this is going to get much more difficult with the introduction of BEPS 2.0 (Pillar Two) in 2024. The challenges facing tax teams with respect to Pillar Two are enormous and will impact many functions within the organisation – including HR, Finance, Legal and Tax – and there are tax technical, accounting and data challenges to be faced. Numerous new, and sometimes overlapping, compliance obligations will arise. We want to focus briefly on the data and technology issues facing tax teams and some immediate workstreams that they can begin to help deal with these Pillar Two challenges.

It is incredibly important that tax teams engage with these changes over the coming months. The data challenges that companies will be facing to comply with Pillar Two are enormous. In many instances there are over 250 data points that will be needed to compile Pillar Two returns. These data points will need to be gathered from multiple data sources that include payroll, ERP and group reporting systems, country-by-country (CbC) reporting, fixed asset data and unstructured data sources, e.g. Excel spreadsheets where deferred tax workings are completed. Collating all of this information will be a huge challenge for tax teams and involves multiple stakeholders in the business. Tax teams should begin engaging within their business as soon as possible to explain the challenge that is coming. In some businesses, BEPS 2.0 might change how the tax provision is prepared – a traditional decentralised tax compliance model may require more central/head office input to determine the impact of the interrelated global requirements.

As a starting point, tax teams should review their CbC process and documentation and identify any data challenges that they face there when completing their CbC report. The process should be documented to ensure that it is done consistently each year. This will help to inform companies' approach to Pillar Two.

With such large amounts of data required, data quality and consistency are going to be important to how efficiently this process works. There are many tools on the market to help with last-mile reporting, local country returns and elections, but the adage of poor-quality data remains – reporting systems (no matter how good) will produce a poor tax return if the input data is poor. A comprehensive data deep-dive to understand the Pillar Two data requirements, map those requirements to the source systems and, finally, identify the data gaps is crucial. Although the first returns are not due until mid-2026, audit planning meetings for December 2024 year-ends will be starting in less than ten months. Some groups will be completing quarterly reporting in early 2024. Other groups will need good-quality data to address questions from investors around the impact of Pillar Two. Although local filing requirements are yet to be fully ironed out, the substantial data mapping work required should begin now.

As mentioned, there are a large number of technology tools available on the market already, with many more to launch over the coming months. Not every organisation impacted by Pillar Two will need a technology solution, but many will. Understanding your organisation's data, current technology systems and any future technology investments will all help to determine whether a new technology is required and the scale of that technology. In some cases existing data tools within the business or changes to how data is gathered can be of significant assistance. Beginning these conversations within your organisation early is necessary for successful implementation.

Conclusion

Many organisations are facing increased challenges in managing corporation tax compliance due to constant, year-on-year changes that require data that may not be present in their underlying source systems. Early engagement with these changes is vital to be able to identify where gaps may be. Fixing previously encountered bottlenecks and current data issues will be of enormous benefit. Many organisations are using technology to bridge these gaps but also identifying the mundane, repetitive tasks within their process and applying technology to free up valuable resources within their tax or finance teams. Finally, BEPS 2.0 is a once-in-a-generation change to the global tax system – identifying data and reporting gaps should be started now to get ahead of this huge compliance burden.

UK and Northern Ireland Tax Update – Winter 2023

Marie Farrell
Tax Director, KPMG Ireland (Belfast Office)

Introduction

With the summer recess over and a general election looming, tax was high on the agenda at both Conservative and Labour Party conferences in September. With rumours circulating about many potential tax changes, to include the abolition of inheritance tax and changes to the capital gains tax regime, as well as continued calls to scrap "non-dom" status, tax is certainly moving up the political agenda. All of this means only one thing – tax changes are afoot.

Although the rumour mill will continue to grind and major change may be over the horizon, this article looks back at some changes and developments in UK tax law over the past six months but also what might be coming down the track.

HMRC Sends Letters to Taxpayers Named in Pandora Papers

HMRC has started writing to UK-resident taxpayers named in the 11.9m documents of the so-called Pandora Papers, warning them to report all overseas income and gains on which they owe UK tax or face penalties of up to 200% of any tax due. Taxpayers are directed to disclosure facilities if they have anything to report. The letters were accompanied by an HMRC press release, which notes that "tax evasion is increasingly global – but, unfortunately for tax criminals, so is HMRC's reach, accessing data and intelligence through international collaboration". This is another nudge from HMRC to all impacted UK-resident taxpayers, not just those named in the papers, encouraging them to make the necessary disclosures now in respect of overseas income received and gains realised, before the disclosure facilities close and large penalties are then levied on overseas income and gains not reported.

HMRC Takes Action on Discrepancies in Clients' 2021/22 Self-assessment Tax Returns

HMRC has issued "nudge" letters to tax agents as part of an ongoing work programme within HMRC to engage with them to maintain compliance standards. HMRC has identified discrepancies in 2021/22 personal tax returns relating to P11D claims, P14 claims and the high-income child benefit charge (HICBC), on the one hand, and details submitted by employers and information held on HMRC's system in relation to child benefit, on the other hand. In the letter, HMRC:

- makes it clear that it is not a formal enquiry or compliance check but is an opportunity for taxpayers and their tax agents to agree a way in which amendments can be made to previously submitted returns to rectify errors that HMRC has identified;
- explains that the deadline to amend 2021/22 returns is 31 January 2024 but acknowledges that the 2022/23 tax return filing season is approaching and states that HMRC is therefore willing to discuss timeframes with agents; and
- confirms that a penalty will not be charged if a voluntary amendment is made by 31 January 2024 but indicates that, if one is not made, HMRC will review the position and consider issuing a discovery assessment and charging a penalty.

Statutory Residence Test – "Exceptional Circumstances"

In "UK and Northern Ireland Tax Update" in issue 4 of 2022, one of the first reported tax cases heard by the First-tier Tax Tribunal (FTT) dealing with the statutory residence test (SRT) – *Coller v HMRC* [2023] UKFTT 212 (TC) – was briefly considered as it helpfully clarified several aspects surrounding when days in the UK may be disregarded under "exceptional circumstances". The Upper Tribunal (UT) has now handed down its judgment in this case – *HMRC v A Taxpayer* [2023] UKUT 182 (TCC) – after an appeal by HMRC. Disagreeing with the FTT, the UT concluded that the "exceptional circumstances" test had not been met in this case. The judgment of the UT is interesting as it again provides some helpful clarity on how the court will review the application of a claim for "exceptional circumstances". In one word, the key to a successful claim seems to come down to "evidence". The decision of the UT:

- serves as a reminder to taxpayers of the importance of evidence to substantiate any claim for "exceptional circumstances" – despite being presented with over 600 pages of evidence including credit card statements and medical records, the UT concluded that there was insufficient evidence in this case to allow a claim for "exceptional circumstances";
- confirms that the taxpayer's evidence must both have sufficient quantity and sufficient quality;
- makes it clear that taxpayers who know that they will need to rely on the "exceptional circumstances" test should ensure that as much evidence and as many records as possible are kept to support their claim, with no gaps therein; and
- confirms that the "exceptional circumstances" test should be applied on a "day-by-day" basis, and thus the taxpayer should have sufficient evidence to demonstrate that the test was satisfied for each day that the taxpayer is seeking to discount.

HMRC has made it known that it is aware of the number of taxpayers who sought to rely on "exceptional circumstances" during the Covid-19 pandemic, and it has recently dispatched letters to a number of taxpayers who may have exceeded the SRT requirements during this time. More cases examining the "exceptional circumstances" test are therefore likely to come before the courts – watch this space.

Inheritance Tax Changes

Rumours are circulating that the UK Prime Minister is considering reducing the rate of inheritance tax and that No. 10 policy advisers have even been looking at including the abolition of inheritance tax altogether in the Conservative Party manifesto. On the other side of the House, the shadow chancellor is reportedly considering major changes to two inheritance tax exemptions, agricultural property relief (APR) and business property relief (BPR). It is not yet known whether Labour is considering scrapping the reliefs altogether or reforming the exemptions, for example, to prevent investors who own agricultural land but are not full-time farmers from claiming APR. Labour is also rumoured to be targeting the tax-planning opportunities of those who invest in Alternative Investment Market (AIM) shares, as well as entities that invest in agricultural land for carbon offsetting, the latter being a loophole that they seem to have their sights set on closing.

The implications of these potential changes if they are pursued, particularly in relation to BPR, would be significant for some businesses, AIM shareholders and landowners. But at this stage they remain only speculation.

What is clear is that the two main political parties appear to fundamentally disagree on the future direction of inheritance tax. However, regardless of which political party forms the next government, major change seems to lie ahead for what many refer to as the UK's "most hated tax".

Taxation of Non-domiciled Individuals

There seems to be continuous debate about those individuals who are non-domiciled but resident in the UK, with rumours surrounding every Budget announcement that change is imminent in relation to their tax status. The UK's "non-dom" status is an area where the Conservative and Labour parties are poles apart. The Chancellor has previously defended the UK's non-dom tax status, stating that axing it would be the wrong thing for the UK, whereas the Labour Party has made headlines saying that it will raise additional funding for the NHS via abolition of non-dom status. Again, who forms the next UK government will undoubtedly dictate the direction of travel for this very contentious regime, with impacted individuals likely keeping a very close eye on opinion polls before next year's general election.

VAT Second-hand Motor Scheme for Northern Ireland

The second-hand motor vehicle payment scheme has replaced the VAT margin scheme for second-hand vehicles bought in Great Britain (England, Scotland and Wales), moved to Northern Ireland and then sold on within Northern Ireland.

From 1 November 2023, VAT must be accounted for on the full selling price of any vehicle moved from Great Britain and sold in Northern Ireland, regardless of when it moved to Northern Ireland. However, to compensate businesses, HMRC has introduced a second-hand motor vehicle payment scheme, which allows businesses to claim a VAT-related payment if they:

- are VAT-registered in the UK and have a business establishment in the UK,
- buy an eligible second-hand motor vehicle in Great Britain and
- move that vehicle with the intention to resell it in Northern Ireland or to the EU.

To use the scheme, businesses should include the payment amount as input tax on their UK VAT return. The payment amount is calculated by applying the VAT fraction (currently one-sixth) to the value of the vehicle, which will usually be the full purchase price paid.

Windsor Framework Updates

The UK Trusted Trader Scheme has been replaced by the UK Internal Market (UKIM) Scheme with effect from 30 September 2023, and it will continue to apply once the green lane/red lane customs model comes into operation in October 2024. An important point to note is that being registered under the new UKIM scheme will be a requirement to access the green lane to move goods under the new simplified arrangements.

The UKIM Scheme has helpfully expanded the number of businesses eligible to move goods into Northern Ireland that are not "at risk" of entering the EU. It is available to UK businesses that are not established in Northern Ireland, although there will still be a requirement to have an indirect representative in Northern Ireland that can act as the customs declarant. The UKIM Scheme should mean fewer barriers for business and better value for customers and thus is a welcome development.

HMRC Interest Rates Rise Again

HMRC late payment and repayment interest rates applied to the main taxes continues to rise. Effective from 22 August 2023, the interest rates are:

- late payment interest rate – 7.75% and
- repayment interest rate – 4.25%.

Noting that the interest rate charged on underpaid quarterly instalments is 6.25%, effective from 14 August 2023, 1.5% lower than the interest rate that then applies from the normal due date of payment of the corporation tax liability.

There are numerous examples in practice of individuals and companies incurring hefty interest costs on their outstanding tax balances, and thus all UK taxpayers should review their tax payment position to ensure that outstanding payments are made and late payment interest minimised.

Customs Update – Winter 2023

Nick Koolen
Senior Manager, Global Trade & Customs, PwC Ireland

John O'Loughlin
Partner, Global Trade & Customs, PwC Ireland

Preferential origin done right?

Introduction

It is widely known in the world of global trade that where goods cross international borders, customs duties can become payable. Countries often enter into free trade agreements (FTAs), which are very comprehensive agreements addressing a number of topics with the aim of facilitating the trade of services and goods. Trade facilitation typically includes a reduction in customs duties levied where the goods originate from the other country but also the reduction and/or elimination of barriers to trade. FTAs can be bilateral or multilateral, and well-known examples include the (bilateral) FTA between the European Union (EU) and Mexico and the (multilateral) United States–Mexico–Canada Agreement (USMCA).

The UK left the EU on 1 January 2021, having been a member since 1973. Given its geographical proximity to and interwovenness with the other EU Member States, trade between the EU and the UK was going to be severely impacted. As a third country, goods imported from the UK would now be subject to full customs formalities and checks when crossing the EU border. In addition, customs duties would become payable on such imports. This would have a huge financial impact on EU and UK traders who are involved in the cross-border movement of goods, with Ireland being significantly affected. To alleviate some of this financial burden, an FTA between the EU and the UK was concluded as part of a wider Trade and Cooperation Agreement (TCA).

The TCA was agreed between the UK and the EU on 30 December 2020 and (provisionally) entered into force on 1 January 2021. After the completion of the ratification processes in the EU and the UK, the TCA formally entered into force on 1 May 2021.[1] The EU–UK TCA broadly encompasses four pillars, one of which is an FTA defining the EU and the UK's new economic and social partnership. The FTA has been in effect since 1 January 2021 and is a key facilitation mechanism for trade between the EU and its former Member State, as it allows for a zero rate of customs duty on goods imported from Great Britain to the EU and vice versa.

The FTA, as laid down in the TCA, thus governs trade of goods between the EU and Great Britain. This article provides insight into origin in the context of customs and trade and aims to help traders to get a better understanding of the use but also the pitfalls of preferential origin when importing goods from Great Britain to the EU.

The Two Concepts of Origin

When goods are imported from a third country to the EU, customs duties are levied. The amount of customs duty due depends on a number of factors, such as tariff classification, customs valuation and the origin of the imported products. Origin has become more relevant nowadays for traders importing goods from Great Britain after Brexit.

1 See https://www.europarl.europa.eu/RegData/etudes/STUD/2023/747433/EPRS_STU(2023)747433_EN.pdf.

There are two concepts of origin that should be borne in mind from a customs perspective:

- preferential origin and
- non-preferential origin.

Preferential origin relates to goods that meet the rules of origin laid down in agreements between two or more countries, which allow for a reduced or zero rate of customs duty, such as FTAs. **Not all goods will have a preferential origin**; where goods are imported from one FTA country to another and the goods do not meet the applicable rules of origin, the goods will not have a preferential origin. This means that preferential treatment (i.e. a reduced or zero rate of customs duty) cannot be availed of on import to the other FTA country.

Preferential origin can also be provided unilaterally. An example is the EU's Generalised System of Preferences (GSP), which allows products originating from developing countries to be imported to the EU with preferential treatment. Goods originating in the EU that are imported to developing countries are not eligible for preferential treatment under the GSP, as the GSP is set up to promote trade and economic growth in developing countries.

Non-preferential origin is determined on the basis of a country's own (customs) legislation and is used to apply certain commercial measures, such as anti-dumping duties or trade sanctions. Although the rules around non-preferential origin are not harmonised, it is important to note that **every product has a non-preferential origin** (whereas not every product has a preferential origin).

Preferential Origin

Trade with the UK and Brexit

Before Brexit, Irish traders could trade freely with UK suppliers and UK customers without any customs formalities or customs duty payments, as the UK was part of the EU's customs territory. After 1 January 2021, however, the UK has become a third country. This means that imports from and exports to Great Britain (GB) are subject to customs formalities and, in principle, customs duties. However, because of the TCA, where goods moving from GB to Ireland meet the rules of origin as laid down in the TCA, preferential treatment can be availed of on importation.

Rules of origin

For a good to qualify as "originating" under the TCA,[2] one of the conditions is that it must have undergone sufficient processing. What constitutes sufficient processing is set out in the product-specific rules in the TCA, at chapter, heading or subheading level.[3]

The most common product-specific rules can be described as the "value-add" rule and the "tariff-shift" rule. Under the value-add rule, a maximum percentage of the ex-works price may be non-originating goods. Take, for example, a bicycle is imported from GB to Ireland. The product-specific rule of origin to consider whether a bicycle, classified under tariff heading 8712, is of UK preferential origin is "MaxNOM 45 % (EXW)". For a bike with an ex-works price of £100, this means that the bike will qualify as UK originating where the total value of non-originating materials is not more than £45. Other, non-product specific rules will need to be complied with for the bike to qualify for preferential treatment – for example, the manufacture of the bike in Great Britain should exceed the insufficient production requirement as laid down in the TCA.

The tariff-shift (or "change in tariff heading") rule requires that any non-originating materials used in the production of a good are of a different tariff heading from the tariff heading of the finished product (which will be exported). An example would be ceramic products, classified under tariff heading 6901:

2 FTAs that the EU has concluded typically include the same format around rules of origin; however, differences exist (e.g. product-specific rules of origin).

3 A good can also be considered as originating from a country where it is "wholly obtained" in the country (for example, plants grown there) or it is made exclusively from materials originating in that country.

any non-originating (raw) materials used in the production of such products must be classified under a different tariff heading (i.e. not under tariff heading 6901).

A product-specific rule may indicate both a value-add rule and a tariff-shift rule. In that case, either rule may be used. Although there are more intricacies around product-specific rules of origin, the rules set out above are the ones seen most often in practice.

In addition to the product-specific rules of origin, there are other rules to consider when determining whether a good qualifies as originating under the TCA. Where only minimal processing or simple operations have taken place, the goods cannot be considered originating, as this would be considered insufficient processing.[4] In addition, for a good to keep its originating status, it may not have been altered after export from the UK and before import into Ireland in any way.[5] A few exceptions apply, such as operations to preserve the goods in good condition or adding or affixing marks. Typical requirements to consider would include the following:

Requirements to consider	Description
Insufficient production	A product will not be considered originating where the only operations conducted on non-originating materials are considered to be **insufficient**, which would include washing, cleaning, simple painting or polishing operations, and simple mixing of products.
Non-alteration (direct transport)	A product that is exported from and imported to the EU or Great Britain **may not have been altered** or transformed in any way other than to preserve the product in good condition. A product may be stored in a third country on the basis that it remains under customs supervision in that country.
Tolerances	Where a product does not meet the product-specific rules of origin due to the use of a non-originating material in its production, it may still be considered originating where the weight or value of that material is below a certain threshold.
Cumulation	In certain instances, non-originating materials originating in a country other than the country of export can be considered as originating for the purposes of determining origin. An example would be bilateral cumulation, which allows a product originating in one country to be considered as originating in the other country if that product is used as a material in the production of another product in that other country.
Exemption from customs duties (or duty drawback)	Where materials are imported to one country and processed while under customs duty suspension (for example, inward processing), the finished products do not qualify as originating when exported to the other country in case he FTA includes a “no-drawback” provision. Interestingly, such a provision is currently not included in the TCA, which provides traders with another customs planning option to consider for EU–UK trade.

4 Article 43 of the EU–UK TCA (“Insufficient processing”).

5 Article 52 of the EU–UK TCA (“Non-alteration”).

Statement on origin

Where the GB exporter has followed the rules of origin as summarised above, proof will need to be provided that the Irish importer can use to claim preferential treatment on importation to Ireland. Where all rules of origin are met, the GB exporter will need to issue a specific statement, a "statement on origin".[6] This statement is made out on an invoice or on any other document that describes the originating product in sufficient detail to enable the identification of that product and follows a specific format and wording:[7]

> "(Period: from____________ to ___________)
> The exporter of the products covered by this document (Exporter Reference No …) declares that, except where otherwise clearly indicated, these products are of … preferential origin.
> ……………………………………………………………………
> (Place and date)
> ……………………………………………………………………
> (Name of the exporter)"

The exporter is responsible for the correctness of the statement on origin and the information provided therein.

The importer will need to ensure that when it is importing the goods from a UK supplier, a document from the exporter identifying the imported products and a statement on origin of those products, as set out above, are available. The importer will need to review these before a claim for preference is made on the import declaration.

Only goods that qualify for preference can be accompanied by such a statement on origin.

Importer's knowledge

The statement on origin is the first of two methods based on which an importer can claim preference.[8] Alternatively, an importer can claim preference on the basis of "importer's knowledge" that the goods are originating (i.e. that the goods are of GB preferential origin). The importer will need to be aware of the details around the manufacture of the goods to determine whether the product-specific rules of origin have been met. Therefore "importer's knowledge" is typically used in cases of inter-company transactions or movements of own goods, where an importer has knowledge of the production process or similar details of the goods being imported.

In summary, preferential origin under the TCA can be claimed by an importer where a commercial document is available from the exporter on which the exporter has made out the origin statement in the prescribed format. However, the particulars of the import declaration, which would include a claim for preference, remain the responsibility of the importer. Where it is known to an importer that, for example, no processing is taking place in GB, the importer should be cautious of claiming preference on such imports from GB.

It is important to note for completeness that preferential origin is also relevant to exports from the EU. EU exporters may be asked by their customers to confirm that the product they purchase is "EU originating", so that the importer can claim the benefit of preferential treatment in their country.

In practice, we see a lot of audit activity and focus from Revenue, the UK's HMRC and other EU Member States' customs authorities on these areas.

Non-preferential Origin

Preference is used to get a reduced or zero rate of customs duty, and non-preferential origin, when relevant, is typically used to impose additional duties or measures on the import or export of certain products. From an EU perspective, the non-preferential origin

6 Article 56 of the EU–UK TCA ("Statement on origin").
7 This text of this statement can be found in Annex 7 of the EU–UK TCA.
8 Article 54 of the EU–UK TCA ("Claim for preferential treatment").

of a product is determined on the basis of Article 60 of the Union Customs Code (UCC):

> "1. Goods wholly obtained in a single country or territory shall be regarded as having their origin in that country or territory.
>
> 2. Goods the production of which involves more than one country or territory shall be deemed to originate in the country or territory where they underwent their last, substantial, economically-justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture."

The non-preferential country of origin is generally based on the country where the product is manufactured. However, to put this concept in a more specific framework, the EU has issued specific, non-binding "list rules"[9] based on the tariff classification of the product, which confer non-preferential origin on a product. These rules generally use the same concepts as the preferential rules of origin, such as the value-add rule and the tariff-shift rule.

Note, however, that the rules around non-preferential origin are not harmonised globally. Therefore there might be discrepancies between countries in terms of the determination of the non-preferential origin of a product exported from one country and imported to another.

Typically, the non-preferential origin is included on a commercial invoice, often on a product line basis (e.g. "Country of Origin: UK").

Where it is determined that a product has, for example, a UK non-preferential origin, this does not automatically mean that the product also is of UK preferential origin. As outlined above, different rules apply to determine the origin under each of the two concepts: rules on non-preferential origin are laid down in the country's own legislation, whereas rules of preferential origin are contained in a bi- or multilateral agreement such as an FTA.

Binding Origin Information/ Advance Origin Ruling

To obtain certainty around the origin of a product, a trader can apply to its local customs authorities for a Binding Origin Information (BOI) in the EU, or an Advance Origin Ruling (AOR) from HMRC in the UK. This can be done to get confirmation of both preferential origin and non-preferential origin. In the application, the trader will need to provide detailed information about the product, the proposed origin and its arguments for the proposed origin. The customs authorities will subsequently issue a decision (the BOI/AOR) to the trader, confirming the origin of the product. The BOI is legally binding throughout the EU for the holder, and an AOR is binding throughout the UK.

In addition, there are other customs procedures or reliefs that traders could consider when trading with the UK, as outlined below.

Returned Goods Relief

Since Brexit, companies importing products to Ireland from GB are often faced with additional customs duties. One way to mitigate these customs duties is to review whether these products are of GB preferential origin.

Supply chains that serve the Irish market are often based on a UK-focused distribution model, whereby products would come to the UK and would be onward supplied to Ireland. Some companies changed their supply chains after Brexit – for example, by moving goods from France directly to Ireland, skipping the UK landbridge. In other cases, however, goods continue to be imported to GB first, and supplied from there to Ireland.

9 See https://taxation-customs.ec.europa.eu/table-list-rules-conferring-non-preferential-origin-products-following-classification-cn_en.

The latter scenario has led to problems for importers in Ireland. First, as such goods did not undergo any processing in GB, the goods would not qualify as GB originating under the EU–UK TCA. This means that, on import into Ireland, customs duties would become due, as preferential treatment cannot be availed of. Second, as the goods were imported to GB first, customs duties may have been paid on the import of those products to GB and passed on to the customer in Ireland. In a worst-case scenario, goods may have been imported to the EU with EU customs duties being paid on them before being transported to GB, with Ireland as an ultimate destination.

One way that this can be mitigated is by the use of a customs relief called returned goods relief (RGR).[10] Where products are exported from the EU and reimported to the EU within a three-year period, a relief of customs duty may apply. Conditions apply to avail of this relief: the reimported goods must be in the same state as the goods that were exported from the EU and may not have been treated or processed while abroad. The trader should be able to show that the goods that are being reimported are the exact same goods as those that were exported. Because of this, the importer will need to obtain proof of export of the products, usually the original export declaration, and it is recommended to ensure that export supporting documentation is available as well.

RGR works very well for traders that have visibility of the export declaration from mainland Europe to GB, such as multinational companies that serve both the UK and Ireland from mainland Europe. For other importers in Ireland, the lack of visibility means that RGR is difficult to avail of, as a supplier may not be willing to disclose the export documentation from mainland Europe to the Irish importer due to commercially sensitive information being included on it.

Customs Warehousing

Many companies continue to use GB as a hub to serve the UK and Ireland. Goods can be imported from third countries to the UK, with UK customs duties paid. Often, a relatively small amount of the goods imported is destined for the Irish market. When such goods are moved to Ireland, EU customs duties will become payable again.

In these circumstances, setting up a customs warehouse in GB may be a solution. Customs warehouses allow goods to be stored under suspension of customs duties, and there is no time limit on how long goods can be stored in a customs warehouse.

The benefit of a customs warehouse is that when goods are brought into GB and placed in a customs warehouse, customs duties will become payable only once the goods are released from the customs warehouse. This means that payment of UK customs duties can be avoided for goods that are not destined for GB but will eventually be redistributed to, for example, Ireland.

Pitfalls

The correct application of preferential treatment under the EU–UK TCA requires a good understanding of preferential origin and that traders do a bit of homework to ensure that they are comfortable that preference is claimed correctly. However, unfortunately, that does not always happen, and preference can be claimed incorrectly. It is often seen in practice that traders are claiming preference without having received the origin statement from their supplier. Where a trader is subsequently audited, it should be able to show that it had a proof of origin based on which the claim for preference was made. Likewise, it has happened that origin statements were made out in a different format from the prescribed format or that the non-preferential origin referenced on the invoice was seen as the preferential origin of the products. In these cases, the statement is invalid and cannot be relied on when claiming preference.

Another common pitfall is traders' not being aware that they are claiming preference on the

10 Article 203 UCC.

import declarations done in their name and for their account. This could be, for example, because of no or incorrect instructions being issued to their customs brokers or because the trader does not carry out a periodic review of a sample of import declarations to review what has been declared.

A third mistake that is common is where preference is claimed on the basis of importer's knowledge instead of on the basis of an origin statement. Although the coding on the import declaration is very similar, the use of importer's knowledge means that the importer will need to have the bill of materials and other relevant data to determine that the goods that it imported from a supplier meet the rules of origin. In cases where the supplier is not related, this is generally not possible to do.

The consequences of getting it wrong can be multiple. First, where an importer's declarations are checked by Revenue and no proof of evidence (such as a correct origin statement) can be provided, customs duties will be assessed retrospectively. In such cases, interest will be levied on top of that. As duties can be assessed up to three years (or, in more malignant cases, even beyond that), these costs often cannot be recovered from the customers. Lastly, the importer might expect more scrutiny from Revenue going forward.

Conclusion

Importers availing of preferential treatment for their imports of products should ensure that they are comfortable that they are claiming preferential treatment correctly and that the evidence is on file in case of a review or an audit. Although it is the exporter's responsibility that an origin statement is made out correctly, the importer is responsible for the particulars of the import declaration, which include the correct use of preference. Importers should also be aware of the difference between preferential and non-preferential origin and how each can be shown on the supplier's documentation.

This also means that the importer should issue clear instructions to customs brokers handling their import declarations. In addition, it is good practice for importers to review the import declarations regularly to correct any mistakes on a timely basis.

Claiming preference correctly can lead to a significant amount of customs duties savings; however, claiming preference incorrectly can result in a large customs duty bill with interest to be paid. Where preference is not an option, there are alternatives that may help to alleviate potential customs duty costs when importing goods from Great Britain to Ireland.

Robert Dever
Partner, Tax, Eversheds Sutherland LLP
Julie Galbraith
Partner, Employment, Eversheds Sutherland LLP
Laura Ellen Ford (*not pictured*)
Associate, Tax, Eversheds Sutherland LLP

The Last Slice of the Action? Supreme Court Delivers in the *Domino's Pizza* Case

Introduction

On 20 October 2023 the Supreme Court delivered its highly anticipated judgment in *The Revenue Commissioners v Karshan (Midlands) Ltd t/a Domino's Pizza* [2023] IESC 24, which concerned a dispute over the employment status of delivery drivers working for the respondent company (Karshan). This case has garnered much attention over the last few years due to the potential consequences of its outcome for employers and workers engaged in the "gig economy". In its judgment the Supreme Court has clarified the position with regards to workers who fall within the legislative interpretation of the "employee" definition by setting out a five-step test to determine whether a contract is one of service or for services.

In addition to being of interest as one of the first cases to be heard in this jurisdiction regarding the employment status of workers in the "gig economy", this decision is a very significant one for many businesses in Ireland. In particular, the decision raises additional considerations for businesses about the use of contractors in respect of short-term and even once-off engagements, not least from a tax perspective.

Background

Although most readers will be familiar with the background of this case, a quick summary of the fact pattern is always helpful:

- Karshan produced and delivered pizzas and ancillary food items to customers, who placed orders by telephone, the internet and attending its stores.
- Karshan engaged drivers to deliver the pizzas to its customers.
- Each driver entered into a written agreement with Karshan, which outlined the company's need to sub-contract the delivery of pizzas, as well as the promotion of its brand logo, and that the driver (referred to in the agreement as the "contractor") would be willing to provide those services.
- The agreement stated that the driver would be retained as an "independent contractor" and that the company had "no responsibility or liability whatsoever for deducting and/or paying PRSI or tax on any monies [he/she] may receive under this agreement".
- Each driver was required to provide his/her own delivery vehicle in a roadworthy and safe condition and to insure same with a reputable insurance company in Ireland for business use. Alternatively, the driver could rent such a vehicle from Karshan, with the agreement stating that the company was also prepared to offer third-party insurance at a predetermined rate (although the Tax Appeals Commissioner (the Commissioner) found that no company vehicles were in fact available for rent).
- Drivers were also required to wear a fully branded uniform (subject to checks by store managers), with a deposit requested by Karshan from the drivers for same.
- In addition to payment based on the number of successful deliveries undertaken by the driver, a payment was made by Karshan for brand promotion for the wearing of company-supplied clothing and/or the application of temporary company logos to the driver's vehicle.
- The legal agreement between Karshan and the driver explicitly stated that the company did not require any minimum number of deliveries and that the driver was entitled, subject to some restrictions, to engage in a similar contract delivery service with other companies.
- The driver could engage a substitute provided that the substitute could undertake all of the driver's contractual obligations, with the substitute being paid by Karshan (as opposed to being paid by the original driver).
- In practice, the drivers would fill out an "availability sheet" indicating their availability for the week, with a roster drawn up by the store manager based on the completed availability sheets received.
- On a shift, drivers clocked in and out using a computerised system located on Karshan's business premises and were given a cash float by the company, which was returned at the end of the shift. Drivers were required to use their own phones when contacting customers. The company also limited the number of pizzas that could be delivered to two per time, and some drivers folded boxes while waiting for deliveries (often at the request of the store manager).
- The contract envisaged that invoices would be prepared and submitted to Karshan by the drivers, but it was found that not all drivers prepared such invoices. Karshan would prepare invoices for many (but not all) of the drivers that would then be signed by the relevant driver.

The Revenue Commissioners ("Revenue") asserted that the drivers were employed under contracts of service. Therefore, they contended that Karshan should have operated payroll taxes in respect of the relevant payments made to the drivers and raised estimates in accordance with s990 of the Taxes Consolidation Act 1997 (TCA 1997).

Previous Decisions

We reviewed the decision of the Court of Appeal in *Irish Tax Review*, 35/3 (2022), whereas the decisions of the Tax Appeals Commission (TAC) and the High Court had been considered previously by Pat O'Brien in *Irish Tax Review*, 33/2 (2020). A high-level overview of those decisions is given below, and readers are encouraged to revisit the articles mentioned for further background.

Determination of the Commissioner

In her determination (23TACD2018) in respect of the appeal of the estimates raised, the Commissioner concluded that the drivers were employees of the company for taxation purposes.

High Court decision

On appeal by way of case stated ([2019] IEHC 894), O'Connor J in the High Court reached the same conclusion, finding that the Commissioner at the TAC was correct in her finding.

Court of Appeal decision

On further appeal ([2022] IECA 124), a two-to-one majority of the Court of Appeal overturned the decisions of the TAC and the High Court, finding that the drivers were in fact contractors and not employees of Karshan.

Decision of the Supreme Court

The Supreme Court, overturning the decision made by the Court of Appeal, moved away from the more recently held position that without clear mutuality of obligation a contract of employment cannot exist. The position adopted by Karshan was that there was no future or ongoing requirement to provide work (from the company) and to carry out such work (from the drivers). The Supreme Court held that this was an overstatement of the principle. Rather, the court stated that the question of whether a contract is one of service or for services should, having regard to the well-established case law, be resolved by reference to the following five questions:

- Does the contract involve the exchange of wages or other remuneration for work?
- If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?
- If so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement?
- If these three requirements are met, the decision maker must then determine whether the terms of the contract between employer and worker, interpreted in light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment or with some other form of contract having regard, in particular, to whether the arrangement points to the putative employee working for themselves or for the putative employer.
- Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing.

In this instance, the Supreme Court took the view that the evidence disclosed details of the previously mentioned "close control" by Karshan over the drivers while at work. Noting that there were some features of the activities carried out by the drivers that were consistent with their being independent contractors engaged in business on their own account, the Supreme Court noted that the Commissioner was entitled to conclude that, having regard to all of the facts, the evidence pointed to the

drivers carrying on Karshan's business rather than their own, and they were employees of the company for the purposes of the relevant provisions of TCA 1997, having regard to the satisfaction of the established tests.

This could be largely attributed to:

- the requirement for the drivers to provide notice of availability;
- the fact that the drivers took part in other jobs such as making pizza boxes while waiting for a delivery;
- the inability to freely provide a substitute in the event of an inability to work;
- the requirement for the drivers to wear the branded clothing of Karshan (furthering the promotion of its brand); and
- the lack of negotiating power held by the drivers in respect of their contracts.

Tax Considerations

With the facts of this case revolving around the company's contest of the assessments raised by Revenue pursuant to s990 TCA 1997, there are significant tax considerations and implications in relation to same. Having found that the Commissioner was correct in her conclusion that the drivers were employees of the company for the purpose of the relevant provisions of TCA 1997, the Supreme Court further considered the emoluments arising from the contracts in place between Karshan and the drivers.

With respect to the statutory provisions of TCA 1997 applicable to this case, these can be differentiated on the basis of whether the contract entered into was one "for service" or "of service". It is important to note in this regard that, irrespective of which was ultimately determined to apply, these provisions contain no requirement for continuity, nor is their application dependent on an employee's having worked for a specific period of time.

Having then determined the facts of the case, addressing the question of whether a worker is considered an employee can, giving consideration to the five questions detailed by the Supreme Court, be aided by an analysis of whether the emoluments arising from the contract ought to be taxable in accordance with Case I of Schedule D TCA 1997 (contracts for services) or s112 and Schedule E TCA 1997 (contracts of service). In doing so, the Supreme Court considered the initial finding by the Commissioner that the multiple contracts of service (collectively comprising the "overarching umbrella contract") were taxable in accordance with s112 TCA 1997. This section charges tax "for each tax year of assessment" and encompasses "salaries, fees, wages, prerequisites, or profits" that arise from employment in that year of assessment. The section does not restrict the number of employments that can be held, providing also that additional employments may be concurrent, successive and part-time or full-time in nature. However, all such emoluments arising from such employments are subject to income tax.

The Commissioner reasoned that the applicability of s112 TCA 1997 to the contracts of service between Karshan and the drivers negated the requirement for analysis of whether the overarching umbrella contract was a contract of service or for services. The consequences of such a finding resulted in a responsibility being placed on the company to file and pay the taxes owed as an employer. Conversely, where workers are found to be contractors, carrying out their duties under a contract for services, Case I of Schedule D TCA 1997 requires those who are in scope to self-assess income for Irish tax purposes.

The Supreme Court, agreeing with the Commissioner, concluded that the contracts between Karshan and the drivers were ones that envisaged personal service by the drivers to the company, and it held that the Commissioner was entitled to find, given the facts, that they were employees.

Conclusion

From the facts of this case, it is evident that the employment and tax considerations are closely intertwined, and that the Supreme Court has not considered these two elements in isolation for the purposes of determining the relevant sections of TCA 1997 that are to be applied.

The Supreme Court squarely brings the analysis back to the control test. Organisations should be aware of the context in which workers are being supervised and engaged, considering the questions posed by the Supreme Court.

Readers will be familiar with the often-severe tax implications that may follow from a misclassification of an individual as an independent contractor, including, but not limited to, potential liabilities in respect of unpaid PAYE, PRSI and USC, alongside interest and penalties. Therefore the classification of individuals as employees or contractors is often a key focus of due diligence exercises and can lead to prospective acquirers of businesses insisting on a full suite of legal protections to protect against any possible Revenue challenge. Furthermore, Revenue will likely pay even closer attention to the classification of contractors when reviewing the payroll tax compliance history of companies. Accordingly, any company that has previously been unsure of the treatment of those working for it, and that has now gained clarity from the Supreme Court's ruling and should seek to contact its advisers to ensure compliance.

This ruling will not stop companies using contractors, nor should it. We now have a new – or a return to the – control test to guide employers on the use of contractors. Given the pace of innovation in the modern economy, it is likely that another novel way of operating may arise to further challenge the traditional definition of an employee before long.

Considerations for Organisations

If an organisation uses contractors, it should consider the following:

- Is the arrangement outlined in a contract? If not, put a clear contract in place stating that this is not an employment arrangement. Take advice from your solicitor and/or tax adviser on how to document the relationship properly.
- Can the work be done by the individual contractor or anyone else equally suitable? If so, include this in the contract. It will significantly help an organisation's position if the work can be done by any person substituted by the contractor.
- How much control is needed? If this is a genuine contractor relationship, very little control should be required. There should be very limited tasks given to the contractor outside of the specific contracted services.

Although contracts for services place the burden of filing an income tax return (and declaring such income therein) on the individual, a determination that a worker falls within the scope of s112 and Schedule E TCA 1997 (therefore being considered an employee) will place this burden on the employer, who will then be liable to operate the payroll tax system (including PAYE, PRSI and USC) in respect of that individual.

Niamh Barry
Director, Deloitte Ireland LLP

Enhanced Reporting Requirements: What Do I Need to Know?

Background

Enhanced reporting requirements (ERR) for employers were legislated for in Finance Act 2022, with the measure to take effect when a Commencement Order is signed by the Minister. The Commencement Order was signed on 14 December 2023, shortly before publication of this article. Unfortunately the Regulations have not yet been released at the time of writing. Further discussion will be included in future issues of the *Irish Tax Review*. These new requirements will take effect from 1 January 2024. The requirements will apply to all employers with an Irish payroll obligation. This includes items provided to directors and shadow payrolls.

Under ERR, employers will be required to notify Revenue **"on or before"** any of the following items are provided to an employee:

- non-taxable travel and subsistence – vouched and unvouched,
- an incentive availing of the small benefit exemption and
- the remote working allowance.

In mid-November Revenue released the Tax and Duty Manual (TDM) relating to ERR. In December, an ERR FAQ was released. However, the enabling Regulations have not yet been made available. This means that there are still significant unanswered questions relating to key aspects of ERR such as penalties for non-compliance. What Is ERR?

ERR is a real-time reporting regime for certain non-taxable items provided to employees. It is not a simple extension of PAYE Modernisation – this is a distinct and separate reporting requirement and separate return of information to Revenue. The legislation requires employers to notify Revenue "on or before" any of the reportable items are provided to an employee.

What Is the Purpose of ERR?

In theory, ERR should not be a revenue-raising measure for the Exchequer in that it is simply a reporting regime for non-taxable items. However, it is clear that Revenue will use the information received in its tax intervention activities. In Budget 2024 ERR was mentioned by the Minister as one of the areas that is expected to yield an additional €120m in revenues annually.

Revenue notes the following in the Tax and Duty Manual as the main benefits of ERR:

- Enhancement of Revenue's compliance framework to ensure that the correct amount of tax is collected at the right time, in a manner that results in optimal efficiency for compliant taxpayers and for Revenue.
- Diversion of resources and contacts away from compliant employers, thereby avoiding associated compliance costs.
- Providing increased visibility and assurance to employees that their income is being reported properly to Revenue.
- Provision of meaningful and effective high-level data for policy consideration by the Department of Finance on such reportable measures.

Business will be hopeful that the ERR data obtained by the Department of Finance would lead to beneficial policy changes – for example, regarding the challenges with the recent updates to the small benefit exemption applying only to the first and second benefit.

"On or Before" Requirement

As mentioned previously, the legislation requires employers to notify Revenue "on or before" any of the following items are provided to an employee:

- non-taxable travel and subsistence,
- an incentive availing of the small benefit exemption and
- the remote working allowance.

The date the payment is made, or the date the small benefit is provided to an employee, is the determining factor. Payments made or benefits provided from 1 January 2024 are reportable under ERR, even if the payment relates to an expense incurred by an employee in 2023 or the benefit was purchased by the employer in 2023 or relates to an event in 2023.

This requirement may be relatively straight forward to meet where you pay your expenses or the remote working allowance via payroll. In this scenario, it should be possible to make adjustments to your current process to include the necessary data to Revenue in advance (as you already do with the payroll data).

However, in many organisations the ERR reportable data is managed outside of the

payroll process, often by multiple teams with their own independent processes, e.g. accounts payable or a separate expense team. A separate process will need to be created to make sure that whoever is going to submit the report to Revenue is provided with the required data by the relevant teams to ensure that the reporting can take place on or before the relevant date.

Employers also need to determine the frequency of reporting. This may not align with your payroll frequency. For example, you may reimburse expenses weekly or provide small benefits on an ad hoc basis but operate a monthly payroll. Each time that you provide a reportable item to an employee, Revenue must first be notified under ERR.

Employers should review their current processes to ensure that there is sufficient time to notify Revenue before providing a reportable item. For example, do you have a lead-in time between when expenses are approved and when they are ultimately paid?

Significant representation has been made to Revenue on this point via the Tax Administration Liaison Committee (TALC), and it has been outlined how onerous the "on or before" requirement will be for employers. Alternative approaches have been suggested to Revenue to simplify the requirements to ensure that they are practical for employers to comply with, while providing Revenue with timely information. For example, one suggestion was to allow reporting one month in arrears by, say, the 14th day of the following month. This specific requirement has taken up much of the agenda at the TALC subgroup meetings with Revenue. Unfortunately, the recommendations regarding reporting on a look-back basis are not being adopted.

To date, many employers were holding off taking concrete actions in the hope that some practical guidance would be provided by Revenue. With the requirements expected to take effect in less than a month (and most stakeholders finishing for Christmas any day now), employers urgently need to implement procedures to comply with these onerous requirements.

Employee Data

The ERR submission must include certain personal identifiers for your employees. The PPS number and employment ID are mandatory. If you are missing one of these indicators, additional data will be required (date of birth and address). These are the same requirements used for payroll submissions, so you should already have processes in place to capture them.

If you are unable to use your payroll software to make the ERR submissions, you will need to create a mechanism to merge the employee data with the other reportable ERR data (either automatically or manually). If this is managed outside of your payroll team, you should involve your data security or risk team to ensure that you have the necessary rights and controls for managing such sensitive personal information.

Travel and Subsistence

There are seven sub-categories that are reportable for travel and subsistence:

- travel vouched,
- travel unvouched,
- subsistence vouched,
- subsistence unvouched,
- site-based employees (including "country money"),
- emergency travel and
- eating on-site.

The date of reimbursement, the sub-category and the total amount reimbursed must be reported to Revenue. Although other information, such as kilometres travelled or receipts, is required to be obtained by employers to support the tax-free reimbursement of travel and subsistence, this information is not required to be provided to Revenue.

For travel and subsistence, ERR applies to payments from an employer to an employee only. Therefore, items incurred on a corporate

credit card or payments made directly to third parties are outside the scope of ERR.

Country money and eating on-site are allowances that are typically available in the construction sector.

Small Benefit Exemption

The small benefit exemption is available for the first and second non-cash tangible item provided by an employer to an employee each year, provided the combined value does not exceed €1,000. The timing of small benefits is important, e.g. you cannot "elect" to tax lower-value items provided earlier in the year to retain the exemption for a Christmas voucher or gift. The small benefits must be non-cash tangible items and cannot be redeemed for cash, e.g. cash withdrawal from a pre-paid card. They are not limited just to vouchers.

The date the benefit is granted and the value of the benefit must be reported under ERR. The date the benefit was purchased and the date the purchasing employee is reimbursed are not relevant. The reportable event is the date the benefit is provided to the receiving employee.

Employers should review their process for monitoring the small benefit exemption to ensure that whoever is responsible for making the ERR submissions is made aware of benefits before they are provided to employees. A central ordering system is sometimes helpful to manage this. Employers should also consider the timing of certain recognition awards and engage with the relevant stakeholders to explore how the process can be flexed to allow the "on or before" requirement to be met. For example, for items such as a raffle prize, could you announce the winner at an event but not provide the benefit until it has been reported to Revenue, or could you provide a voucher or gift early in the New Year rather than before Christmas to ensure that the full value of the exemption is utilised?

Employers should also take this opportunity to explore whether applying for a PAYE settlement agreement would be beneficial for taxable benefits.

Revenue has included some examples in the Tax and Duty Manuals. However, it is disappointing that Revenue considers minor, trivial gifts such as an Easter egg to be within scope of the small benefit exemption.

Remote Working Allowance

Where certain conditions are met, employers can pay an employee up to €3.20 per day tax-free for each remote working day. There is no requirement or obligation for employers to pay this allowance.

The date of payment, the amount paid and the total number of remote working days must be reported. If you do not pay a tax-free remote working allowance, you do not need to report the number of remote working days.

Any excess over the €3.20 per day is taxable and, although not reportable under ERR, is reportable as a taxable payment in payroll under normal rules.

Employers should also be mindful of paying fixed allowances in line with hybrid working policies. To meet the conditions to be paid tax-free, employers must obtain details of actual days spent working remotely. Annual leave, sick days or days spent working at a client site cannot be paid tax-free.

Reporting Methods

There are three reporting mechanisms available.

Direct reporting

This method is facilitated by certain (but not all) software providers and provides a link between the payroll or expense software and ROS. Employers should engage with their software providers to confirm whether this option is available.

Particular care should be given to this option, if it is available to you – although Revenue highlights this as a "seamless" option in the Tax and Duty Manual, there is still significant preparation required to ensure that (a) the

required information is accessible in the system with the direct reporting link and (b) you are reporting the correct information, in the correct categories, to Revenue. For example, if your payroll software will have a direct reporting link but you pay expenses via accounts payable, you will likely need to create a process to import the reportable data into your payroll software.

ROS file upload

An XML or JSON file can be uploaded to ROS.

Excel or CSV files will not be accepted. As of the end of November, Revenue is not providing a template or a conversion tool to allow employers to create XML or JSON files from other standard file formats and has indicated that a conversion tool would need to be acquired to perform this conversion. This places an additional burden and cost on employers to create bespoke tools to convert the reports from Excel.

Revenue has shared technical schema to illustrate the acceptable XML or JSON format on its website. Using Excel macros, Excel templates can be mapped to an XML or JSON format that will be accepted by Revenue. Your internal IT team or external tax technology experts will be able to assist with this.

ROS online manual entry

It is possible to log in to ROS and manually enter each reportable item. This is likely to suit small employers with minimal reportable items.

Deciding on the mechanism and granting access

The Tax and Duty Manual includes links to useful videos on each reporting mechanism. It is important to engage with your software provider and/or tax adviser to determine which mechanisms are available to you.

We understand that the ERR screens were made available on ROS in December. This will allow employers a very short window before Christmas to confirm that the correct accesses have been granted to the relevant users.

The ROS administrator will be able to segregate the access to ERR only, with no access to payroll data, if that is preferred.

It is also possible to engage a separate a tax agent only for ERR where you either operate payroll internally or use a different payroll agent.

What Can I Expect After Filing the ERR Data?

This is largely unknown at present as the underlying Regulations have not yet been released. However, the expectation is that Revenue will apply analytics to the ERR data and that this will influence compliance interventions. It is important to bear in mind that Revenue will now have significantly more data than ever before. This will assist Revenue in forming an overall view regarding the risk structure of an employer.

Revenue has stated that there will be an initial bedding-in period to allow employers to become familiar with the requirements. It is key that employers demonstrate effort to comply with and adhere to the new requirements. This bedding-in period will not last forever, and it is likely that Revenue will start to interrogate the data by the middle or end of 2024. It could be expected that Revenue may initially engage with employers who have not yet made any ERR submissions before specific identified risk areas.

We also expect some “red flags” to be built into the system that will result in automatic queries being issued to employers. For example, a significant increase in value reported for an employee in one particular period or where the same amount is reported each month for an employee. Revenue may also request supporting documentation for particular items.

Employees will be able to access reporting relating to them online, so employers can expect some queries if there are differences between what was reported and what an employee received.

It is important to be aware that this is presented as phase 1 of ERR. It is likely that future phases will expand on the information to be reported. However, that is not the current focus. It is understood that the Department of Finance and Revenue will be using the knowledge gained from phase 1 in considering future phases.

What Should I Be Doing Now?

Employers should engage with payroll and expense software providers to determine what filing solutions are available within the software, if any.

Employers also need to determine the frequency of reporting. ERR data must be filed with Revenue "on or before" the payment is made or benefit is provided to an employee. This may not align with your payroll frequency.

Employers should also analyse what information will be shared with Revenue. For example, are employees correctly categorising expense claims so that you can easily extract the required data? Does your current process capture whether an item is incurred on a corporate credit card or if it is an out-of-pocket expense? Where is the data to be extracted from, e.g. expense system, purchases book etc.?

With the introduction now only days away, every action counts in preparing to be compliant with these new requirements.

Concluding comments

Given all of the regulatory and tax obligations that employers have to comply with, ERR is being viewed by many as an unnecessary administrative burden on employers. It is happening at a time when many businesses are under pressure. Despite significant practitioner concerns being raised, ERR is to take effect from 1 January 2024. It is clear that the authorities are determined to use big data to enhance the effectiveness of their activities, so more focused Revenue interventions can be expected.

Kevin Smith
Partner, Matheson LLP
Bernadine Dooley
Associate, Matheson LLP

Offshore Funds: A Case for Simplification?

Introduction

Ireland has specific tax legislation that taxes funds classified by Revenue as "offshore funds". However, the application of these rules and determining the potential tax consequences that follow have always been an uncertain exercise for investors and tax advisers alike. The exercise has become more difficult in recent years as the range and type of foreign fund products available in Ireland has expanded. It has also been compounded by a narrowing of technical guidance issued by the Revenue Commissioners ("Revenue") and continuing uncertainty in the general Irish tax classification of foreign legal entities as "opaque" or "transparent".

Ireland's offshore fund legislation currently comprises a patchwork of legislative provisions. The legislation was introduced in Finance Act 1990 as an anti-avoidance provision to prevent tax avoidance by Irish-resident investors who held interests in funds outside Ireland. The offshore fund legislation evolved as Ireland developed its legislation for its domestic funds industry. In particular, as Ireland developed tax policy to position Ireland as a global centre of excellence for the international funds industry, it needed to update its offshore funds regime to ensure that Irish investors in offshore funds were treated comparably with Irish investors in Irish-domiciled funds. This was required to ensure that Ireland's offshore fund regime was compatible with EU law.

Overview

Ireland's offshore funds legislation applies to "material interests" in "offshore funds". The basic application of the legislation requires one to identify what is a "material interest" and what is an "offshore fund". These concepts are considered below in reverse order.

What is an "offshore fund"?

Section 743 of the Taxes Consolidation Act 1997 (TCA 1997) describes what should be considered to be an "offshore fund". It provides that each of the following should be considered to be an offshore fund:

- a company resident outside Ireland;
- a unit trust scheme whose trustees are resident outside Ireland; and
- any other arrangements that by virtue of foreign law create legal rights of a kind with co-ownership.

This definition of an offshore fund is very broad. Investments that may not conventionally be considered to be fund investments may be treated as interests in offshore funds for Irish tax purposes. For example, a portfolio holding of publicly traded equities may technically be considered to be an interest in an offshore fund under the above definition. However, an investor would not generally classify such investments as a fund investment.

The above having been said, there are some important exclusions from the concept of an offshore fund in s743(5), (6) and (8) TCA 1997, which include:

- an interest in certain debt lent in the ordinary course of banking business;
- a right arising under an insurance policy;
- certain 10% or greater shareholdings in an overseas company held for the purposes of a trade of the company or the trade of an associated company; and
- certain 50% or greater interests in an overseas company.

Revenue has also confirmed that foreign legal arrangements that are transparent for Irish tax purposes should not be considered to be offshore funds. Instead, investors should be taxed on a "look-through" basis as though they hold the underlying assets (and earn the underlying income) directly. The question of whether a foreign legal arrangement or entity is transparent is a notoriously difficult one. It is a discussion topic by itself, and there is a dedicated Revenue Tax and Duty Manual on the topic (Part 35C-00-02). We do not propose to discuss it in detail here, only to comment that having to consider whether a foreign fund may be transparent adds a further layer of complexity to an already very difficult area of legislation.

What is a "material Interest"?

An interest in an offshore fund will be a "material interest" if, at the time that the person acquired it, it would be reasonable to consider that the person would be able to realise the value of it during the next seven years, by way of transfer or surrender or in any other manner. The seven-year test is an objective one, given the "reasonable to consider" standard. Broadly, an interest will be a material interest if there is any way in which it could potentially be realised within seven years. It does not matter whether an investor intends to hold the interest for more than seven years and has no intention of realising it before that time.

So, for example, an interest may be a material interest in an offshore fund if the fund in question permits redemption or other liquidity events for the investor within a seven-year period. An interest may also be a material interest if there is a prospect that the investor may realise the value of its interest in another way. This means that any interest in an offshore fund that is potentially assignable or transferable within the seven-year period will also constitute a material interest. It does not matter that there is no formal market in which to assign or transfer the interest (e.g. the interests are not publicly traded).

The "*reasonable to consider*" standard is a low legal bar. Revenue's Tax and Duty Manual Part 27-02-01 shares a number of examples that demonstrate when it may be reasonable to consider that an interest in an offshore fund may be realised within seven years.

Overall, it appears that almost any foreign investment is capable of being a "*material interest*" unless there is no reasonable prospect of disposal, and it may be difficult to conclude that this is not the case.

The next step is to consider how an Irish investor may be taxed in respect of that interest.

Taxation of an Offshore Fund

First, s747C TCA 1997 requires an investor to report any new acquisition of a material interest in an offshore fund in its tax return each year.

Second, it is then necessary to determine how income and gains arising from a material interest in an offshore fund should be taxed in Ireland. This is where the offshore funds rules can begin to get quite tricky to apply. Colloquially, there are three different types of offshore funds – "good", "indifferent" and "bad" – which are taxed differently under Ireland's offshore fund legislation, and it is necessary to classify an offshore fund properly to determine which set of rules should apply. The tax treatment can be quite different in each case.

"Good" offshore funds

Funds that are commonly referred to as "good" offshore funds fall with s747B(2A) TCA 1997, being offshore funds that:

- are established in the EU, the EEA or OECD jurisdictions with which Ireland has a double taxation treaty; and
- are similar in all material respects to one of Ireland's regulated fund products, namely:
    - a unit trust authorised under the Unit Trust Act 1990,
    - a UCITS fund,
    - an investment company authorised pursuant to Part 24 of the Companies Act 2014 or
    - an ICAV authorised pursuant to the Irish Collective Asset-management Act 2015.

The key question in determining if a fund is a "good" offshore fund is whether it is similar in all material respects to one of the Irish funds listed above. This has always been one of the most difficult aspects of applying Ireland's offshore funds legislation. Legislation does not prescribe what characteristics of an offshore fund should be considered relevant in determining if funds are materially similar to each other. There was historically little or no guidance on the point, although Revenue's Tax and Duty Manual Part 27-04-01 indicates that the following considerations are relevant:

- The legal form of the offshore fund – is the legal form of the offshore fund similar to a company, unit trust or co-ownership arrangement?
- The regulatory environment applicable to the offshore fund – for example, is the offshore fund regulated as an AIF or under a regime comparable to AIFMD and does it produce a prospectus?
- Other considerations, such as the objective and purpose of the offshore fund, relevant diversification rules, regulatory rules and oversight, and restrictions and/or eligibility rules for investments.

In many cases, determining "equivalence" is straightforward. This will be the case, for example, for UCITS funds or funds that are regulated as AIFs in the EU (such as SICAVs), where the legal and regulatory rules applicable to those funds are broadly the same as in Ireland. However, the exercise can be less than straightforward for other types of funds, particularly those with legal forms or concepts that are not familiar to Irish law and those that are subject to bespoke national regulatory regimes. In recent years there has been a huge growth in the different legal forms of funds created in foreign jurisdictions under local statutes or legal principles that do not feature in Ireland's common law system. It is

not always clear if such offshore funds are similar in all material respects to an Irish fund. There will often be a mix of common and alien characteristics, which ultimately requires an uncertain subjective assessment by a taxpayer and its advisers.

It is also not uncommon that investors do not have the very specific information that is required to determine whether the offshore fund in which they have an interest is indeed similar to an Irish fund. Investors who acquire their fund interests through brokers and distributors may have limited information on very technical questions relating to the underlying legal and regulatory structure of the offshore fund or its governance framework. An investor may instead have summary documents such as a "key information document" (KID) and will not always have more detailed information, as may be included in a prospectus. The more detailed prospectus (if available) may also not include the very technical information required to compare the offshore fund with an Irish fund by reference to the considerations that Revenue considers relevant. In these cases it can be challenging for an investor and its advisers to determine whether the investor holds an interest in a "good" offshore fund.

Taxation of "good" offshore funds

Income and gains arising from a "good" offshore fund are taxed on a self-assessment basis in Ireland. This contrasts with income from Irish funds (excluding those held in a recognised clearing system), which is taxed by deduction at source and does not form part of a taxpayer's self-assessment. The tax treatment of "good" offshore funds can be summarised as follows:

- Income is generally taxable under Schedule D, Case III, for individuals and companies receiving the income otherwise than in the course of a trade.
- Gains are computed in accordance with capital gains tax (CGT) principles but taxed as income under Schedule D, Case IV.
- In each case, the income (exit) tax rate is 41% for individuals and 25% for companies, and neither USC nor PRSI applies.
- As "good" offshore fund gains are taxed under Schedule D, Case IV, and the remittance basis of taxation available to non-Irish-domiciled individuals applies only to items taxable under Schedule D, Case III, only income from "good" offshore fund investments will benefit from the remittance basis of taxation. "Good" offshore fund gains will not be entitled to benefit from the remittance basis of taxation regardless of whether the money is remitted to Ireland or not.
- Higher tax rates can apply if income and gains are not reported correctly and in a timely manner in tax returns.
- Higher tax rates can apply if the "good" offshore fund is a "personal portfolio investment undertaking" (PPIU). This will be the case if the investor has the ability to select the assets that the offshore fund may acquire.
- There is no relief for losses arising on disposals of interests in "good" offshore funds.

Tax will generally arise when there is an actual realisation of income or gains from a "good" offshore fund. However, investors are also deemed to dispose of (and immediately reacquire) their material interests in "good" offshore funds every eight years. Any deemed gains arising on an eight-year anniversary event will be subject to tax as described above under Case IV (and a credit may be available for gains arising when actual disposals are made). This eight-year rule is a common pitfall for investors as it requires monitoring of acquisitions and disposals of interests in "good" offshore funds over time and identifying when each eight-year anniversary arises.

Some practical considerations in respect of "good" offshore funds

The tax treatment outlined above seeks to ensure that investors in "good" offshore funds are subject to tax in a comparable way to

investors in similar Irish funds. This is required to ensure compliance with EU law, so that Irish investment in other EU funds is not discouraged by less favourable tax rules compared to Irish investment in domestic funds.

Although equal tax treatment should be anticipated, there can be some notable differences in the tax treatment in practice. This is particularly true with respect to the taxation of foreign currency gains and losses and can be explained as follows:

- Under s739G(4) TCA 1997 an Irish investor that disposes of an interest in an Irish fund[1] that is not denominated in EUR will be treated as making a separate disposal of a currency asset for CGT purposes. This means that there are two calculations to determine gains arising to an Irish resident:
  - First, a calculation by the Irish fund to determine the gain realised by the investor on the disposal of final units. This calculation is conducted in the functional currency of the fund (e.g. USD) and does not take into account foreign currency gains or losses. The Irish fund will deduct income tax from any gain determined by the Irish fund in this way.
  - Second, the investor is treated as making a separate disposal of a currency asset under s739G(4) TCA 1997. The investor must calculate whether it has a separate liability to Irish CGT in respect of this currency asset. This calculation falls outside the income tax treatment applicable to income and gains from the fund more generally and is subject to ordinary CGT principles. Any currency gain or loss is separately taxable or allowable as a capital gain or loss for Irish CGT purposes.
  - The above means that currency gains across Irish funds are effectively taxed on a net basis under CGT rules (i.e. after deducting capital losses).
- In contrast, s747E(2) TCA 1997 provides that gains arising from a "good" offshore fund are taxable under Case IV of Schedule D but that the gain should be calculated in a single computation in accordance with Irish CGT principles. This single computation means that the gain is calculated by reference to the EUR value of the material interest on both its acquisition date and its disposal date. There is no separate CGT computation for the currency element of any gain. Instead, the full amount of any gain is taxed as income pursuant to Case IV of Schedule D TCA 1997.
- Section 747E(3) TCA 1997 makes it clear that a capital loss or income loss cannot arise in respect a "good" offshore fund. It states that any disposal giving rise to a loss is treated simply as a "nil" gain. This means that currency gains across offshore funds are taxed on a gross basis under income tax principles (i.e. without deducting any losses).

The single calculation and tax charge for "good" offshore funds under Case IV has the capacity to place Irish investors in offshore funds that are denominated in foreign currency in a disadvantaged position compared to Irish investors in a comparable Irish regulated fund. This can be illustrated in the following example, where it is assumed that the investor (an individual) realises gains solely as a result of foreign exchange rates:

	Acquisition	Disposal	FX gain (loss) CGT
Irish fund 1	USD 1,000	USD 1,000	EUR 10
Irish fund 2	USD 1,000	USD 1,000	EUR (5)
Tax			EUR 5 @ 33%

1 Irish funds held in clearing systems (such as ETFs) are generally taxed as offshore funds – see s739G(2)(b) TCA 1997.

	Acquisition	Disposal	FX gain (loss) Case IV
Lux fund 1	USD 1,000	USD 1,000	EUR 10
Lux fund 2	USD 1,000	USD 1,000	EUR (5)
Tax			EUR 10 @ 41%

There is certainly a question mark regarding whether this difference in treatment could potentially be contrary to EU law and whether it would be open to taxpayers to assert that the currency gains and losses arising from "good" offshore funds denominated in foreign currency ought to be calculated for Irish tax purposes in the same way as for equivalent Irish regulated funds. This is likely an untested area, and it is not clear what the view of Revenue may be.

Another technical consideration arises with respect to foreign currency gains from "good" offshore funds that are held on trading account. In this regard, s747E(1) TCA 1997 seeks to exclude gains arising on trading account from the Case IV charge (as such gains should properly be chargeable under Case I of Schedule D). This is logical, as trading gains should generally be subject to tax only pursuant to Case I. In this regard, s747E(1) TCA 1997 states that:

> *"Subject to subsection (1A), where on or after 1 January 2001 a person who has a material interest in an offshore fund, disposes of an interest in the offshore fund and the disposal* ***gives rise to a gain computed in accordance with subsection (2)*** *then, notwithstanding sections 745 and 747, where* ***the gain*** *is not taken into account in computing the profits or gains of a trade carried on by a company,* ***the amount of that gain*** *shall be treated as an amount of income chargeable to tax under Case IV of Schedule D* [emphasis added]."

The gain referenced in s747E(2) TCA 1997 is a gain calculated in accordance with Irish CGT principles. The drafting of this section may create technical uncertainties for corporate taxpayers that prepare financial statements in the same foreign functional currency as the offshore fund in which they invest. For example, a corporate financial trader with a USD functional currency would generally calculate its taxable profits following its generally accepted accounting principles prepared in USD. As a result, currency gains in respect of assets denominated in USD will generally not be taken into account in computing trading income (as they will simply not appear in financial statements). For this reason, it is not entirely clear to what extent a currency gain arising in respect of a "good" offshore fund can be said to be included in computing the profits of a trade for the purposes of s747E(1) if the currency component of that gain or loss does not appear in relevant financial statements.

It would appear logical to disapply the Case IV charge in its entirety where a material interest in an offshore fund is held on trading account. This appears to be what s747E(1) purports to do, and it is consistent with the guidance notes issued by Revenue. However, a very technical review of the legislation leaves scope for uncertainty where offshore funds are denominated in the same foreign currency as the financial statements.

"Indifferent" offshore fund

The second category of offshore fund is an "indifferent" offshore fund. An offshore fund will be an "indifferent" offshore fund where it is established in the EU, the EEA or an OECD jurisdiction with which Ireland has a double taxation treaty but is not similar in all material respects to an Irish regulated fund (so is not a "good" offshore fund, as discussed above).

Many offshore fund interests in entities that are not regulated may fall to be treated as "indifferent" offshore funds. For example, a portfolio holding of publicly traded equities may technically be considered to be an interest

in an offshore fund but is likely to be classified as an interest in "indifferent" offshore funds where the issuers are established in the EU, the EEA or a relevant OECD jurisdiction.

Income and gains arising from "indifferent" offshore funds are taxed on first principles of Irish taxation. There is no specific tax regime applicable to them (and that is why the term "indifferent" is commonly used). The tax treatment may be summarised as follows:

- Income (e.g. dividends) arising from such funds is subject to conventional income tax treatment at marginal rates plus USC and PRSI for individuals, or 12.5% or 25% corporation tax for companies.
- Gains arising from such funds are subject to normal Irish CGT principles. Capital gains are subject to 33% Irish CGT, unless exemptions apply. Capital losses may also be utilised and carried forward in accordance with CGT provisions.

The availability of capital losses may be a key consideration in any decision to invest in an "indifferent" offshore fund compared to a "good" offshore fund. The distinction between a "good" and an "indifferent" offshore fund can be very important for this reason.

Historically, Revenue has publicly confirmed that exchange-traded funds (ETFs) established in North America were to be treated as "indifferent" (and not "good") offshore funds. This clarification provided longstanding certainty to Irish taxpayers that gains were subject to Irish CGT (with relief being available for capital losses). However, this confirmation was removed in more recent versions of the relevant Tax and Duty Manual, Part 27-04-01, which has resulted in the tax treatment of such ETFs being uncertain. Taxpayers must now consider whether their US ETFs are similar in all material respects (or not) to Irish regulated funds – a question that is not entirely straightforward.

"Bad" offshore funds

The final category of offshore funds is "bad" offshore funds. A "bad" offshore fund is an offshore fund that is not located in the EU, the EEA or an OECD jurisdiction with which Ireland has a double taxation treaty. The definition of a "bad" offshore fund is much broader than in the context of investments in "good" offshore funds. However, a crucial distinction exists between distributing and non-distributing funds. In accordance with s744(1) TCA 1997, all "bad" offshore funds are considered non-distributing funds unless a fund applies to be considered as, and is certified as, a distributing fund by Revenue. Section 744(2) provides that a distributing fund is one that has pursued a full distribution policy of 85% of its income during the period under review. However, due to the requirement to apply to Revenue for certification as a distributing fund, their existence is quite rare. Non-distributing "bad" funds are more common.

Income payments received on material interests in non-distributing "bad" offshore funds by individuals and companies are subject to tax under Case III, Schedule D, TCA 1997. Therefore, marginal income tax plus USC and PRSI will apply on payments received by individuals, and corporation tax at 25% will apply on payments received by companies where the investment is not held as part of a Case I trade. Section 745 TCA 1997 provides that a disposal of a material interest in a non-distributing "bad" offshore fund will be taxable under Case IV, Schedule D, in respect of both individuals and companies that do not hold the investment as part of a Case I trade.

Change Ahead?

The proper treatment of offshore funds is generally a self-assessment consideration for taxpayers. The complexity and uncertainty inherent in the rules put even the best-advised taxpayers at risk of inadvertent non-compliance. The legislation spans a number of chapters of TCA 1997, includes current and outdated provisions, and has complicated cross-referencing throughout. It is very difficult for tax professionals to navigate and often more difficult to apply in practice. Taxpayers and advisers

would generally welcome more certainty and simplification.

In this regard, the Department of Finance published a consultation entitled "Funds Sector 2030: A Framework for Open, Resilient & Developing Markets" ("the "Consultation") earlier this year. Part of the Consultation centred around the Irish tax treatment of offshore funds and the difficulties facing taxpayers in applying the current legislation. Stakeholders were asked to recommend how the regime could be simplified or modernised.[2]

Despite the appetite for simplification and change, it may be difficult to see how the offshore fund rules could be materially overhauled in practice. Ireland's domestic tax rules (and the regulatory environment) for Irish regulated funds have positioned Ireland as a centre of excellence for international funds. Our offshore funds rules must remain compatible with EU law. In addition, Irish taxpayers will always be required to self-assess for income and gains arising from foreign investments. However, some changes where possible would be welcomed.

2 The Institute's submission in response to the consultation entitled "Funds Sector 2030: A Framework for Open, Resilient & Developing Markets" is available on www.taxinstitute.ie.

Charlotte Cumiskey
Tax Senior Manager, BDO Ireland

Taxation of Non-Resident Landlords

Introduction

For a number of years, Ireland's real estate market has lured large numbers of foreign investors seeking stable returns and capital appreciation. However, navigating the tax landscape as a non-resident landlord can be a complex endeavour, particularly for those unfamiliar with the Irish tax system. Aside from professional foreign property investors, individuals may find themselves as non-resident landlords in cases where they have moved abroad for work purposes and rented out their home or have inherited a property in Ireland and are not yet in a position to sell it or live in it themselves. This article aims to provide an overview of the tax position for non-resident landlords in Ireland, focusing on the key obligations, allowances and considerations for maximising returns while staying compliant with Irish tax laws. (See also: https://taxinstitute.ie/tax-insight/tax-administration/revenue/non-resident-landlord-withholding-tax-nlwt-system/)

Charge to Irish Tax

One common misconception is that individuals and corporate entities do not have to pay Irish tax on their Irish rental income where they are already subject to tax on that same income in the country in which they are tax resident. Ireland typically reserves taxing rights over income generated from Irish land or buildings, so rental profits will be subject to Irish tax in the first instance. This does not necessarily equate to double taxation. At the time of writing, there are 74 double taxation agreements (DTAs) in effect between Ireland and other countries. Generally, tax paid on Irish rental income should be available as a credit against the tax arising on that same income in the landlord's country of tax residence; however, it is, of course, imperative to review the appropriate articles of the relevant DTA.

Individual non-resident landlords are chargeable to income tax on rental profits and are obliged to file an annual income tax return (Form 11). Depending on the person's circumstances, their marginal income tax rate, including USC, could be c.50%.

Corporate non-resident landlords have been subject to corporation tax since 1 January 2022 and must file an annual corporation tax return (Form CT1). The rate of corporation tax that applies to rental profits is currently 25%.

The Irish VAT-on-property rules are complex and go beyond the scope of this article. However, as is the case with direct taxes, the tax residence of the landlord has no bearing on the potential charge to Irish VAT on rent from Irish property. Although residential leases are exempt from VAT, landlords should ensure to get specific VAT advice when entering into or taking over commercial property leases.

Taxation of Rental Income

Irrespective of whether a non-resident landlord is subject to income tax or corporation tax, rental income from Irish property is taxed under Schedule D, Case V, of the Taxes Consolidation Act 1997 (TCA 1997). It is important to note that income from providing short-term accommodation to occasional visitors (e.g. via Airbnb) or from operating as a guesthouse or hotel is generally assessable under Case I (trading income) rather than Case V and is outside the scope of this article. This distinction is not always clear-cut, but generally the existence of a landlord–tenant relationship is a good indicator that the income arising should be classified as rent.

Landlords are taxable on the rental income that they are entitled to receive in a taxable period, as opposed to the amount of rent actually paid to them. Tax is chargeable under Case V on the rental profits arising after the deduction of allowable expenses, which are outlined in s97(2) TCA 1997. Broadly, the expenses that are deductible from rental income are:

- rent payable on the property, such as ground rent,
- rates payable on the property,
- maintenance costs of the property,
- repairs to the property (once they do not constitute capital expenditure),
- insurance premiums against fire and public liability,
- property management fees,
- advertising and legal fees incurred in letting the property,
- goods or services provided by the landlord such as electricity, refuse collection and the payment of service charges and
- interest on money borrowed to purchase, improve or repair the property.

A deduction for expenditure on qualifying plant and machinery is available by way of capital allowances, which are deductible on a straight-line basis over eight years.

A tax deduction is allowed for the above expenses only during the currency of a lease or during a period when the landlord was entitled to receive rent. Qualifying expenses in between lettings are also deductible once the property is not occupied by the landlord.

The deduction for interest on money borrowed to purchase, improve or repair residential property is conditional on the tenancy's being registered with the Residential Tenancies Board.

The interest limitation rule (Part 35D TCA 1997), which applies to accounting periods commencing on or after 1 January 2022, will be an important consideration for large corporate non-resident landlords that have significant levels of debt funding.

Non-resident Landlord Withholding Tax

Prior to Finance Act 2022, tenants who paid rent directly to a non-resident landlord were required to withhold income tax at the standard rate and submit this tax to Revenue (with a copy of a paper Form R185 'Certificate of Income Tax Deducted') each year. The landlord was provided with the original R185 by the tenant and could then claim a credit for the tax withheld when submitting their Irish income tax return. Alternatively, the non-resident landlord could be assessed to tax through an Irish resident agent of the landlord, colloquially known as a 'collection agent'.[1] If a collection agent was appointed by the landlord, tax did not have to be withheld from the rent, but the collection agent was responsible for submitting the income tax return and discharging the tax liability on the rental income for the landlord.

Typically, non-resident landlords favoured appointing a collection agent over having their tenant withhold tax from rental payments, but many landlords found it difficult to find someone willing to take on that role given the collection agent became personally responsible for paying the landlord's tax on the rental income. In addition, many non-resident landlords filed their income tax returns in their personal capacity without even realising this may not have been compliant with the legislative requirements. However, over recent years, Revenue increasingly focused on adherence to the legislative requirements for this cohort of taxpayers and there have been lengthy discussions at the Tax Administration Liaison Committee (TALC) on the practical challenges in complying with the legislation.

Finance Act 2022 introduced significant changes to the regime for collecting tax on the rental income of non-resident landlords in Ireland. The new regime primarily moves the requirements of the legislation to an online process. In addition, by providing certain information to Revenue and withholding and remitting tax, the collection agent is no longer responsible for the tax owed by the landlord on the rental income and for filing the related income tax returns. The new non-resident landlord withholding tax (NLWT) system came into effect on 1 July 2023, by Ministerial commencement order.

Since 1 July 2023, tenants who are withholding and remitting tax must input "Rental Notifications" via the Revenue Online Service or myAccount every time that a rental payment is made. To submit Rental Notifications, tenants will require the landlord's name and address, email address or phone number, along with the local property tax ID number of the rental property. The tax withheld must also be remitted to Revenue every time that the rental payments are made.

1. Where landlords have appointed an Irish-resident collection agent (this may be a letting agent or a friend/family member, a professional), there are two options for complying with the tax obligations.
   The collection agent withholds and remits tax through the NLWT.
   Under the NLWT system, the collection agent withholds 20% of the gross rent collected and remits this to Revenue with the relevant Rental Notifications, similar to the process for tenants outlined above. Once the Rental Notifications are made

1 Section 1034 TCA 1997 provides that a non-resident is assessable and chargeable to income tax in the name of any Irish resident agent/factor/trustee etc. whether or not that person is in receipt of the income.

and the tax withheld is paid over, the collection agent will have no further tax compliance obligations in respect of the income. The non-resident landlord must then register for tax, if they have not already done so, and file their own tax return in respect of their Irish rental income (and any other Irish-sourced income). The Rental Notifications submitted by the collection agent will enable the landlord's tax return to be pre-populated with a credit for the tax withheld.

2. **The collection agent is the chargeable person in respect of the landlord's rental income**

Where collection agents do not comply with the NLWT system by withholding 20% tax and submitting Rental Notifications, they will remain chargeable and assessable to the tax arising on the landlord's rental profits. The collection agent must have a specific tax registration number for every non-resident landlord on whose behalf they are acting as a collection agent and is responsible for the filing of the appropriate tax returns and the payment of any liability arising on the rental income. While the tax assessment will be in the name of the Irish collection agent, the tax to be charged is the amount which would be charged if the non-resident landlord was assessed in her or his own right.

		Pre-1 July 2023	Post-1 July 2023
Rent paid directly to non-resident landlord	**Tenant position**	Tenant withheld 20% tax which was remitted to Revenue via their annual tax return.	Tenant withholds 20% tax which is remitted via ROS with a Rental Notification every time a rental payment is made.
	Landlord position	Landlord filed Irish tax return with credit given for tax withheld by the tenant.	Landlord files Irish tax return with credit given for tax withheld by the tenant.
Rent paid to Irish collection agent	**Tenant position**	Tenant paid the gross rent to the collection agent.	Tenant pays the gross rent to the collection agent.
	Collection agent position	The collection agent was responsible for filing the tax return and paying the tax arising from the landlord's rental profits.	Where the collection agent complies with the new NLWT system, they are no longer responsible for the filing of the tax return or payment of tax arising on the rental income. Otherwise, they remain chargeable and assessable to the tax.
	Landlord position	No further filing obligations in respect of the rental income returned under the collection agent's tax registration.	The landlord must file an Irish income tax return in respect of the rental income where the collection agent has complied with the NWLT system. A credit is given for the tax withheld by the collection agent.

Capital Gains Tax

As mentioned above, Ireland typically retains taxing rights over income generated from Irish land and buildings. In addition, any gains arising on the disposal of Irish property will be subject to Irish capital gains tax (CGT) regardless of the residence of the person or entity disposing of it. Again, many of the DTAs

will allow for a credit for Irish tax against tax arising on the same disposal in the vendor's country of residence.

The current rate of CGT for individuals is 33%. Capital gains arising in corporate entities are subject to corporation tax on capital gains but at the same effective rate.

CGT clearance is an important aspect to consider when selling or disposing of property in Ireland. A purchaser of Irish land or buildings must withhold 15% of the consideration and pay this to Revenue unless the seller provides the purchaser with a valid CG50A clearance certificate. This requirement applies only where the value of the property is more than €500,000, or €1m in the case of residential units.

To ensure that Ireland retains its taxing rights on the property, where the seller is non-resident, Revenue will not issue a CG50A unless a CGT computation is submitted with the application and any CGT liability has been paid at the time that the clearance is sought (or an undertaking is given that it will be paid).

Where a CG50A is not provided to the purchaser, the purchaser must file a Form CG50B and remit the 15% withholding tax to Revenue within 30 days of the sale. The CG50B is provided to the seller as evidence of the tax withheld, which is then included as a credit in the seller's CGT return.

Local Property Tax

Local property tax (LPT) is a self-assessed tax charged on the market value of residential properties in Ireland. Owners of Irish residential property are liable to pay LPT regardless of their tax residence status. LPT is not deductible in computing taxable rental profits.

There are a number of ways that Revenue can collect LPT from liable persons who do not comply with their obligations, including a 10% LPT surcharge on income tax, corporation tax or CGT liabilities, withholding tax clearance certification and referral of the debt to a sheriff. Furthermore, any unpaid LPT (including interest) remains as a charge on the property until it is paid.

Revenue clearance must be in place confirming that a property is fully compliant for LPT purposes before that property can be sold or transferred.

Conclusion

Understanding the tax obligations of non-resident landlords is critical for successful Irish property investment, from acquisition to exit. The current housing crisis means that the property tax landscape is ever changing, so it is essential to be proactive and seek professional advice when necessary to ensure compliance with the latest legislative changes.

Nicola Sheridan
Tax Director, PwC Ireland
Ruth Maloney
Tax Director, PwC Ireland

CESOP: New EU Tax Information Reporting Requirements

Introduction

The CESOP Directive (Council Directive (EU) 2020/284) is coming into effect on 1 January 2024 and will require payment service providers (PSPs) located in the EU to collate electronic records on cross-border payments and report this data to relevant tax authorities in the EU. The Directive will create additional administrative requirements for PSPs located in the EU. The EU will establish a new central electronic system of payment information (CESOP) to facilitate the reporting and store the payment information. The aim is to address VAT leakage and fraud in the EU, where the VAT gap (i.e. the difference between expected VAT receipts and amounts actually collected) was €93m in 2020. The reporting requirements will allow EU tax authorities to monitor payments made in respect of e-commerce transactions to ensure that they are taxed appropriately. The data collected in this central EU database will be made available to anti-fraud experts in the Member States via the Eurofisc network.

Background

The legislation is being introduced within the broader framework of taxation in the digital economy. Its purpose is to address the difficulties that Member States experience in the taxation of e-commerce transactions. In particular, the legislation will assist Member States in tackling fraud committed by businesses established in a different

Member State or a third country who may not be complying with their VAT obligations and therefore have an unfair advantage compared to local businesses. It is part of an increasing number of instruments that are being introduced to address tax avoidance in the digital economy. The ultimate aim is to provide tax authorities with a better understanding of the level and frequency of cross-border payments, to accurately illustrate the degree of economic activity occurring and to act as a deterrent to companies' not appropriately declaring cross-border transactions.

PSPs – Who Falls Within Scope and When Is Reporting Triggered?

The CESOP Directive refers to PSPs, as defined in the Payment Services Directive (Directive (EU) 2015/2366, PSD2). This definition will bring the following entities within the scope of the reporting obligation:

- credit institutions, including fully licensed banks established in the EU and EU branches of credit institutions that have their head office outside the EU and provide payment services;
- e-money institutions, which covers all PSPs providing payment services via electronic money (e-money);
- payment institutions, including companies providing payment services such as issuing credit/debit cards, acquiring payment transactions, processing payments and initiating payments – this also includes platforms that provide payment services and act on behalf of both the payer and the payee; and
- post-office giro institutions that provide payment services.

Central banks and public bodies are not affected by the CESOP reporting obligation, as they typically do not provide the payment services in scope. The payment methods provided by the above in-scope entities included in the reporting will be card payments, credit or bank transfers, direct debit transfers, e-money remittance and money remittances.

Small PSPs with a turnover of less than €3m and, in specific cases, commercial agents and electronic communication networks or services, who might qualify for less complex reporting under PSD2, also fall within the scope of the new rules.

The reporting obligation applies in respect of cross-border payments. Domestic payments are not within the scope of the rules. A payment is considered cross-border if the payer is located in a Member State and the payee is located in another Member State, a third country or a third territory.

In principle, the PSPs of both the payer and the payee could have a record keeping and reporting obligation. An exemption exists, to help avoid double reporting, which provides that if the payee's PSP is located in a Member State, then it is only the PSP of the payee that will have the reporting obligation.

For the reporting obligation to become effective, a threshold of 25 cross-border payments per quarter to the same payee must be met.

Specific rules apply in the context of EU and third-country branches, certain non-EU territories and entities that are "marketplaces", who collect funds from the payer, hold them and then distribute them to the payee.

Reporting Obligations

PSPs will be required to file a return on a quarterly basis. The return will include information on the payment, including the BIC or other unique identifier of the reporting PSP, the name of the payee, VAT number or national tax number of the payee (if applicable), IBAN of the payee, BIC or any other business identifier for the payee PSP, address of the payee, individual payment transaction details and payment refunds. The returns will be filed electronically in a specified digital format.

The returns will be submitted to the tax authorities in the Member State of establishment or in the host Member State. The host Member State includes the Member States where the PSP offers payment services.

Key Challenges

The reporting requirements under CESOP go beyond having branches or a fixed establishment in another Member State. Unlike other EU Directives implementing reporting obligations, there will be no central reporting in the home Member State, so many PSPs will have CESOP registration and reporting obligations in multiple Member States. This complexity and the potential for Member States to deviate from the Directive in implementing local laws may be challenging for PSPs to navigate.

The prescribed reporting format contains more than 70 data fields, most of which are mandatory. The data to be collected can differ depending on the payment method. For many PSPs, the requirement to link disparate data sets and applications and aggregate in a manner consistent with CESOP Regulations will be challenging, and existing IT architecture may be unsuitable for handling such large data volumes.

Although some guidelines have been issued by the European Commission as regards certain technical aspects of the rules, there are a number of areas where the absence of clear guidelines may result in a lack of consistent application of the rules or in differing local rules or interpretations. This may lead to challenges for PSPs reporting across multiple Member States, particularly when trying to build workable business rules to manage CESOP obligations.

The digital format of the registers and the method of delivery will be determined by each Member State, as these are not prescribed in the Directive. This could lead to Member States' having different digital schema for the reporting of the information. Equally, the form of reporting differs across Member States, with some allowing automated, machine-to-machine reporting, but many others requiring a manual upload of the necessary reports in the required digital format.

Furthermore, Member States may apply different approaches to the applicable penalties for failure to comply with the requirements, and these are wide-ranging across those Member States that have issued legislation on this. PSPs should ensure that they are clear on local reporting obligations in light of the quantum of penalties in certain markets.

Where We Are to Date

Ireland is required to introduce implementing legislation to take effect from 1 January 2024. IT is expected that the legislation will be introduced by statutory instrument. Draft legislation is not available at the time of writing this article. Revenue has established a specialist CESOP team and has engaged with in-scope taxpayers on an ongoing basis. The registration portal for PSPs is expected to open towards the end of 2023. The European Commission has also established an Expert Working Group to support the sector with practical challenges in implementation.

Many Member States have published draft legislation, but some, like Ireland, are still to publish and finalise their local implementing laws.

As noted, the Directive will come into effect from 1 January 2024. The first reporting period will run from 1 January 2024 to 31 March 2024. The filing deadline for the first period will be 30 April 2024.

What To Do Now

Entities that believe that they are or may fall within the scope of the reporting requirements should by now have carried out an impact assessment to determine whether they are within scope. This assessment also helps to assess the challenges that may need to be addressed in order to comply with the reporting requirements by 30 April 2024, from systems capabilities to reporting solutions.

Aoife Murray
Partner in Transfer Pricing, EY
Priyanka Asopa
Director in Transfer Pricing, EY

Transfer Pricing in Financial Services

Introduction

Transfer pricing continues to be a focus area for cross-border related-party transactions in the financial services sector, as well as for financial transactions in other sectors. In times of turbulence – given rising interest rates, changing regulatory landscapes, increasing tax authority attention, inflationary cost pressures and market uncertainty – transfer pricing matters can be complex. This article covers some recent developments in Ireland that are relevant to taxpayers operating in the financial services space.

Application of the Authorised OECD Approach

Of particular interest in the financial services sector, Irish domestic legislation governing the computation of branch profits has been brought into line with international best practice in this area. Irish legislation now incorporates a provision like Article 7(2) of the OECD's Model Tax Convention, which contains the "authorised OECD approach" (AOA) rules (Section 25A TCA 1997 introduced in Finance Act 2021). The rules apply to Irish branches

of non-Irish headquarters. There are specific documentation requirements in the rules, which are separate from but similar to the transfer pricing local file requirements.

The OECD *2010 Report on the Attribution of Profits to Permanent Establishments* provides guidance on how the AOA is applied. The basis of the AOA is to treat a permanent establishment (PE), including a branch, as a hypothetical and separate enterprise and attribute to it the profits that it would have earned on an arm's-length basis. The profits that would be attributable should be based on the functions performed, assets used and risks assumed. The analysis requires a two-step approach: first, to consider the factual and functional analysis and, second, to consider the remuneration of the hypothesised enterprises.

From a legal standpoint, there is no distinction regarding which enterprise "owns" the assets, assumes the risks, or possesses the capital or any contracts. A fact-finding analysis should establish the economically significant activities and responsibilities undertaken by the PE. This analysis should, to the extent relevant, consider the PE's activities and responsibilities in the context of the activities and responsibilities undertaken by the enterprise as a whole. In a financial services context, it is necessary to understand where key entrepreneurial risk-taking (KERT) functions are located. This allows for the attribution of economic ownership of assets and assumption of risks to the PE. Based on the attribution of risks and assets, capital can be allocated to the PE. The second step of the analysis is to determine an arm's-length remuneration based on the hypothesised separate entity.

The assumption of risk is key in the banking and insurance sectors. For a traditional bank, the creation of a financial asset and its ongoing management are likely to be KERT functions. Ownership of the financial asset is generally attributed (along with the related income/expenses) to the location performing those functions. Capital is allocated to the branch by reference to the risks arising from its activities. Generally in an insurance context, the underwriting function is most important to the decision to accept a particular insured risk. Product development, sales and marketing, and risk management may also contribute. Investment assets are allocated to the branch sufficient to cover the reserves and surplus appropriate to the level of insurance risk assumed by the branch.

Transfer pricing is becoming an increasing area of focus for regulators. in terms of how related party transactions are remunerated.

The Rise of Technology

The role of technology in the financial services space has evolved. Historically, technology was viewed as a relatively routine activity, charged for intra-group, based on a cost-plus mark-up model. Technology continues to disrupt the financial services industry, and the OECD's focus on the digital economy has become more relevant. Key questions are whether technology teams are generating valuable intangibles and how they are compensated.

Allocation of profits arising from the exploitation of intangibles should be based on the contribution by each party. Potential approaches for determining the arm's-length remuneration for intangibles include a licence fee, royalty or profit split. A licensing arrangement may be linked to a percentage of sales or be on a per-user basis. The "comparable uncontrolled price" approach, which identifies licensing arrangements between independent companies, can be used to set the intra-group price, as can other approaches and methods. A profit split may be appropriate where group members are making valuable contributions that are highly integrated. A profit split can be complex, and there is often some element of subjectivity involved in determining the value of the contributions of the related parties. The DEMPE (development, enhancement, maintenance, protection and exploitation) footprint will be important in determining who within the group is entitled

to returns connected with intangibles. The remuneration for intangibles is a complex area. More complexities arise where there is a mismatch between the legal jurisdiction of ownership and the jurisdiction where risk control decisions are taken. Not applying the appropriate transfer pricing method may lead to double taxation, litigation and additional cost burden.

Interaction with VAT

VAT is a transaction tax, and transfer pricing considers the pricing of intra-group transactions. Greater transfer pricing documentation requirements in Ireland since 2020 increase the level of information available to Revenue. The local file includes a description of intra-group transactions, value chain and activities of the entities involved. It is important that VAT and transfer pricing analyses are aligned. For example, any adjustments that relate to transfer pricing, arising from true-ups or as a result of an audit by a particular tax authority, may have a impact on VAT treatment and this should be considered. It is important to determine whether TP adjustments could be seen as consideration given in exchange for a supply of goods or services by a taxable person.

Public Country-by-Country Reporting

Multinationals with a presence in the EU and with consolidated revenue of more than €750m for each of the last two financial years may be required to publish certain information publicly. There are a number of items to be reported, including net turnover, number of employees, profit before tax and amount of tax actually paid. The information should be broken down for each EU Member State and for each jurisdiction that is deemed non-cooperative by the EU and for all other jurisdictions may be reported on an aggregated basis. EU countries are required to implement the Directive into law for the financial year starting on or after 22 June 2024. On 21 June 2023, the Minister for Enterprise, Trade and Employment (the Department) signed the Irish statutory instrument implementing public country-by-country reporting (Public CbCR) into Irish law. Public CbCR will apply to the first financial year commencing on or after 22 June 2024 and a report will be required to be published within 12 months of the date of the balance sheet for the relevant financial year. CbCR provides tax authorities information to help them assess tax risks including transfer pricing risks and may assist them in determinations on how they allocate audit resources.

Adrian Walker
Tax Director, Deloitte Ireland LLP

Changes Affecting 2022 R&D Tax Credit Claims

Introduction

Ireland's research and development (R&D) tax credit scheme has been a valuable mechanism for companies to reduce the cost of their R&D activities, encouraging more investment and resource input into the teams that perform this important IP-generating aspect of our economy. The scheme has been continually improved since it was introduced in 2004, Until recent years it has not been subject to major changes, with just a few tweaks and adjustments. Since 2022, however, more significant updates have been made. These are not impacting the type of development work that qualifies as R&D nor the expenditure in doing that work that can be claimed. The changes relate to how the credit is claimed and received.

Budget 2024 announced changes to the tax credit rate from 25% to 30%, however, this article will look at last year's Finance Act (Finance Act 2022) changes. These changes were made to ensure that the Irish scheme is a qualifying scheme under the Pillar Two Regulations that are to come into force in 2024 and the US Foreign Tax Credit regulations that are effective from the end of 2021. The modifications to the R&D tax credit introduced by Finance Act 2022 are applicable to expenditure incurred in accounting periods starting on or after 1 January 2023, however, could have bearing on how their 2022 claims are filed as outlined below.

The changes to the tax credit made by Finance Act 2022 relate to how companies receive the tax credit. Before this, credits were used initially against the current-year corporation tax (CT) liability; if there were tax credits left (or there was no corporation tax liability), excess credits could be carried back against any CT paid in the prior year, and

then taken as a cash refund in roughly three equal instalments, spread over three years, or carried forward indefinitely. There was also the opportunity to transfer tax credits to key R&D employees to use against personal income tax; in practice, this is very rarely, if ever, applied but it is still an option. The main change that Finance Act 2022 introduced was to simplify how companies realise the benefit of their credits, so that the tax credits are no longer connected to the corporation tax liability. A company will, first and foremost, receive its credits as a cash payment irrespective of whether it owes corporation tax to Revenue. For most claimants, that cash refund will come in three annual instalments: 50% in the first year, 30% in the second year and 20%, in the final instalment, in the third year. Smaller claimants can potentially get even greater first instalments. As these instalments become due, the company can ask Revenue to offset the payment against corporation tax or another tax head.

If you get your tax credits as cash repayments, your company will get more of its credits in the earlier instalments which is a useful cash-flow boost. However, there is no longer the ability to utilise all of your tax credits against a corporation tax liability in the year of claim.

These changes will all be enacted via the annual Form CT1 for 2023, Finance Act 2022 also provides companies the opportunity to apply the new repayment scheme to their tax credit claims for accounting periods that started on or after 1 January 2022. In addition to changing the way credits are received, the Finance Act enabled companies to accelerate any second and third instalments from 2020 and 2021 claims, to get them sooner than they might have under the old rules.

To accommodate the changes, Revenue has prepared and issued, via the Revenue Online Service (ROS), an Excel document called "R&D corporation specified return 2022" and some operational guidance, Part 29-01-03A, on how to complete it. This form will be used to file claims for 2022 accounting periods only. The Form CT1 2023 will be updated for use for filing future tax credit claims.

This article outlines some of the considerations that companies should pay attention to when deciding whether to claim under the 2022 rules (regime in place prior to Finance Act 2022) or the 2023 rules (introduced by Finance Act 2022), as there are winners and losers from the change in how the credits are received. Those who do better under the new rules would be wise to claim under them at the earliest opportunity, and those who do not fare as well can at least retain the status quo for one more year.

2022 or 2023 Rules?

First and foremost, it should be checked whether there is a compelling reason to claim under the 2023 rules due to:

- US parent company – for companies that are subject to the US Foreign Tax Credit Regulations, claiming R&D tax credits under the 2023 rules minimises the risk that benefits received in Ireland will be reversed by the US Internal Revenue Service when accounts are rolled up into the parent company.
- The company has a small or nil CT liability for 2022 and little or none expected for 2023. Claiming under the 2023 rules would mean the cash refund available would be greater as outlined below.
- 2022 cash refundable tax credits are less than €50,000, which results in the first instalment under the 2023 rules being €25,000, as this would be greater than 50% of the credit. Under the 2022 rules the first instalment would be 33% of the credit.

The main reason for choosing the 2022 rules is where it will provide a faster route to utilising 2022 tax credits and tax credits brought forward, i.e. historical R&D tax credits. This would be:

- If the 2022 CT liability is large enough compared to the 2022 tax credit, using the tax credits against the CT liability and then claiming the excess as cash instalments will use the tax credits faster than using the 2023 rules and will also make carried-forward credits available against the 2023 and 2024 CT liability, if they are expected.

	€
2022 R&D tax credit claim	300,000
2022 CT liability	200,000
2021 CT paid (after R&D tax credits applied)	0

		Under 22 Rules	Under 23 Rules
a	**Credits used against 2022 CT liability**	200,000	0
b	**Excess credits**	100,000	0
c	**Instalment 1 (due after filing the 2022 claim) [b × 33%]**	33,000	150,000
	Carry forward	67,000	150,000
a+c	**Total 2022 credits used/paid in the year**	233,000	150,000

If CT was paid in 2021 some or all of which can be reclaimed by carrying back 2022 tax credits, 33% of the remaining excess credits can then be claimed in cash repayments in addition to the carry-back amount.

	€
2022 R&D tax credit claim	300,000
2022 CT liability	0
2021 CT paid (after R&D tax credits applied)	100,000

		Under 22 Rules	Under 23 Rules
	Credits used against 2022 CT liability	0	0
a	**Excess credits**	300,000	0
b	**Excess credits used to reclaim CT paid in 2021**	100,000	0
c	**Instalment 1 (due after filing the 2022 claim) [(a-b) × 33%]**	66,000	150,000
	Carry forward	134,000	150,000
b+c	**Total 2022 credits used/paid in the year**	166,000	150,000

- If the 2023 CT liability is expected to be high relative to the 2022 and 2023 tax credits, the 67% of the excess 2022 credits that is carried forward might be able to be used in 2023, accelerating the realisation of the 2022 related benefit.

	€
2022 R&D tax credit claim	300,000
2022 CT liability	50,000
2023 expected CT liability	200,000

		Under 22 Rules	Under 23 Rules
	Credits used against 2022 CT liability	50,000	0
a	**Excess credits**	250,000	0
b	**Instalment 1 (due after filing the 2022 claim) [(a-b) × 33%]**	82,500	0
c	**Carry forward**	167,500	150,000
a+b	**Total 2022 credits used/paid in the year**	132,500	150,000
c	**Total 2022 credits used/paid following year**	167,500	90,000
	Total 2022 credits used/paid in third year	0	60,000

Note: all examples under the 2022 rules assume that the company has sufficient payroll taxes or prior year CT payments that mean the cap on cash refunds exceeds the amounts shown as payable in the first instalment. No restrictions on cash payments exist under the 2023 rules.

There are some situations where maximising the rate at which the company gets the benefit of the credits is less clear-cut. The 2022 tax credit, the 2022 CT liability, the 2023 expected CT liability and the existence of carry-forward cash and non-cash payable credits must be considered to conclude on the preferred option. For example, some companies may have non-refundable tax credits carried forward from a prior year, these are not normally available once the current-year credits are utilised to clear a current-year CT liability. Moving forward, these will be able to be used against CT liabilities for accounting periods starting on or after 1 January 2023 (however, this may not be of any real benefit for companies affected by the US Foreign Tax Credit Regulations). Claiming 2022 tax credits under the 2023 rules allows these carried-forward non-cash credits to be utilised at the earliest opportunity while then claiming a 50% cash refund for 2022 credits using the 2023 rules.

Filing a 2022 Claim by Completing the 2022 CT1 and Specified Return

Where a company has chosen to make a claim under the 2022 rules and does not have any carried-forward cash refunds from 2020 or 2021, there is no real change to filing a claim. You may notice that there are some extra check boxes to complete in the CT1 for companies that are using the specified return to file under the 2023 rules or claim the accelerated cash repayments, but for companies claiming under the 2022 rules these should not be relevant. The CT1 form is then completed as per previous years.

If the company is claiming under the 2023 rules and/or claiming accelerated payments, then the specified return **must** be used.

In addition to entering the information in the forms, there are three pitfalls to be aware of. First, make sure that the latest CT1 form is being used, as versions from earlier in the year did not have the check boxes in the Research & Development Credit section to notify Revenue of a specified return being used. If your tax return was filed earlier in the year without a tax credit claim and with the intention of amending it, you will need to complete the latest version, released in August 2023.

Secondly, once you have downloaded the specified return from Revenue's website, you will notice that there are four tabs. A summary tab pulls the figures from the three other tabs, one of which is used for claiming accelerated credits and the other two for claiming credits for R&D project costs (under s766C TCA 1997) and credits for the construction or refurbishment of an R&D building (under s766D 1997) i.e. the 2023 rules. These tabs in the return are fairly self-explanatory but, care should be taken when completing the accelerated payments tab, box 1(b). It is the total of both third-instalment cash repayments (2020 and 2021). The remaining entries in the three non-summary tabs should also be reviewed and completed as required. When these are complete, check that the figures are pulled through to the summary tab. In addition, the text entry boxes at the top of this tab must be completed along with the declaration at the bottom of the summary tab.

Thirdly, if 2022 expenditure is being claimed under the 2023 rules, the current-year claim information is included in the appropriate tab in the specified return rather than entered on the CT1. However, when claiming accelerated repayments, the amount of unused credit brought forward from 2020 and 2021 and any prior-year non-refundable credits must still be entered in the CT1. Figures should also be entered in the "Total Research and Development Credit claimed in this accounting period" box and the "Total Research and Development Credit now due in this accounting period" box .Only the amount representing credits not being accelerated and being carried forward beyond the 2022 period should be entered in the box, "(b) Total amount of unused prior year credits carried forward to future years following application of Sec. 766B".

Once completed, the specified return is filed via MyEnquiries. If your company wishes to reallocate credits between companies within the group, you should still submit a signed letter to reallocate credits to other companies in the group, in addition to completing the entries in the specified return reallocating tax credits between group companies.

Conclusion

Although there is a new form to get used to for one year only, if you have decided to fill it in, for most companies it means that tax credits will be received more quickly than under the old payment approach. The additional administration is worth the extra effort. It is worth going through the form carefully to ensure that it is completed correctly first time. For the 2023 returns, it is expected that the CT1 should contain all of the necessary details to claim under the new repayment structure It is also important to keep in mind that the changes might impact your preliminary tax calculations for 2023 and moving forward.

This year the usual advice when preparing and filing tax credit claim is perhaps even more appropriate: don't wait until the last minute before the 12-month filing deadline to calculate and submit your R&D tax credit return, as this year it may not be quite as straight forward to file as in prior years.

Alison McHugh
Partner, Head of Private Client Tax Services, EY
Andrea McNamara
Director, Private Client, EY Law Ireland

The Use of Discretionary Trusts as Protective Vehicles

Introduction

Discretionary trusts are increasingly being used by individuals and families for protection purposes, whether to protect assets/capital or to protect the interests of vulnerable beneficiaries. The level of discretion afforded to trustees in the administration of a discretionary trust facilitates control by the trustees over the assets comprised in the trust fund and also provides a significant degree of flexibility. Such inherent flexibility can allow the trustees to take account of any change in circumstances, whether the change relates to the nature of the assets comprised in the trust fund or the personal circumstances of one or more of the beneficiaries. The combined features of facilitating control over assets and allowing a significant degree of flexibility mean that discretionary trusts can be very effective tools to protect both capital and individuals.

Before establishing a discretionary trust, it is essential that comprehensive legal and tax advice is obtained to ensure that the structure is suitable to satisfy the wishes of the settlor in light of the legal and taxation implications that

will arise on establishment and throughout the life cycle of the trust.

Primary Features of a Discretionary Trust

Discretionary trusts are usually established with a class of beneficiaries. Such beneficiaries do not have a fixed entitlement to a specific share or interest in the trust fund but are entitled merely to be considered for distributions by the trustees and may have a hope or an expectation that the trustees will exercise their discretion in their favour. As beneficiaries do not have a fixed interest in the trust fund, settling assets on a discretionary trust postpones a capital acquisitions tax (CAT) liability arising for the beneficiaries until such time as they receive a distribution from the trust fund, which can assist in terms of providing time to raise liquidity to pay CAT if the trust fund initially comprises illiquid assets. For the same reason, assets in a discretionary trust are not taken into account in means testing for State benefits of the beneficiaries of the trust, which is an important consideration when establishing a trust for an incapacitated or vulnerable beneficiary.

Although trustees of discretionary trusts have discretion in relation to the administration of the trust fund, this discretion is qualified by a non-binding letter of wishes that typically accompanies the trust deed and sets out the detailed wishes of the settlor in relation to the administration of the trust fund.

Asset Protection

As outlined above, there has been an increase in the use of discretionary trusts for asset-protection purposes in recent years. This is particularly the case where families have built up wealth, which may comprise both family business and investment assets. When such families are considering succession planning, asset protection tends to be uppermost in their minds, and although devising an estate and succession plan that is tax-efficient remains a priority, it is not necessarily the primary driver of decisions relating to the transfer of wealth to the next generation. There is now often an acknowledgment among families that future generations do not necessarily need to hold assets in their own name; rather, they need the ability to access the value derived from those assets. Accordingly, many families in these circumstances are now considering the use of a discretionary trust as a collective family holding structure to hold assets in a protected structure for future generations.

Tax efficiency is, however, also an important consideration. On a direct transfer of assets to the next generation, an immediate charge to CAT at a rate of 33% will arise (if tax-free thresholds have been fully utilised and no reliefs/exemptions from CAT apply). In the case of illiquid wealth such as property portfolios or a family business, this may result in the forced sale of assets to fund the CAT liability. Alternatively, family members may need to leverage the assets to fund their CAT liability, which can result in a significant cost burden for them. In contrast, if assets pass to a discretionary trust rather than directly to the next generation, any potential liability to inheritance tax can be managed, as family members pay CAT only to the extent that they access value from the trust. Wealth can therefore be transferred in a more measured way.

Discretionary trusts can also be useful in the context of generation skipping. It may be the case that by the time assets pass to children, they have accumulated wealth in their own right. Accordingly, they may not have a requirement for the full amount of the value that they stand to inherit from their parents. If such children subsequently pass surplus inherited wealth on to their own children (i.e. the grandchildren), a further liability to CAT at 33% arises, resulting in an overall effective tax rate of 55%. By way of example, assets valued at €10m in the grandparents' name would potentially end up being reduced to €4.5m by the time that such assets pass into the hands of their grandchildren.

As a discretionary trust postpones a charge to CAT arising until such time as assets are appointed out of the trust to beneficiaries, this results in a greater level of capital value available for reinvestment. The trust can be used as a collective investment vehicle for the efficient management of family wealth and can potentially open up a wider range of investment opportunities due to a greater power of collective investment. Where the next generation is not in a position to manage family wealth, the use of a collective investment vehicle can also support the use of a professional investment management structure (through the trustees).

It is also worth noting that investment income earned within a discretionary trust is subject to income tax at a maximum rate of 40%, as opposed to a maximum rate of 55% which would be payable if such assets were held personally by the beneficiaries. Investment income can accumulate within the trust, and the trustees can make periodic capital distributions to the beneficiaries at their discretion.

Protection of Individuals

Discretionary trusts also offer a very effective means of protecting vulnerable family members, which could include not only individuals who are mentally or physically incapacitated but also individuals who suffer with addiction issues, have special needs or are vulnerable and open to being easily influenced. In addition, if both parents were to pass away while their children are young and do not have the maturity to manage a large inheritance, a discretionary trust can be used to postpone such children's inheritance until such time as the trustees determine that they have the required maturity to manage the assets.

Essentially, a discretionary trust allows trustees to step into the shoes of the parents after their death and to protect the assets comprised in the trust fund for the benefit of the beneficiaries. Accordingly, having a detailed letter of wishes from the settlor that provides guidance to the trustees on how the settlor wishes for the trust to be administered can be extremely helpful to trustees in carrying out their role.

Where a discretionary trust has been established for an individual who lacks capacity or has limited capacity, the trustees can utilise the trust fund to ensure that all of the needs of the beneficiary are fully catered for throughout their lifetime, to include discharging all living expenses and any medical and care costs. If parents also wish to establish a discretionary trust for other children, who do not fall into the category of incapacitated or improvident individuals, it is advisable that a separate discretionary trust be established for the exclusive benefit of their incapacitated/improvident child, to ensure that such a trust would qualify for an exemption from discretionary trust tax, as outlined below.

Other circumstances in which a discretionary trust could offer protection for individuals are in cases of financial difficulty or potential marital breakdown. Where parents wish to transfer assets to an adult child (whether during their lifetime or on death) and the child has ongoing financial issues, the parents could instead consider transferring the assets to a discretionary trust for the benefit of that child and potentially that child's children until such time as the financial issues are resolved, or if they are not resolved, the assets could pass instead from the trust to the grandchildren and "generation skip", if appropriate.

Similarly, if parents wish to transfer assets to an adult child but there is a risk of marital breakdown, the assets could be held in a discretionary trust for that child's benefit until such time as their marital issues are resolved. As the child does not have any fixed entitlement to the assets held in the discretionary trust, the assets comprised in the trust fund may not form part of the "pot" in the context of any settlement arrangements made as part of separation or divorce proceedings. However, although a discretionary trust offers a level of protection in these circumstances, it is important to note the wide-ranging powers of

the family law courts in separation and divorce matters. Thus, discretionary trusts do not act as a complete barrier in this regard.

Exemptions from CAT

There are a number of exemptions from CAT available under the Capital Acquisitions Tax Consolidation Act 2003 (CATCA 2003) in respect of distributions from discretionary trusts to incapacitated and improvident beneficiaries.

Section 82 CATCA 2003 provides for an exemption from CAT in respect of provision made to a child that is for the purpose of the support, maintenance or education of the child, provided that the provision made is normal expenditure and reasonable in the context of the parents' financial circumstances. This section also applies to distributions made from a discretionary trust to an incapacitated child (whether physically or mentally incapacitated). Section 82(2) provides for an exemption in this regard in respect of distributions from a trust during the lifetime of the parents, and s82(4) provides for a similar exemption in respect of such distributions made after the death of both parents. Where a child is incapacitated, the exemptions can apply for the lifetime of the child and there is no applicable age limit.

Section 84 CATCA 2003 provides for an exemption from CAT in respect of benefits that are taken exclusively for the purpose of discharging qualifying medical expenses (which include the cost of medical care and the cost of maintenance in respect of such medical care) of a permanently incapacitated individual. To qualify for this exemption, it is necessary to satisfy Revenue that the benefit will be applied for this purpose. Accordingly, it is prudent to set out the intention of the settlor in this regard in a detailed letter of wishes, which could be provided to Revenue, if required.

Discretionary Trust Tax

Discretionary trusts are subject to an additional tax charge called discretionary trust tax (DTT). DTT comprises an initial once-off charge of 6% that applies to the value of all assets in the trust, together with a 1% annual charge, which arises on 31 December each year beginning in the year after the 6% initial charge arose. The initial 6% charge reduces to 3% if all of the assets in the trust are appointed out to one or more of the beneficiaries within five years of the date on which the initial 6% charge arose.

DTT cannot arise until the later of the date of death of the settlor and when the youngest principal object (the spouse, child or child of a predeceased child of the settlor) reaches the age of 21. Accordingly, in the case of *inter vivos* discretionary trusts, DTT cannot arise until the death of the settlor. With regard to discretionary trusts where the settlor is deceased, DTT will not arise until the youngest child of the settlor (where the settlor's children are included as beneficiaries) reaches the age of 21.

Section 17 CATCA 2003 provides for a number of exemptions from DTT. In particular, it is noted that there is an exemption from DTT in respect of a discretionary trust that is established exclusively for the benefit of one or more incapacitated (whether physically or mentally) or improvident individuals who, as a result of their incapacitation or improvidence, are incapable of managing their own affairs. Revenue guidance indicates that individuals who could fall within the category of being "improvident" include those suffering from an addiction, those who are easily influenced and are vulnerable to being financially exploited, and spendthrifts. However, it is necessary to satisfy Revenue that, as a result of the particular individual's improvidence, they are incapable of managing their affairs. It would therefore be prudent to set out details of the beneficiary's circumstances and the wishes of the settlor in relation to their reasons for establishing the discretionary trust for such a beneficiary in the letter of wishes accompanying the discretionary trust.

Notwithstanding the charge to DTT in respect of trusts established for asset-protection purposes, individuals are often willing to incur this charge, as they view it as the

"cost" of protecting the assets on a long-term basis. As outlined above, where assets pass to beneficiaries directly rather than to a discretionary trust, the value of the entirety of the assets will be depleted by an upfront CAT charge of 33% (again, assuming tax-free thresholds have been fully utilised and no reliefs/exemptions from CAT apply) versus an initial upfront DTT charge of 6%. Accordingly, it can take significantly longer for assets to regain their original capital value after a direct transfer to beneficiaries.

In respect of the 1% annual charge to DTT, it should generally be possible to fund this charge out of income generated by the trust, assuming that the trust is generating an income yield of at least 1% per annum. Thus, the capital value of the trust should not be impacted.

Central Register of Beneficial Ownership of Trusts

Where the trustees of a discretionary trust are resident in Ireland or the trust is otherwise administered in Ireland, such a trust must be registered on the Central Register of Beneficial Ownership of Trusts (CRBOT) within six months of its establishment. The categories of individuals who fall within the meaning of a "beneficial owner" for the purposes of the CRBOT in respect of a discretionary trust are quite broad and include the settlor(s), trustees, protector(s), beneficiaries and any other person exercising control over the trust. The information that must be included on the register includes the name, address, date of birth, PPS number and nationality of all "beneficial owners". (See also article by Aileen Keogan "Central Register of Beneficial Ownership of Trusts: The Irish UBO Register", *Irish Tax Review*, Issue 1, 2022.

Conclusion

It is clear that there are numerous reasons why the use of a discretionary trust may be appropriate in circumstances where protection is a primary objective of the settlor. In terms of protecting assets, a discretionary trust can enable family assets to be maintained intact and not subdivided among children and other heirs. Furthermore, as assets within the trust are sheltered from CAT until such time as they are distributed to beneficiaries, this also has the effect of preserving and enhancing value, as the capital that would otherwise have been paid out in CAT can be invested to achieve a return.

The ability to protect incapacitated or vulnerable individuals through a discretionary trust should also not be underestimated. Discretionary trusts not only allow parents to ensure that their children's needs will be taken care of after their deaths but also provide trustees with the flexibility required to deal with changing circumstances and any unforeseen events that may occur over time.

Dearbhla M. Cunningham
Barrister-at-Law

Errors of Law and Errors of Fact and the Standard of Review by the High Court

Introduction

Although every taxpayer who appeals to the Tax Appeals Commission (TAC) hopes that the Commission will find in their favour, that does not always happen. This article is concerned with the errors that may be reviewed by the High Court and the standard of review applied to them in an appeal against an unfavourable determination of the TAC by way of case stated. There are other jurisdictional and procedural aspects to these appeals, which are outside the scope of this article.

Appeal of TAC Determination by Way of Case Stated

A party who is dissatisfied with a determination of the Appeal Commissioners has a statutory right to look for the opinion

of the High Court on a point of law. The dissatisfied taxpayer can do this by giving notice in writing requiring the Appeal Commissioners to state and sign a case, referred to as a "case stated", for the opinion of the High Court (s949AP(2) TCA 1997). It is also open to the Revenue Commissioners to appeal a determination of the TAC by way of case stated, in which case the taxpayer (who is, presumably, satisfied with the determination) would be responding to the appeal in the High Court.

An appeal by way of case stated is a limited form of appeal on a point of law to the High Court (and from there to the Court of Appeal, as appropriate). It is now the only way to appeal an unfavourable determination of the TAC. Under the old system, the taxpayer had the option of a *de novo* hearing before a judge of the Circuit Court, but that right of appeal was not carried over when the TAC was established. Therefore the dissatisfied taxpayer has no right to a full rehearing before a judge of the Circuit Court, so there is no second chance before such a judge.

In contrast, the High Court does not make findings of fact on appeal. Rather, the TAC is the sole arbiter of fact, and it is for the Commissioner to make and record material findings of fact. The role of the High Court on appeal by way of case stated is to review the impugned determination and answer the questions of law that are put to it for its opinion. In consequence, what happens in the TAC is now more important than ever.

In a notice of appeal the prospective appellant is required to state in what particular respect it is dissatisfied with the determination and state in precise terms in what particular respect the determination is alleged to be erroneous on a point of law (s949AP(3) TCA 1997). So it is for the prospective appellant to identify the error or errors of law and the point or points of law for the High Court. The first question to deal with is in what way it is considered that the Appeal Commissioner fell into error in reaching the determination. The error must translate into a point of law for the High Court. The matter is put before the High Court by way of seeking its opinion on that question of law. So what happens if there is an error of fact – is an error of fact reviewable?

The jurisdiction of the High Court regarding a case stated is a statutory one under the Taxes Acts. It is set out in s949AR TCA 1997, which provides that the High Court shall hear and determine a question of law arising on a case stated. When the High Court has determined the question of law, it is obliged to reverse, affirm or amend the determination of the Appeal Commissioners and to remit the matter with its opinion to the Appeal Commissioners, and it may make any such other order as it thinks just. It also has the power, *inter alia*, to make an order in relation to costs in line with the general rules on costs, which contrasts with the position at the Appeal Commissioners, whereby each party carries its own costs.

The jurisdiction exercised by the High Court regarding a case stated is a limited one, whereby the High Court hears and determines **a question of law arising on a case stated**. In other words, the role of the High Court is to address the questions in the case stated, and it does not go outside that. An obvious example of a question of law arising in a case stated would be the correct statutory interpretation of a particular provision of tax legislation concerned in the determination of the Appeal Commissioner. If the Appeal Commissioner is considered to have erred in their interpretation of a particular statutory provision, this is a question of law for the High Court. If there is found on appeal to be an error of law, then the court must set the TAC determination aside.

It would seem to follow, at first glance, that this is a narrow form of appeal that does not provide for review of errors of fact. However, there are certain errors of fact that may be regarded as errors of law and therefore come within the jurisdiction of the High Court in a case stated. In that way, the scope of appeal is somewhat broader than it might appear. According to

Kenny J in *Mara v Hummingbird Ltd* [1982] ILRM 421: "The line between questions of law and those of fact can rarely be drawn firmly so as to separate one from the other."

Case Law

The scope and extent of the case stated appeal to review findings of fact made by the Appeal Commissioners are set out in *Hummingbird* and *Ó Culachain v McMullan Brothers Ltd* [1995] 2 IR 217 and were approved in *Inspector of Taxes v Cablelink Limited* [2003] 4 IR 510. Although this approach is well established, its application in practice is more complicated when it comes to reviewing findings of fact or mixed questions of law and fact.

In Hummingbird Kenny J set out the approach to a case stated from the Appeal Commissioners at p. 426:

> "A case stated consists in part of **findings on questions of primary fact**, e.g. with what intention did the taxpayers purchase the Baggot Street premises. These findings on primary facts **should not be set aside by the courts unless there was no evidence whatever to support them**. The commissioner then goes on in the case stated to give his **conclusions or inferences from these primary facts**. These are **mixed questions of fact and law** and the court should approach these in a different way. If they are based on the **interpretation of documents**, the court should **reverse them if they are incorrect** for it is in as good a position to determine the meaning of documents as is the commissioner. If the **conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside** his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his **conclusions show that he has adopted a wrong view of the law, they should be set aside**. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which were made from the primary facts were ones that no reasonable commissioner could draw. The ways of conducting business have become very complex and the answer to the question whether a **transaction was an adventure in the nature of trade nearly always depends on the importance which the judge or commissioner attaches to some facts**. He will have evidence some of which supports the conclusion that the transaction under investigation was an adventure in the nature of trade and he will have some which points to the opposite conclusion. These are essentially **matters of degree** and his conclusions **should not be disturbed** (even if the court does not agree with them, for we are not retrying the case) **unless they are such that a reasonable commissioner could not draw them or they are based on a mistaken view of the law** [emphasis added]."

This passage was considered by Blayney J in *McMullan Brothers, where he* extracted the following principles (at pp 222 and 223):

> "1. **Findings of primary fact** by the judge should not be disturbed unless there is **no evidence** to support them.
> 2. **Inferences** from primary facts are **mixed** questions of fact and law.
> 3. If the judge's conclusions show that he has adopted a **wrong view of the law**, they should be **set aside**.
> 4. If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which **no reasonable judge could draw**.
> 5. Some evidence will point to one conclusion, other evidence to the opposite: these are essentially **matters of degree** and the judge's conclusions should not be disturbed (even if the court does not agree with them, for

> we are not retrying the case) **unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law** [emphasis added]."

Therefore, a finding of primary fact by the Appeal Commissioners can be set aside by the High Court only where there is no evidence to support the fact. Inferences or conclusions from primary facts made by the Appeal Commissioners can be set aside only where they are ones that no reasonable Commissioner could draw. Matters of degree in terms of weighing up the evidence are left to the Appeal Commissioners unless the conclusions therefrom are ones that no reasonable Commissioner could draw. So the High Court is slow to interfere unless there is a clear error of law.

The characterisation of the errors is very important but often less than straightforward in practice. Some recent judicial consideration of the nature of the errors before the court and the standard of review to apply to the case stated is outlined below by way of examples of the High Court's approach to the types of errors of fact that come before it.

In *McNamara v Revenue Commissioners* [2023] IEHC 15 the primary issue for determination by the Commissioner when hearing the appeal was whether certain land was "development land" for CGT purposes. On appeal by the taxpayer, the issue for the High Court was the appropriate standard of review to apply to this question. This turned on whether the question concerned a primary finding of fact or an inference or conclusion from the primary findings of fact.

To determine whether the land was "development land" for CGT purposes, the Commissioner had to compare the sale price and the current-use value (CUV) of the land at the date of disposal. If the sale price exceeded the CUV, the land could be determined to be development land. The distinction between whether it was a primary finding or was an inference dictated the appropriate standard of review for the High Court.

Mr Justice Barr held that, in determining the question, the Commissioner was determining a **primary question of fact**. It followed that the determination could be set aside by the court only if there was **no evidence** to support it. The court went on to conclude that there was ample evidence before the TAC on which to make its determination.

The court went on to say that even if it had erred in holding that the determination made by the Commissioner was a finding of primary fact and it was in fact **a mixed finding of fact and law**, that did not aid the appellant in this appeal. The court noted that the test to apply was that if the conclusions from the primary facts are ones that no reasonable Commissioner could draw, the court could then set aside the findings on the ground that the TAC must be assumed to have misdirected itself regarding the law or made a mistake in reasoning. If the conclusions show that the TAC adopted a wrong view of the law, they should be set aside. If they are not based on a mistaken view of the law, or a wrong interpretation of documents, **they should not be set aside unless the inferences made from the primary facts are ones that no reasonable Commissioner could draw**. The court concluded that the TAC was entitled to reach the conclusions that it did. It was satisfied that the inferences and findings that the Commissioner made from the primary facts were findings that any reasonable Commissioner could reach. So the court considered it under both standards of review and dismissed the appeal.

In *Thornton v Revenue Commissioners* [2022] IEHC 396 Ms Justice Egan considered the correct approach to be that set out in *McMullan*. This case concerned an investment syndicate – one of the Liberty Syndicates – and one of the questions that arose for determination was whether the syndicate was trading. The appellant argued that, in applying the law to the facts, the TAC had erred in law in its approach to the question of whether the

appellant was carrying on a trade – specifically, the correct approach to the taxpayer's motivation in carrying on the activity.

The court held that the question of whether the appellant was carrying on a trade is a mixed question of fact and law. The assessment of the trading issue is, to a large extent, a matter of degree and judgement, which has been vested by the legislature in the TAC. The High Court rejected the appellant's argument that, although motive generally is not irrelevant, the TAC was entitled to consider motive only to the extent that such consideration did not involve it in assessing whether the relevant motive was to obtain a tax advantage. The court said that neither the Commissioner nor the court needs to be blind to fiscal considerations. The Commissioner was entitled to consider all identifiable motives and purposes, including the generation of a tax advantage. In fact, the Commissioner determined that the generation of a tax advantage was the **only** purpose that he was able to discern, that the appellant had failed to identify any commercial rationale for the syndicate transactions and that the evidence did not support the claim that there was a profit motive. There were a number of other grounds of appeal.

There are very good reasons for the limited jurisdiction exercised by the High Court on appeal by way of case stated. These reasons inform the standard of review applied to errors of fact in a case stated. The reasons for the high threshold for review in a case stated include the principle of curial deference that is afforded by the High Court to specialist tribunals. Furthermore, the TAC is the sole arbiter of fact and, as such, it is in the unique position of having an opportunity to assess the witnesses and their demeanour. Aligned with this is that, in general, the burden of proof falls on the appellant to prove its case before the Appeal Commissioners.

In *Byrne v Revenue Commissioners* [2021] IEHC 262 Mr Justice Twomey recently considered the test, the standard of review and the reasons for the high threshold. The court was considering the proper approach to the question of law – namely, whether no reasonable Commissioner could have drawn the same conclusion as the Commissioner did, that the appellant should have known about VAT fraud on the part of his suppliers. In so doing, Twomey J referred to curial deference and the high threshold facing an appellant in a case stated under TCA 1997 in meeting the condition that the conclusion drawn by the Commissioner was one that no reasonable Commissioner could draw, so as to amount to an error on a point of law. The court considered the standard of review and, citing Kenny J in *Hummingbird*, summarised the approach of the High Court in the following terms (at para. 28):

> "The High Court cannot disturb the findings on primary fact of the Commissioner unless there is no evidence whatever to support them…
> In relation to conclusions from primary facts which therefore involve mixed questions of fact and law, the High Court can only set aside the Commissioner's conclusion if they are ones which no reasonable commissioner could draw."

Twomey J emphasised that on appeal by way of case stated the court is dealing with an appeal on a point of law and therefore the court is not to determine whether the Commissioner was right or wrong as it is not the function of this court to replace the view of the Commissioner with this court's view. It was clear from *Hummingbird* that the case stated jurisdiction is much more restrictive. For the appellant to be successful, the court must conclude that the Commissioner has reached a conclusion on the evidence that **no reasonable Commissioner could reach**.

The court observed that this high threshold arises because of the well-established and uncontroversial "*curial deference*" that the courts grant to specialist statutory bodies that have been set up by the Oireachtas with expertise, in this case, in tax matters. The court cited the statement of O'Connor J *in Karshan (Midlands) Ltd v Revenue Commissioners* [2019]

IEHC 894 (para. 7) that "[i]n this appeal the Court is restricted to identifying the law and applies a deference to the Commissioner who has experience in determining facts with an eye to the applicable law" and his description (para. 9) of the case stated jurisdiction as one that *"***is inherently deferential to the fact finder***"*.

The court went on to observe that another reason for this high threshold is that, unlike the High Court, the Commissioner is uniquely placed to evaluate all of the evidence – having the benefit of seeing and observing the witnesses' demeanour and hearing the evidence. Accordingly, the Commissioner is the person who is best positioned to determine the appropriate weight to be given to the evidence.

The high threshold facing an appellant in this position is also highlighted by the fact that the burden of proof is on a taxpayer to establish that he is entitled to, in this case, the input VAT credits that he seeks, and not on Revenue to establish that it is entitled to disallow the credit sought. The court cited the well-known judgment of Mr Justice Charlton in *Menolly Homes Limited v The Appeal Commissioners & Anor* [2010] IEHC 49:

> "The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable."

The court also noted the observations of Mr Justice Sanfey in *O'Sullivan v Revenue Commissioners* [2021] IEHC 118, at para. 90, that there is good reason why the taxpayer has this heavy onus:

> "The burden of proof is on the taxpayer to prove his case, and for good reason. **Knowledge of the facts relevant to the assessment**, and retention of appropriate documentation to corroborate the taxpayer's position, **are solely matters for the taxpayer**. The appellant knew, from the moment he submitted his return, that it could be challenged by Revenue and he would have to justify his position."

In dealing with the question before the court, it considered the statement of Blayney J in the Supreme Court decision *of McMullan Brothers* to be particularly apt to the circumstances of the current case. In that case, he adopted the *Hummingbird* test and added the statement that:

> "Some evidence will point to one conclusion, other evidence to the opposite: *these are essentially matters of degree* and the judge's conclusions should not be disturbed (even if the court does not agree with them, for we are not retrying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law."

The test for determining whether there has been an error on a point of law is whether no reasonable Commissioner could reach the conclusion drawn. This is a significantly higher threshold than this court's concluding that the Commissioner got it wrong and, indeed, higher than a test of whether another Commissioner might reach a different conclusion. The court considered that the question in this case was essentially a matter of degree, because although a different Commissioner might well have taken a more benign view of the appellant's application for VAT input credits than the Commissioner, the court could not conclude that no reasonable Commissioner would have drawn the conclusions reached by the Commissioner. In concluding, Twomey J emphasised that there was a very high threshold for review, and he went on to emphasise that there was no finding by the Commissioner that Mr Byrne had actual knowledge of the VAT fraud, and similarly, there is no finding by this court to that effect. The court dismissed the appeal.

Barr J in *McNamara* accepted the *Byrne* approach as the correct one, tempering the dicta on curial deference a little in light of the dicta of Mr Justice Murray when delivering the judgment of the Court of Appeal in *Stanberry Investments Ltd v Commissioner of Valuation* [2020] IECA 33, where he dealt with the issue of courts showing curial deference to decisions of statutory tribunals at paras 46–52. He stated as follows at para. 49:

> "The Commissioner says in this case, as parties in a similar position frequently do, that the Court should be 'slow to interfere with the decisions of expert administrative Tribunals'. Without significant qualification, this statement is apt to mislead. Administrative tribunals, expert or otherwise, obtain no deference on pure issues of law (see *Millar v Financial Services Ombudsman* [2015] IECA 126 [2015] 2 IR 156 at – in particular – para. 62). The remarks of Kelly J in *Premier Periclase Limited v Commissioner of Valuation* [1999] IEHC 8 make it clear that errors of fact simpliciter do not present any issue of curial deference either; '[w]hen conclusions are based on an identifiable error of law or an unsustainable finding of fact by a Tribunal, such conclusions must be corrected' (at para. 25). A similar statement of principle appears in *Nangles Nurser[ies] v Commissioner of Valuation* [2008] IEHC 73 at para. 25. It follows that in both judicial review proceedings, and appeals on a point of law, the scope for 'deference' is limited."

The judge summarised his conclusions at para. 52 as follows:

> "Deference means that in those areas touching on the Tribunal's expertise, the Court should be slow to interfere with the Tribunal's reasoning. It does not mean that where the Tribunal's reasoning is unclear so that there are differing possible interpretations of its decision the Court must simply assume that it was correct in the conclusion it reached. As Charlton J said in *EMI Records v Data Protection Commissioner* at para. 22, 'curial deference cannot possibly arise where by statute reasons for a decision are required but none are given.' 'Curial deference' is thus properly understood as depending on the Tribunal having provided a properly reasoned decision, not as affording a mechanism for compensating where the decision is not so reasoned".

Conclusion

The High Court has a limited jurisdiction, which is one to review questions of law arising on a case stated. Errors of fact may be reviewable. If there is an error of law or an unsustainable finding of fact, the High Court will set it aside. Matters of judgement or degree are matters that are for the TAC, and the High Court will not interfere to set aside the TAC's findings unless the conclusions are ones that no reasonable Commissioner could reach. In conclusion, questions of fact may be reviewable by the High Court, but there is a high threshold to upset them.

Gráinne Duggan
Barrister

Tax Appeals: Your Questions Answered

What Can Be Appealed to the Tax Appeals Commission?

An "appealable matter" can be appealed to the Tax Appeals Commission (TAC). Section 949A of the Taxes Consolidation Act 1997 (TCA 1997) defines an "appealable matter" as any matter in respect of which an appeal is authorised by the Acts. The "Acts" are defined as the income tax acts, the corporation tax acts, the Stamp Duties Consolidation Act 1999, the Capital Acquisitions Tax Consolidation Act 2003, the Value-Added Tax Consolidation Act 2010 etc.

Such matters include the appealing of a notice of amended assessment raised by the Revenue Commissioners (s959AK TCA 1997), a refusal to accept a claim for a repayment (s865 TCA 1997), a finding that an expression of doubt is not genuine (s959P TCA 1997) and the making of an enquiry out of time (s959AJ TCA 1997). Generally, a taxpayer requires a formal decision by Revenue before an appeal can be brought to the TAC. This will usually be in the form of a notice of assessment or a notice of amended assessment, whereby Revenue will have set out what it says is due and owing by

the taxpayer. A decision can also be in the form of a formal determination by Revenue whereby, for example, it is refusing a claim for a refund (s865 TCA 1997). (See also article by Dearbhla Cunningham "Errors of Law and Errors of Fact and the Standard of Review by the High Court", in this issue).

What Is Not Appealable to the TAC?

Until a decision is made by Revenue, there is no right of appeal to the TAC. It may be that Revenue has formed a view on a matter, and that there is correspondence to that effect, but unless the decision is one for which a right of appeal is provided by "the Acts", it cannot be appealed. Revenue is, in effect, obliged to inform taxpayers of their right of appeal,[1] and reference to the making of an appeal will usually be made where a decision has been taken by Revenue. This should be an indicator that it has issued a determination for the purposes of initiating an appeal. However, if the position remains unclear, specific confirmation should be sought from Revenue of whether its communication represents a final determination.

Complaints about individual behaviour or the manner in which an audit has been conducted are not an "appealable matter". Recourse should be had to the "Acts" (as defined by s949A TCA 1997) to check whether the matter is appealable to the TAC.

Certain matters are simply not appealable to the TAC. The imposition of tax-geared penalties by Revenue is not appealable to the TAC and must be disputed in the courts.

When Is It Appropriate To Bring a Judicial Review?

A judicial review arises when there is an issue about the manner in which the decision was made, rather than the fact of the decision itself. In a judicial review the High Court will consider whether Revenue acted lawfully in acting the way that it did. Examples of successful judicial reviews include the recent case of *Arderin Distillery Limited v The Revenue Commissioners* [2022] IEHC 267, whereby the taxpayer successfully argued that it had a legitimate expectation that it was entitled to rely on a representation from Revenue that it was entitled to relief from excise duty when producing hand sanitiser from alcohol during the Covid-19 pandemic.

Where a taxpayer wishes to bring a judicial review, strict time limits apply. Where a taxpayer is seeking an order of certiorari (quashing a decision) or an order of mandamus (compelling certain action), a time limit of three months from the date of the act or decision applies. It is very difficult to have this period of time extended.

Taxpayers often choose to bring a tax appeal when they should in fact be bringing a judicial review. It is important to consider whether a judicial review is the more appropriate remedy at the time when the assessment or determination arises, given the strict time limits that apply.

Are There Any Other Remedies Available?

Revenue has an internal complaint and review procedure[2], which can be initiated in tandem with or instead of a tax appeal. An internal review is appropriate where a taxpayer has a particular issue with how a Revenue official has dealt with their affairs. A complaint is first considered by the Revenue office where the case is managed. If the issue is not resolved at that stage, a local review is carried out by a manager at principal officer level. If the taxpayer is unhappy with that outcome, it can be appealed to an external reviewer.

1 *Keogh v Criminal Assets Bureau and Ors* [2004] 2 IR 159.

2 See Revenue Complaint and Review Procedures Leaflet – CS4.

What Is the Time Limit for Bringing an Appeal to the TAC?

An appeal must usually be brought within 30 days, and the time limit will usually be set out in the specific provision that applies to the appeal, rather than in Part 40A TCA 1997 itself. If an appeal is being made after the prescribed time within which to do so, the appeal must state the "reason the appellant was prevented from making the appeal within the period specified by the Acts for doing so" (s949I(4) TCA 1997).

Can the Time Limits Be Extended?

Section 949O TCA 1997 provides for late appeals. Firstly, an appellant must satisfy the Appeal Commissioners that they were prevented by "absence, sickness or other reasonable cause" from making the appeal within the statutory time period and must make the appeal without "unreasonable delay" (s949O(1)). In *Tobin v Criminal Assets Bureau* [2017] IEHC 825 the High Court held that "reasonable cause" did not need to be read ejusdem generis with the terms "absence" or "sickness", which means that the meaning of "other reasonable cause" does not have to relate to "absence" or "sickness".

The appellant will also have to comply with any preconditions for the making of the appeal, which are usually making the return and paying the tax that the taxpayer says is due in accordance with the return filed by the taxpayer.

An appellant must file any return that Revenue says is due and pay the tax that the appellant says is due, if any, and any interest arising thereon. However, if an appeal is made outside of the 12-month time limit, the taxpayer must pay the tax as assessed by Revenue and the interest arising thereon (s949O(2)). Furthermore, if enforcement proceedings have been initiated by Revenue, a taxpayer will not be permitted to bring a late appeal until those proceedings have concluded (s949P).

Are There Any Conditions To Be Met before a Tax Appeal Can Be Brought?

Section 949I(3) TCA 1997 states:

> *"Where the provisions of the Acts relevant to the appeal concerned require conditions specified in those provisions to be satisfied before an appeal may be made, a notice of appeal shall state whether those conditions have been satisfied"*

The most usual condition that a taxpayer may have to comply with is to file a return, if they have not already done so, and to pay the tax that the taxpayer asserts is due on that return. This can often be a point of contention where a taxpayer is saying that no tax is due at all and there is a dispute regarding whether the taxpayer should come within the charge to tax at all. The Court of Appeal has held in *J.S.S. and Ors v Tax Appeal Commission* [2020] IECA 73 that it may be appropriate for an Appeal Commissioner to engage in a preliminary enquiry into whether a taxpayer is within the charge to tax in order to establish whether the taxpayer is required to file a return for the purpose of s949J(1)(b).

Section 949J goes on to state that an appeal will be a valid appeal only where the conditions that are required to be satisfied before an appeal is made are satisfied before it is made. Revenue has the right to object to the admission of an appeal if it believes that it is not valid (s949L); and if the Appeal Commissioners are satisfied that an appeal is not valid, they must declare that their decision is final (s949N(3)).

What Should an Appellant Put in the Grounds of Appeal?

Section 949I sets out what must be included in a notice of appeal and provides, in particular, at s949I(6) that:

> *"[a] party shall not be entitled to rely, during the proceedings, on any ground of appeal that is not specified in the notice of appeal unless the Appeal Commissioners are satisfied that the ground could not reasonably have been stated in the notice".*

Accordingly, it is imperative that due consideration is given to the grounds of appeal on which the appellant intends to rely – especially if the appellant is represented, because an appellant with appropriate representation may find it difficult to convince an Appeal Commissioner that a certain ground of appeal "could not reasonably have been stated in the notice" at the time of completing the notice.

Always check that the assessment has been raised in time. Although it is a four-year time limit, in effect it is usually almost five years, as it is four years from the end of the year in which the return is due.

Section 949I(2)(d) provides that the notice of appeal should specify "the grounds for the appeal in sufficient detail for the Appeal Commissioners to be able to understand those grounds".

What Is a Statement of Case?

The statement of case was introduced to enable the Appeal Commissioners to decide on the appropriate way to conduct the proceedings.[3] Section 949Q TCA 1997 sets out what it should contain and broadly, it should be an outline of the issues between the parties. It is important to highlight that failure to comply with any direction from an Appeal Commissioner may result in the appeal being dismissed in accordance with s949AV TCA 1997.

What Is an Outline of Argument?

This is an outline of the arguments or submissions that a party will make under appeal. Although it should reference everything that a party wishes to refer to at the appeal, a party is not precluded from making an argument that is not included in its outline of argument (subject to such an argument being within a ground of appeal, as outlined above).

What Is a Case Management Conference?

This is a preliminary hearing that can take place at the direction of the Appeal Commissioner to manage the conduct of the proceedings (s949T TCA 1997).

What Evidence Is Required for an Appeal?

The taxpayer bears the onus of proof, and an appeal will be conducted by examination of the appellant (ss934 and 949AH TCA 1997). Section 949H permits an Appeal Commissioner to:

> *"endeavour to the best of their ability to manage and conduct proceedings in a way that will meet the reasonable expectations of members of the public (and in particular taxpayers) with regard to –*
>
> *(a) undue formality being avoided, and*
>
> *(b) a flexible approach being adopted by the Commissioners in respect of procedural matters."*

However, such flexibility has to be balanced with the parties' rights to fair procedures.

What Documents Should an Appellant Gather for the Appeal?

From the outset, once a taxpayer has decided to progress to appeal, they should begin gathering and collating all of the documentation that they believe will assist the Commissioner in understanding their case. As the taxpayer will bear the onus of proof in nearly all circumstances, except where an appeal is raised out of time, the taxpayer will be required to satisfy the Appeal

3 Explanatory Memorandum, s949Q(2) of the Finance (Tax Appeals) Bill 2015.

Commissioner that they are correct. A tax appeal proceeds on oral evidence, and an Appeal Commissioner will expect to hear a full narrative of what has occurred. Where possible, this narrative should be supported by all of the available documentation. The Appeal Commissioner will also expect to see all of the correspondence between the parties, and the parties' correspondence with the TAC should also be retained.

Can the Appellant Get Documents from Revenue? Can Revenue get Documents from the Appellant?

Section 949E TCA 1997 permits either party to an appeal to apply to an Appeal Commissioner for directions on a number of issues, including a request for documents. In particular, s949E(2)(a) provides that an Appeal Commissioner can give a direction:

> *"requiring a party to provide, to the Appeal Commissioners or to another party, documents, statements, accounts, returns, computations, explanations, particulars, records, certificates, declarations, schedules and such other items or information as they consider relevant to the adjudication of the matter under appeal".*

A taxpayer is presumed to know their own affairs, and so a taxpayer with a broad request for documents from Revenue may face difficulty in convincing an Appeal Commissioner of their need for such documents.[4] Revenue is also entitled to seek a direction from an Appeal Commissioner requiring an appellant to provide documentation. There are very few, if any, published determinations from the TAC regarding applications of this kind, such applications often taking place before the appeal hearing itself and therefore not giving rise to formal determinations. However, decisions by the First-tier Tribunal and the Upper Tribunal in the UK[5] would suggest that discovery applications may be available to both taxpayers and Revenue.

Outside of the parameters of the TAC, a taxpayer preparing their case for hearing may wish to consider making a data-protection request or a freedom-of-information request to Revenue, if appropriate to do so.

What Witnesses Should an Appellant Call?

There are generally two types of witnesses: witnesses of fact and expert witnesses. As an appellant bears the onus of convincing the Appeal Commissioner that they are correct, the appellant should call any witnesses who may assist them in explaining their case to the Appeal Commissioner. Where the appellant is an individual, the appellant themselves will usually give evidence. If the issue concerns accounting matters, the appellant's own adviser may give evidence to explain what occurred. If there are a number of parties to a transaction, it may be necessary for those parties to give evidence regarding what occurred. Ultimately, what witnesses are required will depend on the case being put forward. It is possible for witnesses to give evidence remotely, which will be particularly convenient if a witness is abroad. However, it is generally preferable for a witness to give evidence in person.

The parties will be invited to complete a statement of facts before the appeal, and this will, in effect, act as a checklist regarding what matters will need to be proven by an appellant and what will not. Where Revenue agrees with a fact, it will not have to be proven; otherwise, witnesses will have to be called to give evidence to prove that fact.

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4 *TJ v Criminal Assets Bureau* [2008] IEHC 168.

5 *Ingenious Games LLP and Ors v HMRC* [2014] UKUT 62 (TCC), [2014] STC 1416; *Janet Addo v HMRC* [2018] UKFTT 530 (TC) TC06700.

The Appeal Commissioners are flexible regarding the nature of the evidence that they can admit, and they can admit evidence "whether or not the evidence would be admissible in proceedings in a court in the State" (s949AC TCA 1997). For example, hearsay evidence is not usually admissible in court proceedings. Hearsay is where evidence is given of an out-of-court statement regarding the truth of what it asserts. An Appeal Commissioner may be able to admit hearsay evidence but, again, this would have to be balanced against the parties' rights to fair procedures.

The Appeal Commissioners have the power to summon a witness (s949AU TCA 1997).

When Is an Expert Witness Required?

A witness of fact will give evidence to the Appeal Commissioner on the particular factual matters that are relevant to the appeal. An expert witness will be required where a taxpayer wishes to provide specialist evidence to the Appeal Commissioner on a particular area with which the Appeal Commissioner would not be expected to be familiar. Expert witnesses are most often seen in appeals concerning claims for research and development tax credits, where a taxpayer will call an expert witness in support of their submission that they were carrying out qualifying research and development activities.

Matters of foreign law must be proven as a matter of fact. For example, if a taxpayer is seeking to rely on the meaning and effect of a share purchase agreement made under French law, an expert in French law will be required to give evidence as to the meaning and effect of that share purchase agreement.[6]

An expert witness cannot be an advocate for their client and must be independent.[7]

Is It Possible To Mediate a Tax Appeal?

There is no specific provision in the Acts that requires the parties to engage in mediation before the appeal. Nor are there, as there are in the Superior Courts, any possible cost consequences of refusing to participate in a mediation. However, it is always possible to try to progress a settlement between the parties, and the making of an appeal should not be the end of such efforts. Where an appeal is settled before the hearing (or, indeed, after the hearing but before the determination issues), the TAC will treat the appeal as having been dismissed (s949G TCA 1997).

Should any dispute arise after an appeal is settled, the appeal cannot be re-entered with the TAC; rather, the settlement agreement itself forms the basis of any legal remedy that the parties have against each other.

Are Tax Appeals Held in Public?

Section 949Y TCA 1997 provides that tax appeals are to be held in public, but a party can apply to have the appeal heard in private.

How Much Notice Will an Appellant Get of the Hearing Date?

The TAC will often issue a calendar of availability for both sides to complete so that a common period of availability can be found. Parties will usually be given a number of months' notice of a hearing date and rarely less than six weeks' notice, unless the parties are agreeable to a shorter period of time. The parties will also be asked to specify how long the case will take, and this is really a question for the appellant.

6 *Walsh v National Irish Bank* [2013] 1 IR 294.
7 *Duffy v McGee* [2022] IECA 254.

When Can an Appeal Be Adjourned?

A party can apply to the Appeal Commissioners to have an appeal stayed where the parties are looking to settle the matter; where a party requires more time to prepare for the hearing; where they wish for the Appeal Commissioners to make a determination on a case before them that raises a common or related issue to the appeal being adjourned; or where "in the interests of justice" the Appeal Commissioners consider it appropriate to do so (s949W TCA 1997).

Is an Oral Hearing Necessary?

The parties can elect to have an appeal determined without a hearing. This may be appropriate where the facts are not in dispute and it is solely a question of law to be determined. The appeal is determined solely on the basis of the documentation submitted to the TAC, such as the notice of appeal, statement of case and outline of argument. However, both parties have to agree to the hearing's proceeding in this way (s949U TCA 1997).

What Are Bundles?

Bundles, or booklets, is the term used to describe the collation of the documents and legal authorities that the taxpayer and Revenue will rely on in their appeal. All of the necessary documents and authorities are collated, arranged in order and put in tabbed folders with pagination, and an index is prepared. This ensures that, in the appeal itself, counsel can guide both the witnesses and the Appeal Commissioner to the relevant documents and legal authorities being relied upon. Where possible, the taxpayer and Revenue should try to agree one common book of documents and one common book of authorities.

What Happens on the Day of an Appeal?

The appellant must attend a hearing in person unless they have been specifically excused (s949AA TCA 1997). If an appellant or their agent does not appear, the appeal will be taken to have been withdrawn. The appeal will take place at the TAC's offices at Leeson Close, Dublin 2. There are a number of hearing rooms at the TAC, and the layout of these hearing rooms can be viewed on TAC's website. Although it is not as formal as a court, TAC hearings are formal in nature, with the hearing rooms laid out similarly to a court room. There are also a number of consultation rooms available, which can be booked in advance. Parties often engage stenographers, who record a written transcript of the proceedings.

How Long Does It Take for a Decision To Issue?

The Appeal Commissioner hearing the case will usually reserve their judgment at the end of the case, and a written decision will issue afterwards. The Appeal Commissioners endeavour to issue their determinations promptly, but there is no prescribed timeframe within which they are required to do so.

Will the Decision Be Published?

A report of every determination must be published by the Appeal Commissioners within 90 days of notifying the parties of the decision (s949AO TCA 1997). Where the appeal was not held in public, the decision must be redacted, and both parties will usually be invited by the Appeal Commissioners to suggest the redactions that they believe to be necessary.

Who Pays the Costs of an Appeal?

Each party to a tax appeal before the Appeal Commissioners must pay their own costs.

How Is a Decision of an Appeal Commissioner Appealed?

An appeal against a determination must be made within 42 days after the notification of the determination (s949P(3)(c) TCA 1997). An appeal can be made only on a point of law, and

it is not a rehearing of the case. The Appeal Commissioner must then draft the case stated to the High Court and send it to the parties for their comment within three months. The parties have 42 days to make any submission on the case stated (s949AQ(3)), but the Appeal Commissioner is not obliged to take these submissions into account (s949AQ(4)). Thereafter, the Appeal Commissioner has 21 days within which to complete and sign a case stated (s949AQ(6)), and the party who requested the case stated must transfer it to the High Court within 14 days (s949AQ(7)), together with all of the necessary exhibits.

What Happens in an Appeal to the High Court?

An appeal before the High Court will be held in public. It is not a rehearing of the case but a specific inquiry into whether the Appeal Commissioner made an error of law. The High Court may refer the case back to the Appeal Commissioner for a further determination.

The losing party to a case stated will be required to pay both their own costs and the costs of the winning party.

The TAC's annual report for 2022 states that in that year the Appeal Commissioners signed 16 cases stated pursuant to s949AQ TCA 1997 to enable determinations to be appealed to the High Court.[8] Appeals follow thereafter to the Court of the Appeal and the Supreme Court.

Conclusion

The TAC has recently advertised for new temporary Appeal Commissioners and stated that the *"Department of Finance intends to publish legislation amending the Finance (Tax Appeals) Act 2015 this year. The purpose of this legislation is to provide for the tiered structure of Appeal Commissioners on a legislative basis."* As tax appeals become more prevalent, and the process more regulated, taxpayers and their advisers must be prepared for each stage of the tax appeal process.

8 Tax Appeals Commission, *Annual Report 2022*, p. 27.

Mark Bradshaw
Assistant Principal, Personal Division, Revenue Commissioners

Development of the Online Special Assignee Relief Programme Portal (eSARP)

Revenue engaged with the Irish Tax Institute (ITI) on the management and administration of the Special Assignee Relief Programme (SARP) throughout 2021 and early 2022. A detailed review of the SARP process was undertaken by Revenue, taking on board feedback from members of the ITI, to develop the new online SARP portal (eSARP). The implementation of eSARP will modernise the current SARP process, making it easier for employers to meet their obligations under the Taxes Consolidation Act.

The portal is being developed in line with Revenue's commitments under its Statement of Strategy 2023 -2025 and Key Corporate Priorities 2023. These include commitments "to modernise further taxes and duties with a focus on process automation, digitalisation and personalisation of services" and to "enable our

customers to be voluntarily compliant through the provision of high-quality services".

User-friendly design

The portal is scheduled to go live on Revenue Online Service (ROS) on 1 January 2024. Employers will be able to submit the Form SARP 1A and the SARP Employer Return through the new portal.

Revenue's SARP team have worked hard to ensure the portal is as user-friendly as possible, using all lessons learned and feedback from employers and agents to drive its design. By moving the SARP forms online, employers will immediately have a suite of user-friendly features available to make the form completion and application process a lot simpler. For example:

- the forms can be partially saved prior to submission,
- there are "tooltips" throughout the forms to explain the various legislative technical terms that are used on the forms, and
- the live application status of Form SARP 1As will be available on ROS.

Revenue is also working on introducing further functionality that will allow for pre-population of the SARP Employer Return. Revenue will pre-populate an employer's SARP return with the details of all employees that have been approved for SARP in the selected filing period.

Revenue is committed to managing the safety of our customers' personal data and fulfilling our obligations under the General Data Protection Regulations (GDPR). A new ROS Agent Certificate is therefore being developed for SARP. This will allow an employer to provide access to an agent solely for the completion and management of their SARP applications and obligations, while keeping all their other information secure.

Communications and webinars

Revenue recently engaged with members of ITI on a webinar and also attended meetings with key stakeholders to announce the development of the new eSARP portal.

As the development progresses, Revenue will communicate updates directly to stakeholders on our website at www.revenue.ie. Revenue's SARP Tax and Duty Manual will be updated with information and screenshots to walk users through the form and a corresponding eBrief will be issued in due course. The SARP team are also available to speak at webinars on the new development if any external bodies are hosting webinars.

News & Moves

Addleshaw Goddard Continues Growth Strategy with Appointment of Cormac Doyle to Head up New Tax Practice

International law firm Addleshaw Goddard has announced the appointment of Cormac Doyle to head up its new Tax Practice in Ireland.

Cormac joins from accountancy firm Crowe Ireland and has more than 20 years' experience across aspects of tax, domestically and internationally. He was previously head of the tax department at EisnerAmper Ireland, after training at Deloitte. An Associate Member and CTA of the Irish Tax Institute and Fellow of Chartered Accountants Ireland, Cormac specialises in areas including: tax on corporate transactions; general corporate tax; tax planning for international corporates; employment taxes; VAT issues; and property tax matters for international and Irish investors.

(L-R) Addleshaw Goddard Head of Tax Cormac Doyle with Mark Walsh Addleshaw Goddard Head of Ireland

ByrneWallace appoints new Tax Partner and Tax Director and Head of Compliance Services

ByrneWallace has appointed **Orla Riddell** as Tax Partner and **Nadia de Wet** as Tax Director and Head of Compliance Services.

Orla is a dual qualified solicitor and Chartered Tax Adviser (CTA) specialising in corporation tax and works across a broad range of industry sectors. She has several years' experience advising clients on all aspects of taxation law, with particular expertise in the technology, pharmaceutical, property and retail sector.

Her previous experience includes working in a Big 4 practice and leading the tax function of a large multinational retailer covering all aspects of Irish tax, including corporation tax, transfer pricing and VAT.

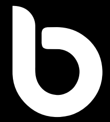
Nadia is a Chartered Tax Adviser (CTA) who has held senior leadership roles for many years within the Big 4, advising clients on corporate taxation law across multiple industries.

Her expertise includes leading multinational engagements navigating complex tax landscapes and delivering tailored solutions to meet the unique needs of each client.

(L-R) Head of Tax Anthony Smyth with Managing Partner and Head of Corporate Feargal Brennan, Tax Director and Head of Compliance Services Nadia de Wet, Tax Partner Orla Riddell and Partner and Head of Indirect Taxes Lee Squires.

Grant Thornton appoints new CEO

Grant Thornton Ireland is delighted to announce the appointment of Stephen Tennant as CEO as the firm continues on its ambitious path of growth. Stephen joined the firm in 2009, before making partner in 2012 and establishing the Financial Services Advisory (FSA) practice in 2017. He succeeds Michael McAteer, and brings with him a wealth of experience across industries and sectors. Stephen will begin his term on January 1st 2024.



Takes Talent
To Know Tax Talent

Kate Flanagan
Partner

Aideen Murphy
Partner

Aoibhín Byrne
Business Lead