2024 VOLUME 37 NUMBER 3 ISSN 1649-7899

Irish Tax Institute

Irish Tax Review

The Journal of the Irish Tax Institute www.taxinstitute.ie

ALSO IN THIS EDITION

Interview with New Institute President, Aoife Lavan

Irish Tax Institute

Tax Technical Support
Margaret Lynch
Published by/Origination by
Irish Tax Institute,
South Block, Longboat Quay, Grand Canal Harbour, Dublin 2
Tel +353 1 663 1700
taxinstitute.ie
Copy-edited by
Aisling Flood
Typeset by Deanta Global Publishing Services
Design and layout by
Deanta Global Publishing Services
Production Liaison
Judy Hutchinson

ISSN 1649-7899
2024, Volume 37, Number 3

The Institute is a company limited by guarantee without a share capital (CLG), registered number 53699.

The Institute is also a registered charity, number 20009533. EU Transparency Register No.: 08421509356-44

Contents

2024 Number 3

Messages from Irish Tax Institute

Regular Features

Feature Articles

Irish Tax Institute News

Editor's Pages

Amanda-Jayne Comyn
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 May to 31 July 2024.

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

Mark Ludlow

» In *Hanrahan v The Revenue Commissioners* [2024] IECA 113, the Court of Appeal considered a tax avoidance transaction, statutory time limit and the validity of a notice of opinion.

» In *Buckley v The Revenue Commissioners* [2024] IEHC 414, the High Court considered an appeal against a TAC determination that the taxpayer had been carrying on a trade of land development and was not entitled to claim losses against other income.

» *Arlum Limited v The Revenue Commissioners* [2024] IEHC 402 considered an appeal against a TAC determination regarding treatment of a debt as a trade receipt.

» In *Brown v The Revenue Commissions* [2024] IEHC 258, the High Court reiterated the position that TAC has no inherent jurisdiction to hear arguments of a judicial review nature.

» 59TAC2024 considered the application of transfer pricing rules.

» 62TACD2024 and 63TACD2024 examined the disposal of goodwill by a sole trader to a company and the effect of creating a directors loan account.

» 70TACD2024 considered the meaning of "debt on security".

Direct Tax Cases: Decisions from the UK Courts

Stephen Ruane and **Patrick Lawless**

UK Cases

» In *J Wardle v HMRC* [2024] UKFTT 543 (TC), the UK First-tier Tribunal (FTT) allowed an appeal against HMRC's decision to disallow entrepreneurs' relief on the basis that no trade was being carried on at the date of disposal.

» In *Centrica Overseas Holdings Ltd v HMRC* [2024] UKSC 25 the Supreme Court upheld the Court of Appeal's decision to reject an expenses-of-management claim for certain professional advisory fees when calculating profits for corporation tax purposes, under the UK equivalent of s83 TCA 1997.

» In *Burlington Loan Management DAC v HMRC* [2024] UKUT 00152 (TCC), the UK Upper Tribunal dismissed HMRC's appeal, and held that an Irish-tax-resident company was entitled to benefit from the exemption in the UK-Ireland double taxation treaty from UK withholding tax on UK-source yearly interest.

» In *HMRC v GE Financial Investments Limited* [2024] EWCA Civ. 797 the Court of Appeal reversed the decision of the Upper Tribunal that a UK-resident company was also US resident for the purposes of the UK-US double taxation treaty.

International Tax Update

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

- BEPS Developments
  - The final text of the OECD Multilateral Convention to Implement Amount A has not yet been finalised; additional guidance on Amount B has been published
  - Further administrative guidelines have been published on the implementation of Pillar Two rules
  - The OECD has opened a public consultation for a draft user guide concerning the XML schema for the Global Anti-Base Erosion (GloBE) information return
  - The G20 Finance Ministers and Central Bank Governors welcomed the progress achieved on the OECD/G20 Inclusive Framework's Two-Pillar Solution and reiterated commitment to the Two-Pillar Solution in a statement released
  - Belgium had adopted Pillar Two law
  - The Isle of Man has issued an update on implementation of Pillar Two
  - Barbados had enacted various tax reforms, including Pillar Two
  - Italy has issued a decree on Pillar Two transitional safe harbours
  - Belgium has extended the deadline for mandatory Pillar Two notification for MNEs and large domestic groups
  - Spain has approved a Bill to implement Pillar Two
  - Luxembourg has enacted legislation for implementation of Pillar Two rules
  - Italy had published a decree on Pillar Two
  - Australia has introduced Bills to implement Pillar Two
  - Canada has introduced a Digital Services Tax Act
  - India has proposed the elimination of equalisation levy to advance global tax reform
  - The UK has published guidance on determining top-up tax, entities and structures
  - Irish Revenue Commissioners have published guidance on Pillar Two
  - Fiji has become a member of the OECD/G20 Inclusive Framework on BEPS
  - Switzerland has proposed draft legislation to address position post-Pillar Two
- EU Tax Developments
  - Belgium has passed law amending investment deduction regime to support a green transition
  - Germany has published new guidance on advance pricing agreements
  - The Directorate-General for Taxation and Customs Union announced that the European Commission will evaluate Directive 2011/16/EU on administrative cooperation
  - Lithuania has issued guidelines on collection of beneficial-ownership data
- UN Tax Developments
  - UN Ad-hoc Committee for Framework Convention on International Tax Cooperation has published revised draft terms of reference
- Australia has released final guidance on aspects of hybrid mismatch rules and launched a public consultation on foreign-resident capital gains tax changes
- Hong Kong has enacted various tax measures and Budget 2024/25 has passed. Inland Revenue Department has updated the FAQs on foreign-source income exemption scheme
- In the UK, HMRC has updated guidance on Large Business Tax Strategy and has published a manual on the Creative Industries Tax Credit

VAT Cases & VAT News

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

VAT Cases

- The Court of Justice of the European Union (CJEU) delivered its judgment in the case of *P. sp. z o.o. v Dyrektor Izby Administracji Skarbowej w Warszawie, intervening party: Rzecznik Małych i Średnich Przedsiębiorców* (Case C241/23). The Polish appellate authority had refused to refund input VAT claimed by P. that was charged on invoices issued by W. and B. in respect of property contributions made by those companies to P.'s share capital. The Court was asked to provide an interpretation of Article 73 of the VAT Directive, which sets out the general rule in relation to taxable amount in the context of shares issued for in-kind property contributions.
- *SC Adient Ltd & Co. KG v Agenția Națională de Administrare Fiscală, Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice Ploiești – Administrația Județeană a Finanțelor Publice Argeș* (Case C-533/22) relates to the interpretation of Articles 44 and 192a of the VAT Directive and Articles 10, 11 and 53 of the Council Implementing Regulation (EU) No 282/2011 ("the Regulation") in the context of the existence of a fixed establishment.
- The CJEU delivered its judgment in the case of *Finanzamt T v S* (Case C184/23), where it was required to provide an interpretation of Article 2(1) and the second sub-paragraph of Article 4(4) of the Sixth Directive (by virtue of the date of the facts at issue, the Sixth VAT Directive is the relevant legislative basis.
- In *Biedrība 'Latvijas Informācijas un komunikācijas tehnoloģijas asociācija' ("the Association") v Valsts ieņēmumu dienests* (Case C87/23), the Court examined the Latvian Tax Authority refusal to allow Biedrība to deduct input VAT in respect of invoices sent to it by sub-contractors providing it with training services.

Accounting Developments of Interest

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

Legal Monitor

Nicola Corrigan 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: Autumn 2024

Tim Duggan and **Caitriona Sweeney** explain what artificial intelligence (AI) is, discuss how it can be of benefit to tax functions and departments, and look at some of the risks around AI in tax and how we can mitigate them.

Revenue Commissioners' Update: Compliance Programme for Central Register of Beneficial Ownership of Trusts (CRBOT)

CRBOT Team, The Revenue Commissioners provide an update on the Compliance Programme for Central Register of Beneficial Ownership of Trusts.

Key Tax Dates

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

Feature Articles

Interview with New Institute President, Aoife Lavan

Aoife Lavan was inaugurated as the Institute's 49th President at the AGM on 5 September. Aoife is a Private Client Tax and Pension Specialist with over two decades of experience in financial planning, pension management and tax advisory services. Her expertise spans intricate pension legislation, compliance strategies and high-net-worth client advisory.

A Chartered Accountant and Chartered Tax Adviser, she holds additional qualifications as a Qualified Financial Adviser and a CEDR Accredited Mediator. Aoife recently set up her own independent advisory firm, which specialises in bespoke pension, tax, estate planning and mediation services – Black Oak Advisory, which is based in Westport, Co. Mayo.

Before taking up her role as President, Aoife sat down with Donal O'Donovan, Business Editor at the *Irish Independent*, who hosts the Institute's Tax Talk podcast series. She spoke to him about her career so far and her passionate interest in pensions. She also spoke about the difficulties of combining family and other life responsibilities with full-time work and her intention to make wellness in the profession a focus of her term of office.

You can listen to Aoife's podcast interview here, and below is an edited transcript of that interview.

Tax Talk Episode 18: New Irish Tax Institute President, Aoife Lavan

Donal O'Donovan: First of all, Aoife, tell me a bit about yourself and about your business.

Aoife Lavan: Well, I'm from Kiltimagh in Mayo originally, and I now live in Westport. I've been working in stockbrokers since 2005. Would you believe I am the ninth female President?

Donal O'Donovan: I would believe it, in fact. I think I wouldn't have been surprised if it was double digits.

Aoife Lavan: Well, don't feel sorry for me just yet, because I checked to see how many we had in the last 12 years, and I'm actually the sixth female President in the last 12 years. That's pretty good. And of our 6,000 members, 52% are female, so we've got good representation in the last 12 years.

So, about myself: I'm from Mayo and I grew up in a family business. We had a coach operator business. I also worked in the bog; we used to sell turf. So that was probably my first work – cleaning buses and working in the bog. I'm a mean footer of turf, and most of our members probably won't know what that is.

Donal O'Donovan: I think you'd be surprised – I'd say there's a few of them who've had a day in the bog by times.

Aoife Lavan: Yeah, probably not whole summers.

Donal O'Donovan: Probably not a whole summer.

Aoife Lavan: I had the best tan ever, back in those days. And then I also worked in Knock Shrine, writing Mass cards and assisting pilgrims. So there's a varied background in the beginning years, I would say.

Donal O'Donovan: You're now helping people to financial heaven.

Aoife Lavan: Ha ha, hopefully! I would say that it probably instilled in me a very strong work ethic. So that's certainly been a focus throughout. And then I did my training. I trained with BDO Simpson Xavier, and that was great. It was actually the business I wanted to train in, because I was looking for a slightly smaller firm that would have a broader view, particularly of family businesses. And from there I trained as an accountant, and then I became a Chartered Tax Adviser in 2007.

Donal O'Donovan: Where did you do that physically?

Aoife Lavan: I was in Dublin, and in my last job, in 2014 or so, I moved to the Galway office. Then I met my husband, and we ended up in Mayo, and I was commuting to Galway. But then I moved to a Dublin team and ended up working remotely before Covid even happened; so, before we even talked about it, I was fully remote, which was great.

Donal O'Donovan: And this year you've gone out on your own and set up Black Oak Advisory. You're doing that from Westport?

Aoife Lavan: Yes.

Donal O'Donovan: Which is, I suppose, new in terms of financial services. What's your client base there? Who are you looking to advise?

Aoife Lavan: I'm focusing on giving technical pension advice and financial advice – not even financial planning – just life advice around finances. I'm also trained as a mediator, and I am currently doing the Trust and Estate Planning Diploma so that I can advise clients on every aspect of financial life, without selling any product, and without the influence of selling any product.

I have a few Irish clients living abroad, and they're looking to see what to do with their Irish pension benefits – that's interesting. Also, people in public service schemes – hospital consultants and GPs – they're probably the type of clients; they have their own existing offering and schemes, and they just want to get advice.

Donal O'Donovan: Would you look to do that nationally or regionally?

Aoife Lavan: I would say nationally. And nowadays you don't actually have to be in Dublin to do it, though I will be in Dublin a lot.

There's one other aspect that I care deeply about, and I'm probably getting ahead of myself here, but an area of pensions I'd love to focus is occupational schemes. A lot of these pension holders don't have a broker or an adviser, and the scheme administrators work with the employer. Nobody actually advises the underlying person, particularly around tax planning for death.

I think that this cohort tends to be a little bit more vulnerable, because the treatment of occupational schemes is less favourable from a tax and a planning perspective. They might have young kids and end up having to purchase an annuity for a child, that kind of thing. But that's not really what a family is thinking about at that early stage. The difficulty is that when they do need financial advice, that's the time they don't want to talk to you, because they've got really bad news about an illness or a death and they're trying to deal with that.

So the issue is preparing occupational pension holders for that eventuality, and having somebody, whether it's the HR Department or whether it's somebody in their lives, who says "let me take that, look at it, get expert advice and see if we can help families when someone passes away". You have a spouse trying to cope and thinking "oh my God, what happens here?", and at that stage it's too late to do anything.

This is an area I really care about, and I'd like to do something to help advise these pension holders at an earlier stage.

Donal O'Donovan: Fundamentally, when you look at the market, and at people in Ireland and their financial needs, what is it that they're most concerned when they come to an adviser like you?

Aoife Lavan: That's an interesting one. I think the problem is that they don't actually know when they should come to see me.

I think everybody should get advice, but when you're starting off and you're trying to buy a house, and that's the objective, and you don't really have spare income. Sometimes when people come to me it's too late, and I'm saying "oh try and do your AVCs", and there's nothing I can say other than "just focus on that for the minute".

Then you have people who say they want to save for kids' college education, or whatever, and they might want to get a product. Actually, I don't think we have many products that work well in these situations, and we could do a little bit better on that front from a pricing perspective, because lot of people do need to save for their families' education.

But most come to me when they're getting closer to retirement. They need to figure out: what am I doing? What do I have? Is it enough? What can I do better? And how can I prepare for eventualities, like death.

Donal O'Donovan: The Budget is coming up. From your own point of view, what would you like to see being prioritised on the tax side there?

Aoife Lavan: The Institute did a really good submission. I don't know if our members are reading our submissions – I'm sure they are, but if they aren't, they really should, because there's a lot of really helpful information in them. Last year the team did 21 submissions, and they're so detailed – superb. I think they have a real impact from a policy point of view.

For Budget 2025 we are calling for support for growth and innovation in the SME sector. There's a serious reliance on the top 10 multinational companies, who pay 52% of the net corporation tax receipts. That's a huge reliance on one cohort, and we need to focus on developing our own businesses and building innovation.

We've also recommended enhancements to different reliefs such as EII, the R&D tax credit, the KEEP scheme and entrepreneur relief. Also, I hope

that we could see a reduction in CGT; it hasn't changed for many years.

The other big issue for the Institute is simplification of the corporation tax code. We've had BEPS, and last year we had Pillar Two. It's very complex area of tax, and it's not my area of expertise – luckily, Tom Reynolds, our immediate Past President, has worked in international corporate tax all of his career, so the timing of his presidency was perfect.

Donal O'Donovan: Indeed.

Aoife Lavan: I'm a little bit lucky this year, because I'm all about pensions, and auto-enrolment will hopefully come in next year.

Another big issue for most of our members is the new Enhanced Reporting Requirements (ERR). This is a tricky one, because I can understand why Revenue would like to collate the data to help them make informed policy. But how it's done and how we achieve that are important. The focus is on the small-benefit exemption that allows companies to give a benefit to an employee that's not taxable. The amount of the benefit has increased from €500 to €1,000 per annum. But the way it's set up, it's based on two benefits, and that creates challenges for employers.

There's actually a really good example in the Pre-Budget Submission that highlights the difficulty. It's about Jane, whose employer gives out a €200 voucher in March and usually follows with a €300 voucher in December. But Jane got married in June or July, and her employer gave her a €50 bouquet of flowers. She was delighted to receive them at the time, I'm sure. But because of the way the ERR rules are set out, Jane can only receive that initial €200 and the €50 flowers tax-free, because that's her two benefits used up – even though she's nowhere near the €1,000. So I'm sure she'd throw back the flowers, if she knew the impact! When she gets the €300 voucher, she has to pay tax on that, and probably at the 52% rate.

Donal O'Donovan: Which feels like an unintended consequence, and a higher reporting burden as well.

Aoife Lavan: Exactly. That's the other aspect of it, the impact on the employers. If you consider small businesses in Ireland at the minute, there's a huge burden on them administratively because they now have to report in real time on these non-taxable payments. If they don't get it right, there's a penalty of €4,000. Even if they make a mistake and they go back to try and change it, they might still have to pay the €4,000 penalty, even though there's no underpayment of tax. I just think that penalty is a little bit disproportionate. So maybe we can do something to try and make that more appropriate.

Donal O'Donovan: Yes, interesting. You mentioned auto-enrolment, and obviously the Bill has passed and, as far as we know, it will be coming into effect next year. The big question there is do you think the system and the sector are ready?

Aoife Lavan: Oh, I do. I think the system is ready, absolutely, and I welcome auto-enrolment. I'm really excited about auto-enrolment. I am so excited that I've even made personal submissions in my own name, just because I care so much about this!

The aim is to start coverage for people who don't have any coverage at all. So you're talking about lower-income earners, and I think it will do just that. It's a little bit of a shame that it's based on two different tax-relief systems, but I understand

why. I suppose they're looking at the SSIA-type style approach to it. I think the way it's set up is great, because everybody on a salary over €20,000 is going to be automatically enrolled between age 23 and 60. That's really good!

Donal O'Donovan: Yes.

Aoife Lavan: Then the highest salary is €80,000, and I think it's going to be very well integrated through payroll, so hopefully it will be less of a burden on smaller employers. It's also tiered, starting with a 1.5% contribution by your employer, increasing to 3%, then 4.5% by year 7. Then, after year ten, it's an employer contribution of 6%. So you are tiered into it.

For every €3 an individual will contribute, the State will give €1, and your employer will give €3.

What I found interesting in all the detail was the questions that were raised about the impact of auto-enrolment on female workers and the gender pensions gap. They discovered that a lot of females get caught out because they're more likely to be working part-time.

Donal O'Donovan: Yes, they might fall under the thresholds.

Aoife Lavan: Exactly, and this is relevant for teenagers **and** part-time workers, many of whom are women: you can opt in. So we need to do a really big job of creating awareness – to say "you need to opt in, because when you opt in your employer must contribute and the State must contribute". They considered making 16 the start age for enrolment but they thought the burden would be too much, so it was set at 18. A lot of 18-year-olds work part-time these days, and they can say "oh, can I opt in?", and the difference that will make from a compound growth perspective…

Donal O'Donovan: It's putting a bit in there early.

Aoife Lavan: Yes. Now, the disappointing part is they can't put extra in, but I suppose your average teenager is less inclined.

Donal O'Donovan: I think it's unlikely, yes. I'm not sure there are that many teenagers who'd be topping up their pensions.

Aoife Lavan: It's probably their parents who'll be saying "hey, go into that because it will make a difference", and they won't notice it because it's their first time getting paid.

Donal O'Donovan: They won't miss it.

Aoife Lavan: For part-time workers, as well, it's important to opt in and make the contribution. So even if you're not automatically enrolled, you can opt in, and that's a really important message.

A few disappointing things about auto-enrolment (AE), which I hope in time might change: I think that the retirement age is way too late. It's the State Pension age, which is 66 at the minute, and it might increase to 68. So the people who don't have coverage will want to use their AE pension savings to cover the gap from when they stop working to the age at which the State Pension kicks in. I know research from Irish Life recently said that the average age they have for retirement is 59.7.

Donal O'Donovan: Really?

Aoife Lavan: Yes, so I think it makes sense to cover that gap. The great thing about the PRSA now is that you can have a phased retirement – you can create it for yourself. A lot of people prefer that, because if you go from full-time work to a hard stop, psychologically that can have a big impact. So a lot of people like to reduce their days, and I think phased that makes a lot of sense. I just think that it would be great if that approach was facilitated in the auto-enrolment system.

I'm really disappointed for the self-employed, because I feel like they always get left behind. The self-employed pay an extra 3% USC, and when it comes to pension planning, they're really limited. We have a €115,000 net relevant earnings limit on salary, and that hasn't changed for years. So I think we need to address that – I'd love to see it increased in the Budget.

I know that the Department of Social Welfare hopes to include the self-employed; they definitely have it on their radar. But it's just too tricky to manage it initially. According to a CSO study, one of the main reasons self-employed workers give for not having a pension is the difficulty of just getting around to setting it up.

Donal O'Donovan: Yes, actual time.

Aoife Lavan: Actual time to do it! Whereas if it was done through the auto-enrolment...What's great about auto-enrolment, as well, is that the objective is to try and keep it under a 0.5% annual management charge. Now I know that's not written into legislation, because you obviously have to see how much it's going to cost to try and run it, but they're really conscious of fees, and that has a huge impact over a longer term as well.

Donal O'Donovan: From your own point of view, you were in the corporate world for a long time?

Aoife Lavan: I was.

Donal O'Donovan: Most recently with Goodbody, who you were with for 12 years. What triggered the decision to go out on your own?

Aoife Lavan: In all honesty, I had to take some time out. That was due to a combination of things – probably both work and personal stresses – and I just had to attend to my own wellbeing.

As challenging as it was at the time, it was probably the best thing I ever did, and as President of the Irish Tax Institute, one of the things I'd love to focus on is wellness. I think there's a lot of pressure on people these days related to their work-life balance, whether it's parenting, caring for an elderly parent, or whatever life throws at you – and we know that life can throw a lot at you.

Donal O'Donovan: Indeed.

Aoife Lavan: Often, it's a really small window that you need to be supported for. I'd love to interact with our members and see if they feel supported in that and ask what can we do to help, and then maybe even look at finding ways to make sure it doesn't impact your long-term career prospects.

Donal O'Donovan: Yes.

Aoife Lavan: So, for me, I decided to set up on my own at the beginning of this year, after I'd taken a year out – probably a year and a half, because I took it easy starting off this business as I didn't want to go head-long straight into it.

I have two small children and a lovely, a good, working husband. I just wanted to focus on this, and I've really enjoyed it – I've really enjoyed figuring out what it is I'm going to do. I trained as a mediator in February, and I'm really interested in that side of things. I always follow the heart a little bit – probably too much! – so I find myself doing the mediation, and I really love that. I think the background in tax and the financial planning will aid that.

So, yes, it's very new. I'm working on my brand and website and all that kind of stuff, and it's really exciting!

Donal O'Donovan: From your own point of view, what you're describing there must be incredibly daunting, because, I suppose, you've done everything right in your career as you're going along, and you're succeeding, and there is a path.

Aoife Lavan: Yes.

Donal O'Donovan: I guess it feels like you're on the right path, and there has to be – for you – a change of mentality to step onto a different path.

Aoife Lavan: Yes, it takes a bit of bravery, for sure. I think it's great, though; I have pure flexibility now. I was a bit worried about this podcast, you know, because I want to do a good job, but I should have probably been more worried about my five-year-old starting school on Wednesday!

Donal O'Donovan: Ha ha ha!

Aoife Lavan: We'll see after this! But that took more out of me on Wednesday than this podcast has yet – unless you start asking me a few dodgy questions?

Donal O'Donovan: Ha ha ha!

Aoife Lavan: Yes, it's great to have the flexibility. I think I'm really conscientious, and I worked really hard, and I want to give everything to whatever I'm doing. So I had to try and find a way that I could balance giving as much as I could to my family and also giving as much as I could to my career and my job. I've worked really hard to get here, so I didn't want to lose that. Also, I'd go stir crazy staying home with the kids, not that I wanted to, but I did find it really tricky to balance the two. I suppose, life happened, and I lost my Dad, and all that stuff.

So I just needed to take a little bit of time out and focus on my own wellbeing, to be able to come back and start afresh. If I'm completely honest, I was deeply ashamed at the time that I just couldn't do it all, because we were supposed to be able to do it all. But I do think when you're trying to do it all you make sacrifices. It's just a way to find balance, and it's great so far – I love it.

Donal O'Donovan: And do it differently.

Aoife Lavan: And have control over my own destiny, as well.

Donal O'Donovan: Of course. What got you into finance to begin with? Was it the background in the family business?

Aoife Lavan: I would say no, I don't think so. In Leaving Cert we had to do a "what will you do?", and I was stuck between finance and music.

Donal O'Donovan: Really?

Aoife Lavan: Yes, big difference there!

Donal O'Donovan: Big gap.

Aoife Lavan: I love to knit and crochet and do all creative things. I want to learn how to dress make. My mother is an amazing dressmaker. So, no, what happened was that I was in accounting and finance, and we all just automatically went through the milk round. I came into the world, and I enjoy it. I started in audit, and I absolutely hated audit.

Donal O'Donovan: You didn't like that?

Aoife Lavan: No, it wasn't for me. So I had to try and find a way out. I brokered a deal at the time with my lovely partner in BDO (I won't say his name), and I said "you've got to get me out of here, anything, anywhere else, I'll do anything!". He said, "oh, we're doing an audit of this client – will you just get me that P35?", and he didn't say it had to be completed.

Donal O'Donovan: Right.

Aoife Lavan: So I got him the P35. It wasn't completed. But he was straight to his word, and he got me out and I joined the financial services area. That's when I started doing pensions; I just fell into it.

Donal O'Donovan: In terms of that, you're taking up the President's role with the Institute now, so what are your priorities for the year ahead?

Aoife Lavan: We did talk about this, and I really wanted to focus on our membership and look a little bit at the regional side. 57% of our 6,000 members are based in the regions. If you take Leinster out of that, it comes down to 38%. Dublin alone is 43%, and Connacht is only 8%. I'd like to bulk that up a little bit, if I could. But we also want to concentrate on some of the corporate sector. Around 25% of our membership is in the corporate sector.

Donal O'Donovan: Have you an agenda for pensions for the year?

Aoife Lavan: Oh my God, yes! I think they'll be saying "can you please get her to stop talking about pensions?"! I'd love to see a little bit of simplification on the pension side.

The first thing is consistency around death: I'd love to see all products being treated the same on death. That would be great. I think it would take out some of the complexity. And some of the administrative burden, as well, because when you have to go back to your first job, which might have been 25 or 30 years ago, and you're trying to figure out what was my salary? How long did I work there? That takes a long time. You can't go back to the original company. They don't really have those records anymore. So it's tricky to get that information, and then to get your benefits sorted – sometimes it's a time delay. So having all pensions treated equally on death would be a great help.

Donal O'Donovan: Indeed, yes.

Aoife Lavan: There's a little issue on ARFs where there's double tax for an ARF holder who doesn't have a spouse or kids and the fund goes to a niece or nephew, for example. The beneficiary pays both CAT and income tax, depending on their age. I'd love to see that changed because I think it's a little bit unfair on those ARF holders.

In general, I would say the rules for all the different treatments on death of ARF holders are unnecessarily complicated.

I'd love to see the rules on retirement being the same for all products. As it is, there are different late retirement ages, different early retirement ages for company directors, for instance, who must sever ties and sell shareholdings if they retire before age 60. I'd love to see that changing.

Around the PRSA: there's no flexibility in pricing. You have to go through the Pensions Authority, you have to pay to get your agreement pricing, and there are very strict rules around it. I do welcome the recent change on allowing contributions to the PRSA. I think that evened the pitch a little bit. It has also meant that, with IORP II, a huge amount of group schemes have ended up moving to master trusts.

Donal O'Donovan: Yes.

Aoife Lavan: But now what we're actually seeing is people moving out of that master trust into PRSAs. One of the reasons they're doing that is probably because of the treatment on death, if they have a good adviser telling them that, and also because PRSAs offer more flexibility.

That leads me to the pension cap. I'd love to see that being raised. It hasn't been changed for 10 years, so it would be great to see that addressed. I think the Institute did a submission on that, as well, and is suggesting that it goes to €2.4 million, which would be taking account of inflation.

Donal O'Donovan: More or less inflation, yes.

You have a busy year ahead and a fairly busy agenda. Aoife Lavan, founder of Black Oak Advisory and incoming President of the Irish Tax Institute, it's been great meeting you, and best of luck for the year ahead.

Aoife Lavan: Thank you, Donal, I appreciate it.

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

Chief Executive's Pages

Martin Lambe
Irish Tax Institute Chief Executive

Introduction

The Institute's Annual General Meeting took place on 5 September, and Aoife Lavan was elected as our 49th President. Aoife joined Council in 2014 and has been a valued member of numerous Committees over the last 10 years. She is the ninth female Institute President.

Aoife is an accomplished Private Client Tax and Pension Specialist with over two decades of experience in financial planning, pension management and tax advisory services. She recently set up her own pensions and retirement planning business, Black Oak Advisory, which is based in Westport, Co. Mayo.

Before she took office, Aoife spoke to our Tax Talk podcast host, Donal O'Donovan, about her career so far and her passionate interest in pensions. She outlined her priorities for the year ahead, including simplification of the pensions landscape and listening to members with a focus on wellness in the profession. An edited transcript of the Tax Talk episode is included in this edition of *Irish Tax Review*, or you can listen to the full episode here.

Aoife Lavan, President, discussing her plans for the year with Donal O'Donovan, Tax Talk host.

Council 2024-25

Aoife takes over from Tom Reynolds, who had a very busy term of office. Tom's expansive experience in industry, in Ireland and abroad, was invaluable as Pillar Two was implemented in the Irish tax system. He also provided rich insight into the administrative burden for employers as Revenue's new system of Enhanced Reporting Requirements was introduced earlier this year.

On behalf of Council, the Institute and the wider membership, I want to thank Tom for his dedication and generosity with his time during his Presidency. I would also like to congratulate Shane Wallace who was appointed Deputy President and Brian Brennan who became Vice-President.

We also welcome three new members to Council – Sheila Lawlor of Maples Group, Aidan Lucey of PwC and Dr Patrick Mulcahy of DCU.

Tommy Walsh steps off Council and we would like to thank him for his dedication and commitment to Council over the last number of years. His expertise has been a great asset to the Institute. And thanks, again, to Amanda-Jayne Comyn, who, as I mentioned in the last issue of *Irish Tax Review*, stepped down to take on the role of *Irish Tax Review* Editor. We wish the best of luck to both in the future.

Education

Our autumn 2024 courses are open for registration. Numbers are promising across the courses – Diploma in Tax, Tax Technician and the Chartered Tax Adviser (CTA) qualification. The Diploma in Tax started last week but is still open for registration until mid-October, and the CTA and Tax Technician programmes will begin shortly.

To the students who completed our Tax Technician and CTA summer courses we wish them the best of luck as they receive their exam results in the coming weeks.

Our third-level textbook, *Irish Taxation: Law and Practice*, published earlier this month, is used in third-level institutions across Ireland and is the basis for our Tax Trainee Induction Programme. The book is edited by Dr Patrick Mulcahy and Laurence May and authored by Christopher Crampton, Sean Cogill, Raymond Holly, Paul Murphy, Margaret Sheridan and Martina Whyte. I want to thank them all for their contributions to this important publication.

Our work to promote the career in tax continues. At this time of year we are busy attending career fairs for both second- and third-level students to highlight the many opportunities that the career can offer them. We will continue our engagement with undergraduates through our Fantasy Budget competition, which opens after the Budget 2025 announcement, as well as sponsoring third-level prizes in colleges across the country and announcing our Third-Level Scholar 2024.

Budget 2025

In mid-July we met with the new Minister for Finance, Jack Chambers TD, where we presented our arguments for the legislative changes outlined in detail in our Pre-Budget and Pre-Finance Bill Submissions. We hope to see some of them reflected in Budget 2025.

The over-arching theme of the Institute's Pre-Budget proposals is competitiveness. In that context we called for a well-resourced simplification project for the tax code. After a decade of bolting OECD BEPS and EU anti-tax-avoidance measures onto our existing tax code, it has become a tangled web of complexity that is very complex and time-consuming to comply with.

We welcomed the previous Finance Minister's understanding of the need to simplify the Irish corporation tax code and, specifically, his commitment to reform our interest deductibility provisions.

L–R: Our then President, Tom Reynolds; Anne Gunnell, Director of Tax Policy and Representations; Brian Brennan, Council Member; Minister for Finance, Jack Chambers TD; Cathy Herbert, Director of Corporate Affairs; and Martin Lambe, Chief Executive.

We now urge his successor to set out, as a matter of urgency, a clear statement of intent to overhaul the legislative provisions to ensure a broad base for deduction of interest against both trading and non-trading income, using the protection of the ATAD interest limitation rule against base erosion risks. This would bring Ireland's interest deductibility provisions into line with the measures contained in the corporate tax systems of other European countries.

We accept that simplification is a big project, requiring significant resources. But the case for this investment is compelling. Clear and simple corporation tax rules that are easy to operate and comply with would significantly enhance Ireland's reputation as a pro-business location.

The Government has the power and the means to deliver simplification. We wait to see what Budget 2025, to be announced on 1 October, has to offer.

Watch out for our usual Budget Webinars, moderated by Newstalk's Shane Coleman, which begins at 7.30pm on the evening of the Budget. Joining our President, Aoife Lavan, to give their reactions to the Minister's speech will be Fergal O'Brien, Ibec, and Stephen Gahan, Forvis Mazars. The next morning Mark Barrett of RDJ and Clare Belton of KPMG will go through the technical details and what Budget 2025 means for you and your clients.

Professional Services

The Tax Trainee Induction Programme, designed to give trainees the tools and knowledge to get started in their careers, took place earlier this month with a live hybrid workshop on

19 September. It is still available on demand for those starting later in the year.

How we work and tax employment in Ireland and abroad are being altered by legislation, greater employee mobility and their use of technology. Responding to this, we designed a new eight-part online practical programme, with a Certificate option, to bring members up to date on key areas in employment tax. Running from 5 September to 17 October, the programme includes an expert panel of speakers.

Rounding off the year is a full schedule of CPD events, online and in-person. Focusing on key issues for CTAs and their clients, the schedule includes Budget 2025 Webinars, Finance Bill 2024, lifetime planning, farming tax and legal update, VAT on property, and tax research skills.

On the publications side, two important annual titles were published. *Finance (No. 2) Act 2023 – The Professional's Guide*, which used to be known as *FINAK*, provides expert section-by-section commentary on the latest Finance Act. My thanks go to our authors, Fiona Carney and Brendan Murphy, and to the editor, Denis Herlihy, who ensure that this publication remains informative and of high quality.

Taxation Summary, an essential guide to Irish tax for tax advisers and other professionals who encounter tax, was expertly authored by David Fennell and David Shanahan. A digital copy of this publication is available to all members as part of your subscription.

We are committed to the evolving and ever-changing lifelong learning needs of our CTA members, and I would like to thank our members who responded to our Learning Needs Analysis survey. We are grateful for your feedback, which will inform our professional development and information services offerings over the coming years.

Representations

It has been a busy summer for our Policy and Representations team, with no fewer than six tax policy submissions completed since June and numerous engagements with Revenue and the Department of Finance. The main strand of the team's work has been on the introduction to the Irish corporation tax system of a participation exemption for foreign dividends.

Getting the participation exemption legislation right from the outset is imperative if it is to fulfil the commitment by the Minister for Finance to simplify the Irish corporate tax system and promote a best-in-class business environment. We have been actively engaged in a subgroup of the Business Tax Stakeholder Forum over the summer to discuss the policy development. And in response to the second Feedback Statement on the introduction of this participation exemption, we highlighted a number of elements of the proposed legislative approaches that we believe should be reconsidered to avoid introducing unnecessary complexity and ambiguity in the exemption. We hope to see our concerns addressed when it appears in Finance Bill 2024.

In addition to the participation exemption for foreign dividends, we have engaged on many topics, including the Enhanced Reporting Requirements and the Form 11 issues experienced by members. We will continue to keep members up to date on our representations and submissions in TaxFax.

Sustainability and Tax

In the coming months the first group of businesses in scope of the Corporate Sustainability Reporting Directive (CSRD) will report on their climate and environmental data. Even if the new regulations do not yet apply to your business, you may be asked to provide information for the sustainability reports of some of your clients.

In that context, we launched a new Sustainability and Tax series with the aim of breaking down the new sustainability regulations and helping members to digest them bit by bit. In late August we held the first webinar in the series.

Sustainability and Tax webinar, 29 August. Clockwise from top left: Shane Coleman, Chair; Mary Teehan, MT Sustainability Consultancy; Eamonn Sheils, SEAI; and Aidan Lucey, PwC.

Titled "Sustainability and Tax: What to Know and Where to Start", the first webinar focused on the tax touchpoints in the CSRD and why it is important to start decarbonising your business even if it is not in scope. It proved very popular, with nearly 550 registrations, which was in no small part due to our expert panel – Aidan Lucey, PwC; Mary Teehan, MT Sustainability Consultancy; and Eamonn Sheils, SEAI. The series will cover the E (environmental), S (social) and G (governance) of sustainability in future parts. Watch out for more in the coming year.

Also in August, all Institute employees completed an unconscious bias workshop. It was an insightful discussion and gave us food for thought. As a group, we decided on actions to tackle our unconscious bias in our operations and activities. This was part of our commitment to being a sustainable, responsible and open business organisation.

Rest in Peace

In sad news and on behalf of all in the Institute, I would like to send my condolences to the family and many friends of Graham Williams who passed away on 13 August 2024. Graham was the 10th President in 1985/86 and will be long remembered by all in the Institute along with his many colleagues and friends for the role he played in the promotion and study of tax in Ireland. Ar dheis Dé go raibh a anam.

Policy and Representations Monitor

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

News Alert

Institute representations before Budget 2025/Finance Bill 2024

The Institute sent its Pre-Finance Bill 2024 Submission to the Minister for Finance on 24 May, setting out a number of legislative changes for consideration in the drafting of Finance Bill 2024. On 20 June the Institute sent its Pre-Budget 2025 Submission to the Minister.

The Pre-Finance Bill 2024 Submission contains recommendations relating to a number of key areas, including detailed legislative and administrative recommendations to enhance the Employment Investment Incentive (EII), the Key Employee Engagement Programme, CGT revised entrepreneur relief and the R&D tax credit. We outlined our recommendations to make the new Enhanced Reporting Requirements (ERR) workable for SMEs by increasing the number of permissible benefits qualifying for the small-benefit exemption (SBE) so that the €1,000 limit applies to the cumulative value of the incentives received by an employee in the year of assessment, rather than limiting the exemption to the first two benefits received, and reviewing the fixed penalties that apply for a failure to comply with ERR in real time.

We stressed the importance of introducing a foreign branch exemption in Finance Bill 2024 in tandem with the participation exemption for foreign dividends. We emphasised the need to overhaul the legislative provisions to ensure that a broad base for deduction of interest against both trading and non-trading income is permitted, using the protection of the Anti-Tax Avoidance Directive interest limitation rule against base erosion risks. We recommended reducing the marginal income tax rate and removing the obstacles that exist to the use of share-based remuneration by SMEs and start-ups, in order for Ireland to remain competitive. In addition, we outlined targeted tax measures to promote the green agenda and sustainability for businesses seeking to reduce their carbon emissions.

In our Pre-Budget 2025 Submission we highlighted the risks posed by the Exchequer's dependence on a small number of multinational companies and the increasingly competitive battle for inward investment. To help mitigate these risks, we recommend that the Government focus on three broad areas in Budget 2025: the need to support growth and innovation in the SME sector; enhancing Ireland's competitiveness; and ways to improve the ease of doing business.

We underlined the importance of maintaining and building on Ireland's reputation as a pro-enterprise economy, highlighting how this has been critical to its success in attracting foreign direct investment, and advised that having a clear and simple business tax code is a key element for the ease of doing business in Ireland. We emphasised the imperative of ensuring that adequate resources are provided to Revenue that are ring-fenced for IT developments that will make it easier for the self-employed and small businesses to comply with their tax obligations. We also recommended increasing the resources of the Irish Competent Authority to ensure that disputes arising as a result of the implementation of Pillar Two across jurisdictions can be dealt with in a timely manner.

The Institute discussed some key elements of the Pre-Budget 2025 Submission with the new Minister for Finance, Jack Chambers TD, at a meeting at the Department of Finance on 17 July. The delegation, led by the Institute's President, Tom Reynolds, took the Minister and his officials through the detail of our recommendations and the legislative reforms, outlined in our submission, that we believe would encourage more investment in SMEs and make the current suite of tax measures more accessible to support growth and innovation in the indigenous sector. We stressed the need to simplify Ireland's corporation tax code with the introduction of a participation exemption for foreign dividends, and we also emphasised the need to progress the reform of Ireland's interest deductibility provisions, which have become extremely difficult and costly for businesses to comply with. We raised the ongoing challenges and significant administrative burden that the real-time nature of the ERR presents to employers. To assist businesses, we urged the Minister to consider increasing the number of permissible benefits qualifying for the SBE and to review the level of fixed penalties that can apply for a failure to comply with ERR in real time.

The Summer Economic Statement 2024 was published in July, setting out the fiscal parameters within which discussions will take place ahead of Budget 2025. The Statement notes that it will provide an overall package of €8.3bn, composed of additional public spending amounting to €6.9bn and taxation measures of €1.4bn.

The Minister for Finance confirmed that Budget 2025 will be brought forward by one week and delivered on Tuesday, 1 October. It is expected that Finance Bill 2024 will be published on Thursday, 10 October.

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

Report of the TALC Sub-committee on Administrative Simplification of Business Reliefs for SMEs published

The Report of the TALC Sub-committee on Administrative Simplification of Business Reliefs for SMEs was published on Revenue's website in June. This dedicated TALC sub-committee was established by Revenue after the request by the then Minister for Finance, Michael McGrath TD, in his Budget 2024 speech, for Revenue to convene a sub-group focused on identifying any opportunities to simplify and modernise the administration of business supports.

The sub-committee held monthly meetings between January and June 2024 and examined tax reliefs applicable at each stage of the life cycle of a business (i.e. start-up, growth and maturity). The Institute was an active participant throughout the process, including submitting extensive written feedback to Revenue in April. The Institute's feedback is included in Appendix E of the report.

The sub-committee's report was endorsed by Main TALC on 27 June and has been presented to the Board of the Revenue Commissioners and to the Minister for Finance. A table of the agreed administrative recommendations made by the sub-committee in relation to the EII/ Start-Up Relief for Entrepreneurs (SURE)/ Start-up Capital Incentive (SCI), the R&D tax credit, share valuations, revised entrepreneur relief, transfer of a business to a company, "angel investor" relief, the Revenue Technical Service, the Revenue website and Tax and Duty Manuals is included in section 1.6 of the report. Revenue has advised that it will prioritise the implementation of these agreed administrative recommendations over the coming months and it will provide regular progress updates to Main TALC.

During the sub-committee's review the Institute raised several matters regarding the underlying tax policies and associated legislation governing these tax reliefs. However, the sub-committee could not make any recommendations in relation to legislative matters because TALC is purely an administrative forum, and policy formation is outside of its remit. The policy proposals submitted by practitioner bodies, including the Institute, are outlined in Appendix B of the report.

The legislative recommendations made by the Institute at the sub-committee were included in its Pre-Finance 2024 Bill Submission and Pre-Budget 2025 Submission.

ERR "service to support compliance" approach continuing for remainder of 2024

From 1 January 2024 employers are required to report to Revenue certain tax-free payments made to employees (and directors) under the Enhanced Reporting Requirements (ERR). The three categories of non-taxable payments that must be reported to Revenue on or before the payments' being made are: tax-free payments or reimbursement of travel and subsistence expenses; benefits or gifts to employees that qualify for the small-benefit exemption; and the remote working daily allowance.

Revenue adopted a "service to support compliance" approach until 30 June 2024, and during this period it did not operate any compliance programmes in relation to ERR and did not seek to apply any penalties for non-compliance.

In the run-up to 30 June the Institute raised ongoing concerns about the administration burden imposed by the real-time reporting requirement, the challenges for businesses and the knock-on impact on employees where employers change the frequency at which expenses are reimbursed in order to manage the demands of the ERR regime. At a meeting of the TALC sub-group on ERR in June Revenue clarified that the "service to support compliance" approach would continue for the remainder of 2024.

Revenue subsequently updated the Tax and Duty Manual "Returns by Employers in Relation to Reportable Benefits – Enhanced Reporting Requirements (ERR)" to outline its approach to ERR compliance for the second half of 2024 and its expectations of employers for this period. In respect of the period 1 July to 31 December 2024 Revenue is continuing to support those employers who are making genuine efforts to meet their reporting obligations. As part of this, Revenue confirmed that it will not seek to apply penalties for non-compliance during the remainder of 2024. However, it is expected that employers are taking all reasonable steps to ensure that they are now complying with the new reporting obligations.

From 1 July 2024 there is a firm expectation by Revenue that all employers providing reportable benefits submit details of same on or before the provision of the benefit. In particular, employers who have integrated systems that have the functionality and capability to file should be doing so. It is also expected that any employer who starts filing after 1 July will be expected to backdate its filings to 1 July 2024.

Revenue is encouraging employers to make efforts to comply with their reporting obligations and, where issues arise in doing so, to contact the National Employer Helpline or ROS Helpdesk, as appropriate, via MyEnquiries.

Important update on Finance (No. 2) Act 2023 changes to EII

In June the Department of Finance and Revenue jointly hosted an information meeting on the Finance (No. 2) Act 2023 changes to the EII scheme.

The EU General Block Exemption Regulation (GBER) is a European Commission Regulation that allows Member States to put certain State Aid schemes in place without prior notification to the Commission, provided certain conditions are met. In June 2023 the Commission adopted Commission Regulation (EU) 2023/1315, which amended the GBER.

The EII, SURE and SCI schemes, under Part 16 of TCA 1997, come within Articles 21 and 21a of the revised GBER. Many of the changes introduced in Finance (No. 2) Act 2023 were made to reflect updates to the GBER in 2023.

It was indicated at the meeting that the Minister for Finance is considering amendments to the legislation relating to follow-on investments after re-examination of the revised GBER. The current provisions allow for a rate of 20% for all follow-on investments. Consideration is being given, subject to Government approval, to an increase in the rate of relief that applies to follow-on investments to 35% for investments made within the seven-/ten-year eligibility period, with 20% applying thereafter.

The recently published Tax Strategy Group papers include a paper on enterprise supports (TSG 24/04), which contains updates on several such schemes, including the EII. The paper notes that, having further considered the provisions of the revised GBER, the TSG believes that there may be scope to provide an increased rate of relief for follow-on investments made within the GBER eligibility period of seven years since a company's first commercial sale or ten years since its registration.

Double taxation conventions in respect of CAT

On 14 July the Institute wrote to Revenue's International Tax Division to highlight the ongoing concerns of members about the lack of double taxation conventions that have been concluded between Ireland and other jurisdictions in respect of capital acquisitions tax (CAT).

Ireland has only two double taxation conventions in respect of CAT in operation; one with the UK and the other with the USA. In our letter we highlighted how migration and international investment trends have changed significantly since these two double taxation conventions were concluded, and as a result, Irish individuals bequeathing assets from more than one country on their death has become a common occurrence. The absence of double taxation conventions on CAT means that double taxation can arise in respect of the passing on of those assets.

Given the varying types of inheritance and estate taxes levied in the EU alone, and the limitations that exist in respect of unilateral relief under the Capital Acquisitions Tax Consolidation Act 2003 for foreign tax paid, we urged policy-makers to consider commencing the process of negotiating new double taxation conventions in respect of CAT, with priority given to negotiations with EU Member States and other countries where there is a strong Irish presence, such as Australia and Canada.

In addition, we stressed that the existing Ireland–USA double taxation convention in respect of taxes on the estates of deceased persons should be reviewed and updated, particularly given that the double taxation convention does not compare favourably with either of the double taxation conventions that the United States has concluded with Germany and the UK. Although investment in US assets by Irish-resident taxpayers may have been relatively rare when the Ireland–USA double taxation convention was concluded in 1950, it is now an increasingly common occurrence.

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

Institute responds to DETE public consultation on Statement of Strategy 2024–2025

On 14 July the Institute responded to the request by the Department of Enterprise, Trade and Employment (DETE) for input on the development of its new Statement of Strategy to cover the period 2024–2025.

In our letter we suggested that the Department's strategic vision for the next eighteen months should explicitly recognise the importance of the tax system as a lever in sharpening Ireland's competitiveness and in incentivising enterprises to build resilience and take the necessary risks to grow and provide continued quality employment in the current difficult global trading environment.

We made a number of tax-related recommendations, including supporting growth and innovation in the SME sector by ensuring that existing tax reliefs for SMEs achieve their policy objective; making the new Enhanced Reporting Requirements workable for SMEs; and reducing the CGT rate. We also included recommendations for enhancing Ireland's competitiveness by simplifying the Irish corporation tax code; making Ireland's personal tax system more attractive; and supporting businesses in reducing their carbon emissions.

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

Institute responds to DAC consultation

The Institute responded to the European Commission's consultation on the evaluation of the Directive on Administrative Co-operation, known as the DAC, on 19 July. The evaluation covers the functioning of the DAC in the period from 2018 to 2022; therefore DAC7 and DAC8 were not covered in this evaluation.

The DAC establishes a system for secure administrative cooperation between the national tax authorities of EU countries and lays down rules and procedures for exchanging information. In our position paper we outline that, since its introduction, the scope of the reporting requirements under the DAC has significantly expanded and the rules have become increasingly complex with each iteration.

We highlighted that compliance with these reporting requirements, in particular DAC6, is administratively burdensome and costly for taxpayers and advisers. In keeping with the Commission's goal of reducing burdens associated with reporting requirements by 25% without undermining the policy objectives of the initiatives concerned, we urged the Commission to make recommendations to streamline the existing reporting requirements under the DAC as part of its evaluation, to help reduce the administrative burden for taxpayers and their advisers. This could be achieved by minimising the reporting of arrangements that have a clear commercial purpose.

We emphasised that now is the right time, given the significant changes to the tax policy landscape since DAC6, in particular, was first proposed. The implementation of public country-by-country Reporting, the Pillar Two GloBE Rules and the Anti-Tax Avoidance Directives across the EU has occurred since then.

We recommended extending the timeframe for reporting from 30 days to 90 days to ensure that tax advisers have sufficient time to consider fully whether an arrangement meets the criteria for disclosure under the DAC6 rules.

We also noted our view that it is illogical that advice regarding the same subject matter and underlying legislation may be considered reportable when provided by one professional adviser but not another. Given the importance of legal professional privilege in safeguarding taxpayers' rights, we recommended extending the scope of professional privilege solely for the purpose of DAC6 to tax advisers.

In respect of DAC2, which brought the Common Reporting Standard into EU law and extended the scope of automatic exchange of information to certain financial assets held by non-residents, we suggested that efforts should be made to promote greater awareness of the self-certification procedures. We also noted that consideration could be given to the better alignment of the classifications under the US Foreign Account Tax Compliance Act and DAC2.

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

Policy News

Legislation to introduce Pay-Related Benefit and PRSI rate increases enacted

The Social Welfare (Miscellaneous Provisions) Act 2024 was signed into law by the President of Ireland, Michael D. Higgins, on 15 July. The Act provides for a new Pay-Related Benefit system that will ensure that people with a strong work history receive enhanced benefits if they lose their employment. The introduction of Pay-Related Benefit will bring Ireland in line with other EU countries and represents a fundamental reform of the social welfare system.

The key features of the new Pay-Related Benefit scheme are:

- The weekly rate of payment for people who have at least five years' paid PRSI contributions will be set at 60% of previous earnings, subject to a maximum of €450 for the first three months.
- After that, the rate will reduce to 55% of earnings, subject to a maximum of €375 for the following three months.
- A further three months will be paid at the rate of 50%, up to a maximum payment of €300.
- For people who have between two and five years' paid contributions, the rate will be set at 50% of previous earnings subject to a maximum for €300 per week and six months' duration.
- The scheme will be available to persons who become fully unemployed after the commencement of the scheme.

The Act also provides for PRSI rate changes from 2024 to 2028. All classes of PRSI will increase by 0.1 percentage point from 1 October 2024, followed by a further 0.1 percentage point in October 2025, gradually rising to 0.2 percentage points in October 2028.

Revenue publishes report on key findings from VAT modernisation consultation

Revenue published a report on 27 June setting out the key findings from the initial stage of its public consultation on modernising Ireland's administration of VAT. Revenue noted that a well-designed programme of VAT modernisation is a priority on its path to support VAT compliance for businesses and enhance the effectiveness of tax administration. This early-stage consultation was the first step in Revenue's engagement with the VAT community on VAT modernisation. Revenue advised that further consultations and other public engagement will follow, as reform proposals take clearer shape and are tested, refined and put into operation.

To start work on the early stages of mapping out the Irish domestic reporting system, and to align it with what will be required for intra-EU reporting, Revenue wants to have a good understanding of the European Commission's technical requirements. Responses to the consultation also emphasised that Ireland's real-time reporting design should be aligned with what is agreed at EU level regarding digital reporting requirements (DRR) to minimise compliance costs for business through harmonisation. Revenue is awaiting the outcome of the VAT in the Digital Age (ViDA) file at the Economic and Finance Affairs Council (ECOFIN).

At the June ECOFIN meeting the Council exchanged views but ultimately, did not reach agreement on the ViDA package. The Commission intends to adopt all three strands of the ViDA proposal together (i.e. the introduction of DRR and e-invoicing for cross-border transactions; updating the VAT treatment of the platform economy; and a single EU VAT registration).

New thresholds for micro, small, medium and large companies

The Minister for Enterprise, Trade and Employment, Peter Burke TD, signed into law the European Union (Adjustments of Size Criteria for Certain Companies and Groups) Regulations 2024, which increase the balance sheet and turnover thresholds for micro, small, medium and large companies (in addition to groups) in the Companies Act 2014 by approximately 25%.

This change will mean that more companies will move into the micro and small categories and will therefore benefit from abridged reporting requirements and audit exemption.

The Regulations took effect from 1 July 2024, and the new thresholds will apply for financial years commencing from 1 January 2024, with companies' also having the option to apply them from 1 January 2023.

Company size is typically determined by the company's meeting two of the three size criteria (with other relevant factors applying). These size thresholds are contained in s280A to s280I of the Companies Act 2014, and the new criteria are:

- **Micro company:** A balance sheet total of not greater than €450,000, a net turnover of not greater than €900,000 and no more than 10 employees on average.
- **Small company:** A balance sheet total of not greater than €7.5m, a net turnover of not greater than €15m and no more than 50 employees on average.
- **Medium company:** A balance sheet total of not greater than €25m, a net turnover of not greater than €50m and no more than 250 employees on average.
- **Large company:** This continues to be a company that does not qualify as a micro, small or medium company.

Group size thresholds have also increased.

After the change to the size thresholds for SMEs, the Institute sought clarification from the Department of Enterprise, Trade and Employment (DETE) on the impact of the increased thresholds on the public country-by-country reporting (PCbCR) Regulations (European Union (Disclosure of Income Tax Information by Certain Undertakings and Branches) Regulations 2023). The DETE subsequently updated its accounting policy to clarify that reference to "medium-sized undertaking" in the PCbCR Regulations should be read in accordance with its definition in the European Union (Adjustments of Size Criteria for Certain Companies and Groups) Regulations 2024.

Ireland's revised National Recovery and Resilience Plan approved by European Council

At the June ECOFIN meeting the Council adopted Ireland's amended National Recovery and Resilience Plan (NRRP). Ireland's modified plan, which includes a new REPowerEU chapter, is now worth €1.15bn in grants.

The overall objective of Ireland's NRRP is to contribute to a sustainable, equitable, green and digital recovery effort, in a manner that complements and supports the Government's broader recovery efforts. Ireland's REPowerEU chapter consists of five investments and one reform and amounts to €240m. It is consistent with REPowerEU's objectives to make Europe independent of Russian fossil fuels and accelerate the green transition.

Some amendments have also been made to the NRRP based on objective circumstances such as the identification of better alternatives and the stronger-than-anticipated post-pandemic recovery of the labour market. In addition, the European Commission simultaneously endorsed a positive preliminary assessment of Ireland's first payment request for €324m under the Recovery and Resilience Facility.

Council adopts new package of anti-money-laundering rules

At the end of May the European Council adopted a package of new anti-money-laundering rules to strengthen the EU's rules on anti-money laundering and countering the financing of terrorism (AML/CFT).

The AML Regulation harmonises AML rules throughout the EU and extends the AML rules to new obliged entities, such as most of the crypto-sector, traders of luxury goods, and football clubs and agents. The AML Regulation also sets tighter due diligence requirements, regulates beneficial ownership and sets a limit of €10,000 on cash payments.

The AML Directive will improve the organisation of national AML systems, setting out clear rules on how financial intelligence units (FIUs) and supervisors work together. The package also sets up the new European authority for anti-money laundering and countering the financing of terrorism, the AMLA, which will have direct and indirect supervisory powers over high-risk obliged entities in the financial sector. The AMLA will boost the efficiency of the AML/CFT framework by creating an integrated mechanism with national supervisors to ensure that obliged entities comply with AML/CFT-related obligations in the financial sector. The AMLA will also have a supporting role with respect to the non-financial sector and will coordinate and support FIUs. Frankfurt was selected as the seat of the AMLA, which will begin its operations there in mid-2025.

The new AML Directive also prescribes that EU Member States make information from centralised bank account registers, containing data on who has which bank account and where, available through a single access point. As the AML Directive will provide access to the single access point only to FIUs, the Council also adopted a separate Directive to ensure that national law enforcement authorities will have access to these registers via the single access point. This Directive also includes the harmonisation of bank statement format. Such direct access and the use of harmonised formats by banks are an important instrument in fighting criminal offences and in efforts to trace and confiscate the proceeds of crime.

The texts of the new AML Directive and AML Regulation entered into force after their publication in the EU's *Official Journal* at the end of May. The provisions of the AML Regulation will apply from three years after the date of entry into force. Member States will have two years to transpose some parts of the AML Directive and three years for others.

Commission launches call for evidence on evaluation of ATAD

The European Commission has launched a call for evidence to gather feedback for the evaluation of Council Directive (EU) 2016/1164 of 12 July 2016, as amended by Council Directive (EU) 2017/952 of 29 May 2017 (Anti-Tax Avoidance Directive (ATAD)). The feedback period is open until Wednesday, 11 September 2024.

ATAD lays down minimum standard rules to address the most common forms of aggressive tax-planning and tax-avoidance practices that directly affect the functioning of the internal market. Article 10 of the Directive states that the Commission shall evaluate the implementation of ATAD, in particular the impact of Article 4, regarding the interest limitation rule, and report back to the Council.

The evaluation will cover the period from 1 January 2020 until the date of completion of the evaluation. It will include the application of ATAD in all EU Member States.

The evaluation will examine three broad themes:

- The implementation of ATAD in Member States and the policy choices made where the Directive allowed the Member State's legislator to choose.
- The functioning of ATAD in the form of a qualitative and quantitative assessment of the effectiveness of its measures as a minimum standard in addressing aggressive tax planning.
- The evaluation should consider the future-proofing of the measures, in particular their fitness for purpose and continued relevance given the introduction of Council Directive EU 2022/2523 of 14 December 2022 (the EU Minimum Tax Directive).

The evaluation will provide an evidence-based assessment of ATAD according to five evaluation criteria:

- **Effectiveness:** to consider the extent to which ATAD has achieved its objectives by way of a qualitative and quantitative assessment of its impact on Member States and relevant EU businesses.
- **Efficiency:** to measure whether extra national budget revenue was generated as a result of the measures and how this compares to a situation without measures. It will look at the administrative costs for the stakeholders concerned, in particular tax administrations and affected businesses. It will also consider if and how specific administrative practices have achieved a high degree of efficiency.
- **Relevance:** to assess the current relevance of ATAD measures and whether they remain relevant into the future.
- **Coherence:** to review how consistent the Directive is with other EU legislation.

- **EU added value:** to consider to what extent the results of ATAD bring added value compared to what Member States acting alone could have achieved.

Update on meetings of UN Ad Hoc Committee on international tax cooperation

The Ad Hoc Committee to Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation ("the Ad Hoc Committee") met in New York from 26 April to 8 May 2024. The Ad Hoc Committee is open to participation by all UN Member States, and all Member States were encouraged to participate in the Committee's first substantive session.

The first substantive session of the Ad Hoc Committee focused on the possible structure of the terms of reference, including substantive elements of the convention and potential topics for high-level commitments. Issues discussed included the concept of domestic resource mobilisation and the role of capacity building, the importance of effectively taxing high-net-worth individuals and possible tax measures to address environmental challenges.

The Belgian Presidency of the Council of the European Union put forward a position on behalf of the EU and its Member States before the first substantive session, advocating for a robust international tax cooperation framework under the UN to ensure a fair, inclusive and effective global tax system. The EU supports aligning the proposed convention with existing international tax initiatives to avoid duplication and ensure coherence. EU Member States advocated for consensus-based decision-making to include all countries' perspectives and stressed the importance of supporting the UN's Sustainable Development Goals through effective tax policies.

While affirming the importance of inclusive, effective and fair international tax cooperation, the first substantive session highlighted notable differences in the positions of various UN Member States and groups, particularly between developed and developing countries.

The second substantive session of the Ad Hoc Committee was held from 29 July to 16 August in New York. Before the second substantive session the Bureau of the Ad Hoc Committee released the Zero Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation.

The Zero Draft Terms of Reference set out the basic parameters and mechanisms of a United Nations Framework Convention on International Tax Cooperation and provided guidance to the negotiation of the framework convention. The draft did not necessarily represent the unanimous view of all Bureau Members. Member States of the UN and other stakeholders were invited to provide written comments on the Zero Draft Terms of Reference.

The Bureau of the Ad Hoc Committee released a Revised Draft Terms of Reference for a United Nations Framework Convention on International Tax Cooperation on 18 July. After this, further revised Draft Terms of Reference were published on 3 and 11 August.

An advanced unedited version of the Chair's Proposal for Draft Terms of Reference was published on 15 August. This draft confirms that the Committee, having completed its work in accordance with its mandate, is recommending the draft terms of reference for consideration by the General Assembly.

The draft notes that the framework convention would incorporate commitments to the fair allocation of taxing rights, including "equitable taxation of multinational enterprises". It would commit to addressing tax evasion and avoidance by high-net-worth individuals and ensuring international tax cooperation approaches that will contribute to sustainable development. The framework would also ensure effective mutual administrative assistance in tax matters related to transparency and the exchange of information; addressing tax-related illicit financial flows, tax avoidance and evasion, and harmful tax practices; and effective prevention and resolution of tax disputes.

The draft notes that efforts to achieve the objectives of the framework convention should, in the pursuit of international tax cooperation, be aligned with States' obligations under international human rights law.

The draft confirms that protocols are separate legally binding instruments, under the framework convention, to implement or elaborate the framework convention. The revised text states that "each party to the framework convention should have the option whether or not to become party to a protocol on any substantive tax issues, either at the time they become party to the framework convention or later".

The draft states that two early protocols should be developed simultaneously with the framework convention and that one of the early protocols should address taxation of income derived from the provision of cross-border services in an increasingly digitalised and globalised economy. The subject of the second early protocol should be drawn from the following specific priority areas:

- taxation of the digitalised economy;
- measures against tax-related illicit financial flows;
- prevention and resolution of tax disputes; and
- addressing tax evasion and avoidance by high-net-worth individuals and ensuring their effective taxation in relevant Member States.

The draft recommends that an inter-governmental negotiating committee meet for at least three sessions per year from 2025 to 2027, with the goal of submitting the final text of the framework convention text and the two early protocols to the UN General Assembly for its consideration by September 2027.

OECD releases additional guidance on implementation of the Two-Pillar Solution

On 17 June the OECD/G20 Inclusive Framework on BEPS released supplementary elements relating to the implementation of the *Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, including the report on Amount B of Pillar One and guidance to ensure consistent implementation and application of the global minimum tax under Pillar Two.

Amount B of Pillar One

Amount B of Pillar One provides a simplified and streamlined approach to the application of the arm's-length principle to baseline marketing and distribution activities, with a particular focus on the needs of low-capacity countries. The OECD published a report on Amount B on 19 February 2024, pending completion of design aspects. These aspects have now been completed by the Inclusive Framework, allowing jurisdictions to begin with implementation.

The additional guidance on Amount B published in June includes:

- A statement on the definitions of qualifying jurisdiction within the meaning of sections 5.2 and 5.3 of the simplified and streamlined approach: These definitions will facilitate adjustments to the return calculated under the simplified and streamlined approach for tested parties located in those qualifying jurisdictions. The definitions are now incorporated in the Amount B Guidance in the Annex to Chapter IV of the OECD Transfer Pricing Guidelines.
- A statement on the definition of covered jurisdiction for the Inclusive Framework political commitment on Amount B: The political commitment recognises that:
    - Members of the Inclusive Framework commit, subject to their domestic legislation and administrative practices, to respect the outcome determined under the simplified and streamlined approach to in-scope transactions where such an approach is applied by a covered jurisdiction and to take all reasonable steps to relieve potential double taxation that may arise from the application of the simplified and streamlined approach by a covered jurisdiction where there is a

bilateral tax treaty in effect between the relevant jurisdictions.

- The approach developed to produce the list of covered jurisdictions facilitates tax certainty for jurisdictions most interested in implementing Amount B from 1 January 2025. It is noted that an expression of interest in applying Amount B does not necessarily mean that a jurisdiction will proceed to implement it.

Further work on the Pillar One package, including the Amount B Framework, is continuing.

Pillar Two

The Inclusive Framework also released further guidance clarifying and simplifying the application of the global minimum tax and an overview of the streamlined process for recognising qualified status for the legislation of jurisdictions implementing the Global Anti-Base Erosion (GloBE) Rules.

Administrative guidance

The Inclusive Framework has released agreed *Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), June 2024*, dealing with a number of key topics where consistency and simplifications were sought by Inclusive Framework members and stakeholders.

This package of administrative guidance sets out simplified procedures that will allow MNE groups to aggregate various categories of deferred tax liabilities for determining whether they have reversed within five years and, therefore, do not need to be recaptured. The guidance also clarifies the methodology used to determine deferred tax assets and liabilities for GloBE purposes.

In addition, it provides further guidance on:

- the allocation of cross-border current and deferred taxes,
- the allocation of profits and taxes on certain flow-through tax structures and
- the treatment of securitisation vehicles under a jurisdiction's qualified domestic minimum top-up tax.

This new package of guidance will be incorporated in the Commentary to the GloBE Model Rules.

CbCR safe harbour guidance

In December 2022 the Inclusive Framework agreed a significant simplification to the GloBE Rules with the transitional country-by-country reporting (CbCR) safe harbour, which is based on financial information used for purposes of CbCR.

In December 2023 the Inclusive Framework released further guidance on the use of the transitional CbCR safe harbour under the GloBE Rules, which provided that intra-group payments need to be treated consistently in the payer and recipient jurisdiction.

The Inclusive Framework released Additional Interpretative CbCR Guidance on 27 May, which also ensures the consistent treatment of those intra-group payments and avoids the need for further adjustments under the global minimum tax where a consistent treatment is applied in the first place.

Qualified status

Under the "common approach" to the global minimum tax agreed by the Inclusive Framework in October 2021, Inclusive Framework members that adopt the GloBE Rules have agreed to implement and apply them in a consistent and coordinated way so as to minimise compliance and administration costs and the risk of double or over-taxation.

In particular, the GloBE Rules incorporate an agreed rule order, which prevents a jurisdiction from levying top-up tax in respect of the low-tax profits of a MNE where those profits have already been subject to top-up tax under "qualified" rules in another jurisdiction. In light of the rapid adoption of the global minimum tax, the Inclusive Framework has agreed a streamlined process for recognising which jurisdictions have qualified rules.

The Inclusive Framework Secretariat has now published "Qualified Status under the Global Minimum Tax: Questions and

Answers", summarising the main features of this transitional qualification mechanism. The transitional qualification mechanism is based on a self-certification by an implementing jurisdiction that its legislation achieves outcomes consistent with the key provisions of the GloBE Rules. Where the rules of an implementing jurisdiction contain some minor inconsistencies, that jurisdiction can still make a self-certification if such inconsistencies are expected to be addressed within an agreed timeframe.

Any Inclusive Framework member (including non-implementing jurisdictions) may raise questions on the self-certification and ask for these questions to be considered by all Inclusive Framework members in a meeting. If no questions are received or if questions from Inclusive Framework members are resolved, the implementing jurisdiction's legislation is recorded as having transitional qualified status.

If questions from Inclusive Framework members are not resolved and the Working Party agrees (on a consensus-minus-one basis) that an implementing jurisdiction's legislation should not be determined as qualified under the transitional qualification mechanism, the transitional qualified status is not recorded. If no agreement can be reached, then a jurisdiction's self-certification will be respected, but the implementing jurisdiction can be expected to be subject to an accelerated full legislative review to consider those questions raised that were not resolved to the satisfaction of delegates.

The transitional qualification mechanism is intended to provide jurisdictions with certainty that their rules will be recognised as qualified by other implementing jurisdictions for a transitional period while a full legislative review is undertaken and will provide MNEs with certainty regarding which jurisdiction's rules they must comply with in line with the agreed rule order.

G20 Finance Ministers issue Declaration on International Tax Cooperation

G20 Finance Ministers agreed "The Rio de Janeiro G20 Ministerial Declaration on International Tax Cooperation" at their July meeting under the Brazilian G20 Presidency. This is the first time that G20 Members have agreed a stand-alone Tax Declaration. It reflects the transformational achievements of international tax cooperation to date, the importance of that cooperation and the commitment to continue to carry it forward.

The Tax Declaration highlights the OECD's work to make international tax arrangements fairer and work better, including through the "landmark achievement" of the automatic exchange of information through the Global Forum on Transparency and Exchange of Information for Tax Purposes.

All G20 Finance Ministers committed to finalising and swiftly implementing the Two-Pillar Solution and urged G20 Members to resolve quickly any outstanding issues to ensure that the Multilateral Convention to implement Pillar One can be finalised and opened for signature as soon as possible.

This commitment was reiterated in a Communiqué issued by the G20 Finance Ministers and Central Bank Governors, where they also commended the ongoing work to implement the Two-Pillar Solution as a "resounding success of international taxation cooperation".

Recent Revenue eBriefs

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

Revenue eBriefs Issued from 1 May to 31 July 2024

No. 129 MyEnquiries Manuals

Revenue has updated the following three MyEnquiries manuals:

- Part 37-00-36B, "MyEnquiries: Submitting and Managing Enquiries in myAccount", includes a new paragraph 1.9 on the correct naming of attachments so that they are recognised as correct attachments and do not result in an enquiry's failing. In particular, users should avoid having commas, dots or other symbols in the file name of the attachment. Their inclusion could result in the MyEnquiries system's not recognising the attachment as an acceptable "file type". Updated screenshots are also included in paragraphs 1.10 and 1.11.
- Part 37-00-36C, "MyEnquiries: Submitting and Managing Enquiries in ROS", includes a new note in paragraphs 1.10 and 2.11 about the correct naming of attachments (referenced above); a new paragraph 1.13 regarding automatic notifications (e.g. "deemed clearances"); a new paragraph 2.5 with further information for agents and other advisers on the limited options for raising an enquiry without having to specify the client PPSN/tax number. Paragraph 2.10 includes information about changing an email address and the need to ensure that the email address is registered in MyEnquiries.
- Part 37-00-36E, "Notifications about Enquiries – System Notifications and Replies", includes new paragraphs 2.1, 2.2 and 2.3 with information on Revenue's automated replies to submissions regarding clearance to distribute estates/funds in respect of death cases, CGT and non-resident vendors, and CAT and non-resident beneficiaries.

No. 130 Relief for Increase in Carbon Tax on Farm Diesel

Revenue has updated the manual "Relief for Increase in Carbon Tax on Farm Diesel" to reflect an increase in the rate of mineral oil tax on farm diesel effective from 1 May 2024.

No. 131 Anti-Dumping and Countervailing Duty Refunds

Revenue has updated its "Anti-Dumping and Countervailing Duties" manual to clarify that refunds of anti-dumping and countervailing duty should be processed manually by customs officials where:

- a provisional duty is subsequently revoked and a corresponding definitive duty is not imposed; and
- the definitive duty rate is lower than the provisional rate.

No. 132 Treatment of Additional Tier 1 Capital – Section 845C, Taxes Consolidation Act, 1997

Under the Capital Requirements Directive and the Capital Requirements Regulation, together known as CRD IV, Tier 1 capital (the primary funding of a bank) is made up of two components, one of which is Additional Tier 1 capital. Revenue has updated the manual "Treatment of Additional Tier 1 Capital" to provide guidance on how to determine which instruments can be treated as equivalent to an Additional Tier 1 instrument.

No. 133 Relief for Certain Income from Leasing of Farm Land

Revenue has updated the manual "Relief for Certain Income from Leasing of Farmland" to reflect amendments made to s664 TCA 1997 by Finance (No. 2) Act 2023. A new section 5 of the manual explains the amendment to the definition of a "qualifying lessor" to impose a seven-year holding requirement on farmland purchased under a contract entered into on or after 1 January 2024, as well as the anti-avoidance rules that may apply to prevent avoidance of the seven-year holding requirement.

No. 134 Update to Accounting for Mineral Oil and Horticultural Production Relief Guide Tax Manuals

Revenue updated the "Accounting for Mineral Oil Tax" manual in Appendix I to include the mineral oil tax (MOT) rates effective from 1 May 2024. Rates up to 1 April 2024 are included with the historical rates in Appendix VII.

Revenue also updated the "Horticultural Production Relief Guide", as follows:

- For reference purposes only, a link is provided in paragraph 1 – Introduction to the non-statutory consolidated version of Chapter 1 of Part 2 of the Finance Act 1999 on the Revenue website.
- A link is provided to the manual "Natural Gas Carbon Tax Horticultural Production and Mushroom Cultivation Relief Guide".
- In paragraph 3.2 the rates of repayment have been updated with the MOT rates effective from 1 May 2024. The replaced rates are included with the historical rates in Appendix 1.

No. 135 DIRT Free Deposit Accounts – Branch Procedures

Revenue has updated the manual "DIRT Free Deposit Accounts – Branch Procedures" to specify that deposit interest arising on a deposit that is solely in respect of a general payment, and work-related payment if applicable, under the Mother and Baby Institutions Payment Scheme can be paid without deduction of deposit interest retention tax (DIRT).

No. 136 Implementation of Council Directive (EU) 2022/2523 of 15 December 2022 on Ensuring a Global Minimum Level of Taxation for Multinational Enterprise Groups and Large-Scale Domestic Groups in the Union

Revenue published a new Tax and Duty Manual, titled "Implementation of Council Directive (EU) 2022/2523 of 15 December 2022 on Ensuring a Global Minimum Level of Taxation for Multinational Enterprise Groups and Large-Scale Domestic Groups in the Union". The manual contains an overview of the main Pillar Two charging rules, along with a detailed correlation table that cross-references the legislation contained in Part 4A of TCA 1997 with:

- the relevant article of the EU Minimum Tax Directive,
- the relevant article of the OECD Model Rules,
- OECD Commentary, where relevant, and
- OECD Administrative Guidance, where relevant.

Finance (No. 2) Act 2023 inserted a new Part 4A into TCA 1997 to transpose the EU Minimum Tax Directive into Irish law. The manual will be expanded in due course to include further guidance on the Pillar Two rules contained in Part 4A of TCA 1997.

No. 137 Deduction for Retrofitting

Revenue published a new "Deduction for Retrofitting Expenditure" manual to provide details about the provisions of s97B TCA 1997. Section 97B TCA 1997 provides for a deduction against rental income for individual landlords who undertake retrofitting of rented residential premises between 1 January 2023 and 31 December 2025 that has been subsidised by a grant from the Sustainable Energy Authority of Ireland.

The criteria to claim the relief are outlined in the manual, including:

- Paragraph 2 – "What relief is available under section 97B TCA?", which outlines when relief is available, how much relief and who can claim.
- Paragraph 3 – "What are the eligibility criteria for the deduction?", which details the eligibility requirements.
- Paragraph 4 – "What happens when a property is owned by more than one landlord?", which describes what happens where these eligible properties are jointly owned.
- Paragraph 5 – "When will a clawback of the deduction occur?", which indicates the circumstances in which a clawback of relief will occur.

No. 138 Returns by Employers in Relation to Reportable Benefits – Enhanced Reporting Requirements (ERR)

Revenue updated the manual "Returns by Employers in Relation to Reportable Benefits – Enhanced Reporting Requirements" to clarify, in paragraph 4.2.2, that reporting is not required under ERR for unpaid volunteers whose only payments are for travel and subsistence expenses incurred in the performance of their volunteer duties in not-for-profit organisations.

No. 139 The Provision of Miscellaneous Benefits

Revenue's manual "Chapter 12 – The Provision of Miscellaneous Benefits" has been updated in paragraph 8.1 – Examination Awards to provide additional guidance on the tax treatment of examination awards. The manual has also been updated in paragraph 21 – Pension Contributions to note that since 1 January 2023 an employer's contribution to an employee's personal retirement savings account is not treated as a benefit-in-kind.

No. 140 Revenue Guidelines for Determining Employment Status for Taxation Purposes

Revenue published a new manual, "Revenue Guidelines for Determining Employment Status for Taxation Purposes", explaining the five-step decision-making framework set out in the landmark Supreme Court judgment in *Revenue Commissioners v Karshan (Midlands) Ltd. t/a Domino's Pizza* [2023] IESC 24. Businesses are required to use the five-step decision-making framework to determine whether a worker is an employee or self-employed for tax purposes. Guidance is provided on each of the steps in the decision-making framework and what the judgment means for businesses. The manual also includes 19 examples to illustrate the practical application of the decision-making framework.

On publication of the judgment last October, Revenue encouraged all businesses that were engaging contractors, sub-contractors or other workers on a self-employed basis to familiarise themselves with the judgment and review their workforce model. Businesses are responsible for ensuring that the correct taxes are deducted from their employees' pay and reported through the PAYE system.

No. 141 Residence of Trusts (Other Than Unit Trusts) and of Estates under Administration – Ireland and the United Kingdom

The manual "Residence of Trusts (Other Than Unit Trusts) and of Estates under Administration – Ireland and the United Kingdom" has been updated to incorporate changes to Article 4(3) of the double taxation agreement between Ireland and the UK arising from the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). The MLI introduced a new tie-breaker rule for the determination of treaty residence of persons, other than individuals, that are resident of more than one jurisdiction.

No. 142 Stamp Duty Manual – Part 7: Section 79 Conveyances and Transfers of Property Between Certain Bodies Corporate – Updated

The manual "Part 7: Section 79 – Conveyances and Transfers of Property Between Certain Bodies Corporate" has been revised and refreshed throughout to make it easier to follow. The manual provides guidance on s79 Stamp Duties Consolidation Act 1999, associated companies relief, which provides for a stamp duty exemption to apply on certain instruments that have the effect of conveying or transferring a beneficial interest in property between associated bodies corporate.

Additional guidance has been included in section 5.3.1 – Alternative Conditions to clarify the treatment that may apply in the case of a merger of a trade where relief is claimed in respect of assets that are naturally utilised during the course of the trade (e.g. trading stock, plant and equipment) and cannot therefore meet the two-year holding requirement.

No. 143 Deposit Interest Retention Tax (DIRT) – Dirt Exempt Accounts and Refund of DIRT

The manual "Deposit Interest Retention Tax (DIRT) Exempt Accounts and Refund of DIRT" has been updated to provide that interest arising on a deposit that is solely in respect of a general payment, and work-related payment if applicable, under the Mother and Baby Institutions Payment Scheme can be paid without deduction of deposit interest retention tax.

No. 144 Stamp Duty Manual Part 9: Section 125A Health Insurance Levy

The manual "Part 9: Section 125A – Levy on Authorised Insurers" has been updated in section 6 to confirm that only one health insurance levy under s125 Stamp Duties Consolidation Act 1999 is payable in relation to any 12-month period for each insured person, regardless of the number of health insurance contracts that person has entered into in the 12-month period.

No. 145 Filing the Return

Revenue has updated the manual "Filing and Paying Stamp Duty on Instruments – Chapter 4: Filing the Return" in section 5 – Preparing Stamp Duty Returns Offline to include guidance on using the Return Preparation Facility (RPF) for filing offline returns. Filers should note that when applying for young trained farmer relief, the claim should be made only using the RPF facility.

No. 146 Requests for Clearance in Death Cases and Processing

Revenue updated the "Dealing with Death Cases" manual, which provides information about the ways in which Revenue is advised of the death of a taxpayer (including various system updates) and the actions by case-workers to update the taxpayer record and ensure that the notification is processed in a timely and sensitive manner. The contents of the published manual were previously redacted. Updates to the manual aim to provide more clarity on the process, including on filing tax returns in respect of the deceased.

Revenue also updated the "Requests for Clearance in Death Cases" manual, which outlines the process for persons acting in a representative capacity to request clearance to distribute an estate after the death of a taxpayer. It has been updated as follows:

- Paragraph 3 includes guidance on how the clearance request should be submitted using MyEnquiries (by users of ROS and myAccount).
- Appendix 6 includes examples of death case clearance requests in MyEnquiries.
- Appendix 7 includes guidance for solicitors/agents that clearance requests should not be submitted under a solicitor's/agent's own tax registration number but using a TAIN with its own TAIN ROS certificate, and screenshots are provided.
- Revenue explains that if a solicitor/agent uses their own (personal/business) tax reference number for the clearance request for the client or estate, the client/estate information submitted is linked to the solicitor's/agent's own Revenue record, and the information is incorrectly linked to the solicitor/agent. These submissions require further review as Revenue staff need to check the record of the solicitor/agent and remove information that should not

be on their own business/personal record. The submission needs to be recreated or linked to the record(s) of the taxpayer/client. Revenue also points out that a ROS certificate will be needed for the TAIN. This will mean that advisers do not have to share their own ROS certificate or create sub-certificates under it.

- Appendix 8 includes guidance about the online registration of estate cases and linking the estate registration to the deceased person's record, which was an issue that the Institute raised following members' feedback. eRegistration was updated to enable agents to do online registration of estate cases (using a TAIN). The functionality was included as part of the updates to the "Register a Trust" options. This appendix includes information and screenshots of the process for agents.

All requests for "deemed clearance" must be in line with the requirement for due diligence set out in the "Requests for Clearance in Death Cases" manual.

No. 147 Flat-rate Farmers Refund Order

Revenue published a new "Flat-rate Farmers Refund Order" manual, outlining how VAT can be reclaimed under the Value-Added Tax (Refund of Tax) (Flat-rate Farmers) Order 2012 (SI 201 of 2012), the conditions under which VAT may be reclaimed, the types of expenditure on which VAT can be reclaimed and the information required to make a claim.

No. 148 Payment Made Without Deduction of Income Tax

The manual "Payment Made Without Deduction of Income Tax" has been updated to reflect the change in tax bands introduced by Finance (No. 2) Act 2023 and revise the examples, where relevant. The manual has also been updated to clarify that re-grossing will apply by reference to the applicable income tax rate only (i.e. USC and PRSI will not be included for the purposes of calculating the re-grossed amount).

No. 149 Representative Church Body – Cost of Living Accommodation Allowance

Revenue has updated the manual "Representative Church Body – Cost of Living Accommodation Allowance" to include the allowance for 2023 and to update the examples.

No. 150 Rent a Room Relief

Revenue has updated the "Rent-a-Room Relief" manual as follows:

- Paragraph 3.1 clarifies the circumstances where relief is not available between family members.
- Paragraph 7.2 provides details of the reintroduced rent tax credit and how the credit interacts with the relief.
- Paragraph 7.3 refers to the mortgage interest tax credit introduced by Finance (No. 2) Act 2023, which does not affect entitlement to Rent-a-Room relief.

The examples in this manual have also been updated.

No. 151 Tax Treatment of the Reimbursement of Expenses of Travel and Subsistence to Office Holders and Employees

Revenue has updated the manual "Tax Treatment of the Reimbursement of Expenses of Travel and Subsistence to Office Holders and Employees", in paragraph 1.4, to include guidance on mandatory reporting by employers under the Enhanced Reporting Requirements. In addition, Appendix 1 has been updated to reflect the increases in the Civil Service subsistence rates that apply from 14 December 2023.

No. 152 Stamp Duty Manual Part 7: Section 83DA – Repayment of Stamp Duty Under Affordable Dwelling Purchase Arrangements – Updated

The manual "Part 7: Section 83DA – Repayment of Stamp Duty Under Affordable Dwelling Purchase Arrangement" provides guidance on how to make a repayment claim under s83DA of the Stamp Duties Consolidation Act 1999 (SDCA 1999). Section 83DA provides for a full repayment of stamp duty paid on the acquisition of a residential property where, within 12 months of acquiring the property, the accountable person sells it to an eligible applicant within the meaning of the Affordable Housing Act 2021.

The updated manual confirms that only those persons that are directly involved in the provision of affordable housing are eligible to claim a repayment under s83DA SDCA 1999. In addition, the manual now confirms that eligibility for a repayment will arise only if the sale of the property to an eligible applicant is charged to stamp duty under the CONVEYANCE or TRANSFER on sale head of charge.

No. 153 Part 9 Levies – Guidance Updated

Revenue has updated the "Part 9: Levies" manual, which provides for a charge to stamp duty to be levied on certain financial products. The manual has been updated to provide further guidance on charge cards – specifically, company charge cards. Under s124 of the Stamp Duties Consolidation Act 1999 a charge to stamp duty arises on credit cards and charge cards.

No. 154 Particulars To Be Supplied by New Companies

The manual "Particulars to be Supplied by New Companies" has been updated in paragraph 1 to include information on the National Registrations Unit (formerly, the National Companies Unit).

No. 155 Vehicle Registration Tax Manual Section 1A

The "Vehicle Registrations Tax Manual – Section 1A: Vehicle Classification and Tax Categories" has been updated as follows:

- Section 3 – Classification of Vehicles, reflecting changes made in the Road Traffic and Roads Act 2023.
- Section 4 – Vehicle Categories, reflecting EN 1789:2020, the European Standard for ambulances.
- Section 8 – EU Classification of Vehicles, reflecting the current EU legislative framework for EU type-approval.

No. 156 Registration and Filing Guidelines for DAC7 – Digital Platform Operators

Section 3 of the manual "Registration and Filing Guidelines for DAC 7 Digital Platform Operators" has been updated to reflect information required when registering as a foreign platform operator.

No. 157 Natural Gas Carbon Tax Compliance Procedures

The manual "Natural Gas Carbon Tax Compliance Procedures" has been updated as follows:

- Paragraph 1.4.1 – National Law, which now includes a link to the non-statutory consolidated version of Chapter 3, Part 3, of the Finance Act 2010 as published on Revenue's website.
- Paragraph 2 now reflects the carbon charge rate applicable from 1 May 2024.
- Appendix I includes previous rates of the natural gas carbon tax.

No. 158 Repayments and Offsets of Taxes and Duties

Revenue has updated section 16 of the manual "Repayments and Offsets of Taxes and Duties" to incorporate the contents of the manual "Interest Payable by Revenue", which is now archived. The manual has been further updated as follows:

- Section 2 – Who is entitled to repayment? The wording has been updated for ease of understanding.
- Section 6.2 – Repayment arising from mistaken view taken by Revenue. This has been updated to clarify that where further information is requested to determine

whether a repayment is due and the amount of any such repayment, the return will not be treated as containing all of the information reasonably required and will therefore not be treated as a valid claim until the required information is received.

- Section 10 – Interest on repayment of tax. This has been updated to reflect s960GA TCA 1997, which was introduced by Finance Act 2020.

No. 159 Solid Fuel Carbon Tax Compliance Procedures Tax and Duty Manual

Revenue has updated the manual "Solid Fuel Carbon Tax (SFCT) Compliance Procedures" as follows:

- Paragraph 2 now reflects the rates of SFCT that came into effect from 1 May 2024. The previous rates are included in Appendix I.
- In paragraph 6.1 legislative references relevant to biomass products have been expanded.
- In paragraph 6.1.1 the rates of relief for solid fuel biomass products now reflect the rates from 1 May 2024, with the previous rates included in Appendix 2.
- A link is now included in paragraph 1.4.1 – National Law to the non-statutory consolidated version of Chapter 3, Part 3, Finance Act 2010, for reference purposes only.

No. 160 Section 481 Film Corporation Tax Credit

Revenue updated the manual "Section 481 Film Corporation Tax Credit" after the commencement of Finance Act 2022 and Finance (No. 2) Act 2023 amendments, which extended the operation of the incentive to 31 December 2028 and increased the expenditure cap to €125m. The updates to the manual also reflect the closure of the Regional Film Development Uplift to new claims from 1 January 2024.

No. 161 Taxation of Crypto-Asset Transactions

Revenue updated the "Taxation of Crypto-Asset Transactions" manual to include minor clarifications, including confirmation that Central Bank digital currencies must be treated as currency assets and not crypto-assets for tax purposes.

No. 162 Betting Duty Returns and Payments Compliance Procedures

The manual "Betting Duty Returns and Payments Compliance Procedures" has been updated to include the Notice of Assessment for Excise Duty template in Appendix 4 and some miscellaneous minor corrections and updates.

No. 163 C&E TAN Reports Available on ROS

The manual "C&E TAN Reports available on Revenue's Online Service (ROS) for C&E Traders" has been updated to include details for TAIN agent (tax agent) access in ROS to C&E reports for their clients. Further information on postponed VAT reports where a declaration is invalidated has been included, as has clarification where only one transaction and one payment is submitted in a month.

No. 164 Enhanced Reporting Requirements – Online Event

Revenue's final Enhanced Reporting Requirements (ERR) webinar took place on 13 June. A video of an webinar is available on Revenue's ERR Hub, together with further information and guidance on reporting under ERR.

Employers with queries that are not addressed by the information resources on Revenue's website can contact the National Employer Helpline or ROS Helpdesk, as appropriate, via MyEnquiries.

No. 165 Mineral Oil Traders' Excise Licences Manual

The manual "Mineral Oil Traders' Excise Licences (Auto-fuel Trader's Licence & Marked Fuel Trader's Licence)" has been updated as follows:

- For reference purposes only, links are provided to non-statutory consolidations, maintained by Revenue, of Chapter 1 of

Part 2, Finance Act 1999, and the Mineral Oil Tax Regulations 2012.

- References to “unmanned service stations” are revised to “unattended service stations”.
- The VAT registration threshold referred to in paragraph 2.10 has been updated to include all of the principal VAT thresholds; additional guidance regarding providers of both goods and services; and links to VAT registration information on the Revenue website.
- Where appropriate, references are included to AccutraceTM Plus, the Euromarker since January 2024.
- References to Tax Clearance Certificates are updated to reflect eTax Clearance.
- Miscellaneous minor corrections and updates have been made.

No. 166 Status of Children Act 1987 and Related Acts – Effect on the Income Tax Acts

The manual “Status of Children Act 1987 and Related Acts – Effect on the Income Tax Acts (Section 8 Taxes Consolidation Act 1997)” has been updated to remove references to the one-parent family tax credit. Section 462 TCA 1997, which provided for the credit, ceased to apply for the 2014 tax year of assessment and subsequent years.

No. 167 High Income Individuals’ Restriction

Revenue’s manual “High Income Individuals’ Restriction – Income Chargeable to Tax at the Standard Rate in Joint Assessment Cases” has been updated to reflect the 2024 rate band for jointly assessed married couples and civil partners.

No. 168 Charitable Donation Scheme

The manual “Charitable Donation Scheme Tax Relief for Donations to Approved Bodies: Section 848A and Schedule 26A TCA” has been updated as follows:

- Paragraph 3 provides examples of payments to “approved bodies” that are not considered a relevant donation for the purposes of the Charitable Donation Scheme. This material was previously contained in a Guidance Note on the Revenue website, which has now been removed.
- Paragraph 6 reflects updates to the list of bodies approved for the Charitable Donation Scheme to include educational institutions defined in s53(1)(a) of the Higher Education Authority Act 2022 and the Royal Irish Academy.
- Paragraph 8, which concerns applications for authorisation under the scheme, has been updated to indicate that the minimum annual income limit for audited financial accounts has been raised to €250,000.

No. 169 Local Property Tax Direct Debit Guidelines

The manual “Local Property Tax – Direct Debit Guidelines” has been updated in paragraph 4, SEPA Monthly Direct Debit Scheme, to add Andorra and Vatican City to the list of countries for the SEPA area. In addition, Appendix 7 – Online Procedures has been updated to include up-to-date screenshots.

No. 170 PAYE Reviews Where Week 53 Applies

Revenue’s manual “PAYE Reviews Where Week 53 Applies” has been updated to reflect the 2024 tax rate bands and tax credits in the examples provided.

No. 171 Confidentiality of Taxpayer Information

Revenue has updated the “Confidentiality of Taxpayer Information” manual in paragraph 4.13 to refer to the provisions of s891L TCA 1997, introduced by Finance (No. 2) Act 2023. This section transposed Article 12a of EU Directive 2021/514 (DAC7) into Irish law. The update concerns the authorised disclosure of taxpayer information in the context of DAC7 joint audits carried out by Revenue officials with nominated officials from other EU Member States.

No. 172 Importation of Motor Vehicles from the UK

Revenue has updated the manual "Importation of Motor Vehicles from the UK" in section 10 to add a link to vehicle registration tax requirements when registering vehicles from Great Britain. In addition, minor text changes have been applied to the manual, and an out-of-date eCustoms Notification has been removed from the Appendix.

No. 173 Section 79 Associated Companies Relief

Revenue has updated the Stamp Duty Manual "Part 7: Section 79 – Conveyances and Transfers of Property Between Certain Bodies Corporate" in section 5.3.1 – Alternative Conditions to clarify that the treatment referred to in paragraph (g) does not apply where any of the conditions set out in paragraphs (c) to (f) apply in relation to the property.

The Alternative Conditions section of the manual relates to circumstances where the two conditions in sub-section (7A) of s79 are not satisfied for the two-year period following the date of conveyance or transfer, but Revenue will not seek a clawback of the exemption provided one of a number of alternative conditions is met.

No. 174 Part 44-01-01 Amended

Revenue's "Income Tax Treatment of Married Persons and Civil Partners" manual has been updated in paragraphs 4, 6 and 7 to reflect increases in the value of the standard rate tax bands and personal tax credits after the enactment of Finance (No. 2) Act 2023. Examples 3 to 12 have also been updated to reflect the standard rate tax bands and personal tax credits in place for the 2024 tax year.

No. 175 Film Withholding Tax

Revenue's "Film Withholding Tax" manual has been updated at section 9 to advise film producer companies and their agents of a change to the system for uploading film withholding tax returns. The Revenue File Transfer System has replaced the ROS secure upload facility for this purpose.

No. 176 Customs Import Procedures Manual

Revenue's "Customs Import Procedures Manual" has been updated in sections 11.2 and 11.2.2 to include further clarifications of the text regarding repayments for e-commerce goods. Some minor text changes have also been applied, and references to the AEP system, which has been replaced by AIS, have been removed.

No. 177 Procedures for Revenue Debt in Small Companies Administrative Rescue Process

Revenue's manual "Procedures for Small Companies Administrative Rescue Process" (previously, "The Small Companies Administrative Rescue Process (SCARP)" manual) has been updated in the areas listed below:

- Initial notification by the Process Advisor,
- Role of the Revenue SCARP Unit,
- Revenue's review process to determine its decision to include/exclude Revenue debt in the scheme,
- Revenue's proof of debt,
- Tax issues arising from the SCARP and
- Role of Revenue and the Corporate Enforcement Authority.

No. 178 Capital Gains Tax (CGT) – Disposals of Business or Farm on "Retirement" (s598 TCA 1997)

Revenue's manual "Disposals of Business or Farm on 'Retirement' (s598 TCA 1997)" has been updated as follows:

- To reflect Finance (Covid-19 and Miscellaneous Provisions) Act 2022 changes. These amendments relate to the availability of retirement relief in respect of payments made on the destruction of a "relevant vessel", and the surrender of a "sea-fishing boat licence", under the Brexit Voluntary Permanent Cessation Scheme ("the Decommissioning Scheme").
- To reflect the changes to the relief that were introduced by Finance (No. 2) Act 2023,

which apply to disposals from 1 January 2025.

- To update examples and to remove content that is no longer relevant.

No. 179 Returns by Employers in Relation to Reportable Benefits – Enhanced Reporting Requirements (ERR)

Revenue updated the manual "Returns by Employers in Relation to Reportable Benefits – Enhanced Reporting Requirements (ERR)" to outline its approach to ERR compliance for the second half of 2024 and its expectations of employers for this period. In relation to the period 1 July 2024–31 December 2024, Revenue will continue to support employers with regard to ERR obligations and will not seek to apply penalties for non-compliance. From 1 July 2024 there is a firm expectation that all employers providing reportable benefits submit details of same on or before the provision of the benefit. Further details of the approach to ERR compliance for the second half of 2024 and Revenue's expectations of employers are outlined in Policy and Representations Monitor for this Issue of the ITR.

No. 180 Ex-Gratia Magdalen Laundry Payments

The "Ex-Gratia Magdalen Laundry Payments" manual has been updated at paragraph 4 as follows:

- To clarify that the investment exemption applies to the person who received a "relevant payment" under the scheme.
- To remove references to repayment claims for taxes paid between 1 August 2013 and 31 December 2014 that arose as a result of the investment of Magdalen redress payments, as they are no longer relevant. The deadline for making a claim for repayment in relation to the tax years 2013 and 2014 was 31 December 2019. The usual time limits apply regarding refund claims for the tax year 2015 and subsequent years.

No. 181 Schedule E Basis of Charge

Revenue's manual "Schedule E Basis of Charge" has been updated with the following changes:

- The title of the manual has been updated.
- The layout has been updated to improve ease of reference to relevant guidance, starting with the most up-to-date guidance.
- References to the position pre-1 January 2018 have been moved to paragraph 5.
- Improvements to content in paragraphs 1 and 2, and updates to paragraph 5, including additional hyperlinks and updated examples, where relevant, have been made.

No. 182 Charitable Tax Exemption

Paragraph 10 of the "Charitable Tax Exemption" manual has been updated to include a link to the list of bodies with the exemption on Revenue's website. The publication of the list is permitted by s208B(9) TCA 1997, which was introduced by Finance (No. 2) Act 2023.

No. 183 Tax Equalisation Arrangements

Revenue's "Tax Equalisation Arrangements" manual has been updated as follows:

- Step 2 in paragraph 5, which outlines the shadow payroll process, states that employers are required to ensure that payroll submissions under shadow payroll arrangements are accurate and reviewed for accuracy on an ongoing basis.
- The example in paragraph 5.1 reflects the relevant income tax rates, bands and credits, and USC rates and thresholds, in place for 2024.
- The example in paragraph 5.2 has been updated to reflect the Finance (No. 2) Act 2023 change to the collection of tax on share option gains realised after 1 January 2024. The gain realised is a notional payment by the employer, who is responsible for remitting the income tax, USC and PRSI (if applicable) through the PAYE system.

No. 184 Certificates of Discharge

Revenue's "CAT Certificates of Discharge" manual has been updated by removing paragraphs 4.3 and 4.4. These paragraphs contained references to "Clearance Letter (Form I.T. 10)" and the "Abolition of the status of CAT as a charge on property that has been the subject of a gift or inheritance in the previous 12 years". The paragraphs referenced items that were removed in Finance Bill 2010 and therefore are no longer required.

No. 185 Update to Rates of Tax for Repayment Manual to Reflect 2024 Rate Band/Tax Credits

The examples in Revenue's manual "Rate of Tax at Which Repayments Are To Be Made" have been updated to reflect the 2024 rate band and tax credit values.

No. 186 Non-resident Landlord Withholding Tax

Revenue released an updated "Non-resident Landlord Withholding Tax" manual to include additional clarifications and guidance on operating the NLWT and related matters, as follows:

- Paragraph 1 (Introduction) adds that where a non-resident landlord has a resident chargeable collection agent to meet their obligations, they should confirm that position to the tenant/other party in the event of any queries where the tenant/other party is concerned about the obligations that may fall on them under s238(3) TCA 1997.
- Paragraph 3.1 further clarifies the description of the Tenant/Other option when inputting a Rental Notification (RN). This option is for any person/entity paying rent directly to the non-resident and includes public bodies such as local authorities paying rent support to a non-resident landlord, even if the entity is not the tenant. The paragraph also references that an RN can be submitted with a forward date up to seven days into the future.
- Paragraph 3.2 includes clarification that a commercial ID can be created for a non-residential property to operate the NLWT. (Details on how to create this ID are included in paragraph 9, outlined below.) Revenue has also included a table to illustrate better the mandatory and optional fields when inputting RNs (for both tenants and collection agents).
- Paragraph 3.6 notes that the Rental Payment Date, to be entered on the Input Rental Notification screen, is the date the rent was paid to the non-resident landlord. The payment date cannot be later than seven days from the date the RN is being made. Information on the expanded payment options (personal credit/debit card, bank debit instruction) is included in paragraph 4.
- Paragraphs 5 to 5.3 include additional information on setting up a repeat RN function and bank mandate to remit the tax at monthly intervals. Revenue acknowledges that the repeat RN function was not working for a period last year but was fixed with effect from October 2023. The new text in the paragraph provides advice and answers questions on how to set up this facility while avoiding a duplicate deduction for the initial RN for the account holder.
- Paragraph 5.3.2 notes that the NLWT system will proceed to make deductions until the payment frequency set by the filer expires (e.g. direct debits are not processed indefinitely). Filers must remember to update the direct debit mandate, if required, as outlined in the paragraph. The system will not notify filers that the payment frequency set is expiring/has expired.
- Paragraph 7 includes more details on the two-step process for uploading RNs via CSV files on ROS (i.e. bulk uploads) and the validation checks.
- Paragraph 8.4 covers amending an RN. If the filer discovers an error, they can amend or delete an RN until the end of February of the following year (before 1 March). Revenue will need to be contacted to make any amendment after the 1 March deadline.
- Paragraph 9 outlines the three classifications of rented property with no local property

tax ID and how to generate a property ID for NLWT. These categories are commercial property; agricultural property (land); and long-term leases where the tenant assumes designated-owner status and will pay the LPT liability on behalf of their landlord (this relates to certain leases of a residential property to a local authority). The non-resident landlord needs to generate a property ID under the Create Commercial Premises/Land ID function in the NLWT and provide this ID to the tenant or collection agent. The collection agent/tenant cannot generate this ID for the non-resident landlord. Further details are provided in paragraph 9.1.

- Paragraph 11 confirms that it is not mandatory for collection agents to use the NLWT system as they can elect to remain chargeable persons. However, this means that they will remain liable for tax on the landlord's rental income and any issues that arise from those returns (including surcharges, penalties and interest). As chargeable persons, they will not use the NLWT system and cannot avail of its features, such as pre-population of tax returns. If tenants are making the deductions, they must use the NLWT system. The Form R185 is not being used since 1 July 2023.
- Paragraph 11 also includes text on the rationale for the introduction of the NLWT and its administrative benefits; the ceasing of previous derogations; how the NLWT works with the HAP/RAS; and the position where a landlord receives top-up payments from the tenant (as distinct from rent payments from the local authority).
- The manual had referenced that, given that the NLWT was introduced mid-year in 2023, in some cases a collection agent may need to file a tax return for rent collected in the period 1 January–30 June 2023, and the landlord would need to submit a tax return for the period 1 July–31 December 2023, including rental income for that period. Point 3 in paragraph 13 (and paragraph 11) notes that consideration has been given to a special administrative arrangement for the 2023 tax year, based on allowing the non-resident landlord to file a single return for the full year with the cessation of the collection agent's tax registration from the start of 2023. Revenue will be contacting non-resident landlords and collection agents about this option for 2023.
- Question 9 in paragraph 13 clarifies the interaction of the NLWT with preliminary tax. Tax withheld under the NLWT system should be treated as a payment on account. Preliminary tax should be calculated in the normal way; then any amount of withheld tax paid up to that point should be used to offset the amount of preliminary tax owing by the landlord. The text notes that for some (even many) non-resident landlords, the NLWT will reduce their preliminary tax liability to zero.
- Question 10 in paragraph 13 addresses how a collection agent can correct an error if the agent enters an RN in error (or in excess). Revenue will process the amendment and refund the excess remittance. The text notes that refunds are processed in days, in general, and in accordance with Revenue's Customer Service Standards. A query on the refund or other issues on the taxpayer's record can result in the refund's being held while the issue is clarified.
- Appendix 2 includes links to information in relation to ROS permissions and sub-certificates.
- Appendix 3 includes an extract from Revenue's Notes for Guidance on relevant legislation, i.e. s238, s1034 and s1041 TCA 1997.

No. 187 Payment and Receipt of Interest and Royalties Without Deduction of Income Tax

Revenue's manual "Payment and Receipt of Interest and Royalties without Deduction of Income Tax" has been revised in section 9.1 to address instances that may arise where there is a short delay in receipt of a completed certified Form 8-3-6 Interest, or completed uncertified Form 8-3-6 Interest and tax residence certificate, by the person making the interest payment.

No. 188 Update to State Aid Transparency Requirements

Revenue has updated the manual “State Aid Transparency Requirements: Publication of Information Regarding State Aid Granted to Individual Taxpayers” to reflect the current State Aid figures for several schemes. The changes to the manual reflect the following:

- Revised threshold for publication of €100,000 (previously, €500,000) for aid granted under the General Block Exemption Regulation, i.e. Commission Regulation (EU) No 651/2014 (as amended).
- Revised cumulative lifetime limit for young trained farmers of €100,000 (previously, €70,000) under Article 18 of the Agricultural Block Exemption Regulation, i.e. Commission Regulation (EU) 2022/2472.
- Expiration of the Temporary Business Energy Support Scheme and other general updates.

No. 189 Special Assignee Relief Programme (SARP)

The “Special Assignee Relief Programme (SARP)” manual has been updated to include a new sub-paragraph 7.1.3, which provides guidance on the calculation of SARP relief in re-grossed net pay/benefits cases.

No. 190 Research and Development (R&D) Corporation Tax Credit

Revenue has updated the “Research and Development (R&D) Corporation Tax Credit” manual to incorporate changes to the credit introduced by Finance (No. 2) Act 2023, with new examples included in the manual where appropriate.

The manual has been amended for the following key changes, which apply in respect of accounting periods commencing on or after 1 January 2024:

- increase in the rate of the R&D tax credit to 30%,
- increase in the first instalment threshold from €25,000 to €50,000 and
- introduction of a pre-filing notification requirement.

The manual has also been updated to revise references to the use of the R&D Specified Return 2022, as it is no longer required to submit a specified return for claims going forward.

No. 191 Customs Manual on Import VAT

The “Customs Manual on Import VAT: A Guide on Value Added Tax Payable on Goods Imported from Outside the European Union” has been updated as follows:

- All references to Automated Entry Processing (AEP) have been deleted.
- Appendix A – Goods Diverted to Home Use has been deleted.
- Contact details for the Anti-Fraud Unit have been updated.
- Some minor text changes have been made to the manual.

No. 192 Share Schemes

Revenue has updated Chapter 12 of the Share Schemes Manual, relating to Save As You Earn (SAYE) schemes, in section 12.11, to reflect recent amendments to the taxation of unapproved share options. In certain circumstances an SAYE option may be treated as an unapproved share option. Gains realised on or after 1 January 2024 that are chargeable to tax under s128 TCA 1997 are no longer taxed under self-assessment. From 1 January 2024 the employer is obliged to remit the relevant taxes through payroll.

No. 193 Foreign Pension Lump Sums

Revenue has updated the “Taxation of Foreign Retirement Lump Sums” manual as follows:

- Paragraph 4.1 includes guidance to the effect that when determining the tax-free amount that is available on a foreign pension lump sum, this should take account of the value of all foreign lump sum payments paid on or after 1 January 2023, whether or not such payments are chargeable to Irish tax under s200A TCA 1997. A new Example 8 has also been included.

- Paragraph 4.3.1 notes that the value of a foreign pension arrangement, as defined in s200A TCA 1997, is not taken into account for standard fund threshold purposes.
- A new paragraph 12 has been inserted to provide guidance on Revenue's treatment of foreign pension lump sums paid to resident taxpayers before 1 January 2023.

No. 194 Revenue Guidelines for Determining Employment Status

Revenue updated several manuals, listed below, to reflect the recent publication of the manual "Revenue Guidelines for Determining Employment Status for Taxation Purposes" ("the Revenue Guidelines"), which explain the five-step decision-making framework set out in the Supreme Court judgment in *Revenue Commissioners v Karshan (Midlands) Ltd. t/a Domino's Pizza* [2023] IESC 24 ("the *Karshan* judgment"). Businesses are required to use the five-step framework to determine whether a worker is an employee or self-employed for tax purposes.

The newly updated Revenue manuals are:

- "Taxation of Couriers", which has been updated throughout and to note that Example 9 in the Revenue Guidelines considers the status of a courier by reference to a particular set of circumstances and, in applying the five-step framework, the courier is considered an employee in that example.
- "Code of Practice on Determining Employment Status (Employed or Self-Employed)", which notes that Revenue is working with colleagues in the Department of Social Protection and the Workplace Relations Commission to update the content in the Code to reflect the *Karshan* judgment.
- "Part-Time Lecturers/Teachers/Trainers", which has been updated throughout and to note that Example 15 in the Revenue Guidelines considers the status of a guest lecturer by reference to a particular set of circumstances and, in applying the five-step framework, the person is considered an employee in that example.
- "Agency Workers", which notes that each case must be examined having regard to the five-step framework as set out in the *Karshan* judgment.
- "Individuals Described as 'Locums' Engaged in the Fields of Medicine, Health Care and Pharmacy", which notes that, notwithstanding that an individual, in relation to an engagement, may be described, correctly or otherwise, as a 'locum', in determining the employment status of such an individual for tax purposes, each case must be examined having regard to the five-step framework as set out in the *Karshan* judgment.
- "Taxation of Exam Setters, Exam Correctors, Exam Attendants, Invigilators, etc.", which notes that it is Revenue's view that exam setters, exam correctors, exam attendants, invigilators, etc. engaged by the State sector, private colleges or associations will, subject to the five-step framework, generally be considered to be engaged under a contract of service, i.e. as an employee.
- "National Co-op Farm Relief Service Operators", which notes Revenue's view in relation to operators that provide labour only, operators that provide equipment only and operators that provide equipment in addition to labour.

No. 195 Self Assessment: Processing/ Screening of Returns for Companies in Liquidation, Death Cases and CGT for Non-residents

Revenue has incorporated the contents of the manual "Self Assessment – Processing/ Screening of Returns of Companies in Liquidation, Death Cases, Capital Gains Tax Returns of Non-Residents and Returns on Which an Expression of Doubt Has Been Made" into the following manuals:

- "Dealing with Death Cases",
- "Requests for Clearance in Death Cases",
- "Collection Manual – Liquidation of Companies and Other Company Law Issues",

- "Requests for Clearance – Capital Gains Tax and Non-Resident Vendors" and
- "Self-Assessment – Processing/Screening of Returns on Which an Expression of Doubt Has Been made".

No. 196 Capital Acquisitions Tax Manual Part 12 – Business Relief

Revenue has updated Part 12 of the Capital Acquisitions Tax Manual, which relates to business relief (ss90–102 of the Capital Acquisitions Tax Consolidation Act 2003). Paragraph 12.7 – Clawing Back the Relief has been updated to reflect Finance (No. 2) Act 2023 amendments to the clawback provisions and to add a new example. Obsolete legislative references have also been removed from the Appendix.

No. 197 Capital Gains Tax (CGT) – Updates to TDM Part 19-06-03b Disposals Within Family of Business or Farm (s599 TCA 1997)

Revenue has updated the manual "Disposals Within Family of Business or Farm (s.599)", to reflect Finance (No. 2) Act 2023 amendments to CGT retirement relief on disposals to a child. The changes to the manual include:

- Updates to the age thresholds effective for disposals made on or after 1 January 2025, increasing the upper age limit from 65 years to 69 years.
- Updates to the monetary thresholds effective for disposals made on or after 1 January 2025, including a lifetime limit of €10m to apply to the market value of the qualifying assets in respect of which relief is available, where such assets are disposed of by individuals aged 55 to 69 years to a child, and the existing €3m cap to apply where the individual is 70 or older (before 1 January 2025 this cap applies where the individual is 66 or older).
- Updates to age limits and monetary thresholds in the context of the aggregation rules relating specifically to the disposal by an individual of shares or securities in a family company to a child.
- Inclusion of details on the requirement to claim the relief as part of a return in a relevant year of assessment.

In addition, the manual has been updated to clarify matters relating to the phrase "substantially on a full-time basis", as set out in the definition of "child" for the purpose of the relief. The manual notes that whether a niece or nephew is considered to have worked substantially on a full-time basis in the business is a question of fact to be established based on the facts and circumstances of each case. It states in a footnote that the provisions of Schedule 2, Part 1, paragraph 7, of the Capital Acquisitions Tax Consolidation Act 2003, which provides, in certain circumstances, for gift and inheritances received by nieces and nephews to be treated as those received by a child of the disponer, do not apply to CGT as they apply to CAT.

No. 198 Guidelines for Charging Interest on Late Payment Through Revenue Debt Management Systems DMS and Fixed Direct Debit Systems

The manual "Guidelines for Charging Interest on Late Payment Through Revenue Debt Management Systems (DMS) and Fixed Direct Debit Systems", which provides guidance on when and how Revenue charges interest and the rates that apply, has been updated. The updates include:

- References to the legislation covering interest in respect of overpayments under the Employment Wage Subsidy Scheme (EWSS) and Temporary Wage Subsidy Scheme (TWSS) (paragraph 2.1).
- Information on the operation of Revenue's DMS, which automatically raises and issues warnings or charges to interest, as appropriate, for employer income tax/PRSI/USC/LPT, VAT and RCT. CG case-workers can also select cases for interest late-payment charges for those tax heads and for income tax/corporation tax/CGT, EWSS and TWSS as part of routine case-working (paragraphs 2.2 to 2.5).

- Confirmation that, for interest purposes, the payment due date reverts to the original due date (i.e. not the ROS extended due date) if the payment (and return) is not made online by the ROS extended due date (paragraph 7.4).
- Contents relevant to phased payment arrangements (PPAs). For example, how interest on late payment is charged and presented in PPA cases on late part-payments or credits for period included in a PPA (paragraph 6.5) and that taxpayers can avail of a PPA to repay an interest-only charge, providing the total interest balance outstanding is in excess of €500 (paragraphs 8.4 and 8.6).
- The circumstances when interest on balance outstanding is calculated, i.e. enforcement and PPAs (paragraph 9).
- Confirmation that there is no formal appeal process in relation to interest. The amount of interest charged is dependent on the amount of tax due, the due date and the payment date. Where there is no dispute about any of these factors, it follows that the amount of interest is correctly charged (paragraph 10.1).
- A note that balloon interest does not apply to employer income tax/PRSI/USC/LPT for fixed direct debit taxpayers for the annual periods from January 2019 onwards (paragraph 11).

No. 199 Stamp Duty Manual – Part 4 Adjudication and Appeals – Updated

Revenue has updated the Stamp Duty Manual titled "Part 4 – Assessments and Appeals". The manual has been refreshed throughout and now includes details of the e-stamping regulations in the context of amending a self-assessment.

No. 200 Member of State & State Sponsored Committees, Boards, Commissions & Other Bodies

The manual "Tax Treatment of Remuneration of Members of State & State Sponsored Committees, Boards, Commissions & Other Bodies" has been updated in paragraph 1 to reference the "Revenue Guidelines for Determining Employment Status for Taxation Purposes", which explain the five-step decision-making framework set out in the Supreme Court judgment in *Revenue Commissioners v Karshan (Midlands) Ltd. t/a Domino's Pizza* [2023] IESC 24.

No. 201 The Employers' Guide to PAYE from 1 January 2019

Revenue has updated "The Employers' Guide to PAYE With Effect from January 2019" as follows:

- Removal of content that is published in other manuals.
- Updated list of applicants who can submit a paper application to register as an employer.
- Updated contact information for Revenue offices throughout.
- Details of employer obligations under Enhanced Reporting Requirements.
- Updated guidance in relation to service charges (tips) paid out by/on behalf of an employer, including examples.
- Updated text in relation to annual membership fees paid to a professional body, reflecting that where an employer makes or reimburses the payment without deduction of tax (in accordance with the manual Part 05-02-18), this treatment incorporates the value of the deduction that would have been available under s114 TCA 1997. The employee cannot then claim an expense deduction for the annual fee under s114 TCA 1997.
- Reference to the eSARP portal available in ROS.
- Detailed guidance in relation to employer obligations throughout the income tax year.
- Updated examples throughout.

No. 202 Mineral Oil Tax (MOT) Rate Changes – 1 August 2024

Revenue has updated the manual "Excise Duty Rates – Energy Products and Electricity Taxes" to reflect increases in mineral oil tax rates on petrol, auto-diesel and marked gas oil effective from 1 August 2024.

No. 203 Incapacitated Child Tax Credit

Revenue has updated the "Incapacitated Child Tax Credit" manual to remove references to specific medical conditions in paragraph 3.

No. 204 Health Expenses – Qualifying Expenses

The following updates have been made to the "Health Expenses – Qualifying Expenses" manual:

- Section 4.2 confirms that chargeable persons in receipt of PAYE income may avail of the real-time credit facility in respect of health expenses and nursing home fees.
- Section 12 includes the updated flat-rate amounts allowable in respect of children with life-threatening illnesses.
- Appendix 1 includes the updated flat-rate amounts allowable for kidney patients.
- The examples throughout the manual have been updated to reflect the standard rate tax bands and personal tax credits in place for the 2024 tax year.

No. 205 Exemptions from CAT

Revenue has updated Part 23 of the Capital Acquisitions Tax Manual, titled "Exemptions from Capital Acquisitions Tax (CAT)", in paragraph 23.12, to reflect the commencement of s42 of the Mother and Baby Institutions Payment Scheme Act 2023. This Act amended s82 of the Capital Acquisitions Tax Consolidation Act 2003 to exempt from CAT certain payments made under the scheme.

No. 206 Guidelines on PAYE Assessments

The manual "Guidelines on PAYE Assessments" has been updated in paragraph 1 and by the inclusion of a new paragraph (6.2), to reflect Finance (No. 2) Act 2023 amendments. The Finance Act introduced a four-year statutory time limit in relation to the making or amending by Revenue of PAYE assessments on employers (subject to certain exclusions), with effect from 1 January 2024.

Additional guidance on how to appeal a PAYE assessment is also included in the manual.

No. 207 Capital Acquisitions Tax Manual Part 8 – Valuation Date

Revenue has updated Part 8 of the Capital Acquisitions Tax Manual, titled "Valuation Date", in paragraphs 8.1 and 8.2.2. Paragraph 8.1 notes that the clawback periods for agricultural relief and business relief commence on the valuation date, in accordance with Finance (No. 2) Act 2023 amendments to the Capital Acquisitions Tax Consolidation Act 2003 (CATCA 2003). Paragraph 8.2.2, which relates to a benefit acquired immediately on a death, has been updated to remove the phrase "In the context of real property". This is to clarify that s13 CATCA 2003 applies to any property that is held under a joint tenancy.

No. 208 Updates to the Tax and Duty Manual on Accounting for Mineral Oil Tax

Revenue has updated the "Accounting for Mineral Oil Tax (MOT)" manual to include MOT rates in effect from 1 August 2024. The MOT rates that applied up to 31 July 2024 are included in Appendix VII.

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

Mark Ludlow
Senior Associate – Tax, RDJ LLP

	Topic	Court
01	**Capital Gains Tax: *Hanrahan v The Revenue Commissioners***	Court of Appeal
02	**Income Tax: *Buckley v The Revenue Commissioners***	High Court
03	**Corporation Tax: *Arlum Limited v The Revenue Commissioners***	High Court
04	**TAC's Jurisdiction: *Browne v The Revenue Commissioners***	High Court
05	**Corporation Tax: Determination 59TACD2024**	Tax Appeals Commission
06	**Income Tax: Determinations 62TACD2024 and 63TACD2024**	Tax Appeals Commission
07	**Capital Gains: Determination 70TACD2024**	Tax Appeals Commission

01 Capital Gains Tax: Hanrahan v The Revenue Commissioners [2024] IECA 113

The Court of Appeal (consisting of Donnelly J, Faherty J and Butler J) considered cross-appeals from a High Court judgment. In summary, the taxpayer had in 2004 entered into transactions with connected parties whereby a bond was sold subject to an option agreement. The overall result of the transactions was that a significant tax loss (for CGT purposes) was purportedly created owing to the operation of the connected-party rules (in particular, s549 TCA 1997), in respect of which relief was then claimed under s31 TCA 1997, even though no corresponding commercial loss had been suffered. Revenue challenged the taxpayer's claiming of that loss and sought to use s811 TCA 1997 (the general anti-avoidance rule, or GAAR) to reverse it.

The three questions before the Court of Appeal were:

(1) Did the taxpayer engage in a tax-avoidance transaction for the purposes of s811 TCA 1997 (the GAAR provision) ("the substantive question")?

(2) Did Revenue act within the time allowed?

(3) Was Revenue's Notice of Opinion invalid?

The High Court had ruled in favour of the taxpayer on the substantive question, which Revenue appealed to the Court of Appeal, and had ruled in favour of Revenue on the two procedural points, which the taxpayer cross-appealed.

The Court of Appeal decided all three questions, and thus the appeal, in favour of Revenue, holding the following:

(1) The fact that the tax treatment that the taxpayer sought to avail of was derived from an anti-avoidance provision (s549 TCA 1997) rather than a relieving provision did not preclude the operation of s811. "On the contrary this is a general provision which is intended to apply to **any** transaction undertaken or arranged to benefit from… **any** relief, allowance or abatement" (paragraph 115, original emphasis).

(2) Revenue was not precluded from raising the assessment beyond the four-year time limit provided by s955(2) TCA 1997 as the taxpayer had not made a full and true disclosure of all material facts on his return. Furthermore, even if the taxpayer had made a fully compliant disclosure, then s955(2) would still not apply given the effect of s811(5A).

(3) The court considered that an error in the description of the transaction by Revenue in its Notice of Opinion was not material. The court noted that the key factors that made the transaction a tax-avoidance transaction (which the court stated were the parties' connection and the consequent substitution of market value) had been sufficiently set out in the Notice of Opinion and the factual error that the taxpayer complained of had no bearing on the tax consequences of the transaction. It therefore decided that the Notice of Opinion was not invalid. Significantly, although the court found against the taxpayer on this point, it also rejected Revenue's argument that the taxpayer should be regarded as being on notice of the correct details of the transaction (on the basis that the taxpayer was a participant) and criticised that argument as Kafkaesque. The question of whether any omission from a Notice of Opinion could be cured by such details' having been included in prior Revenue correspondence to the taxpayer was looked on more favourably by the court but ultimately not considered further, given its finding that the notice was not invalid.

02 Income Tax: Buckley v The Revenue Commissioners [2024] IEHC 414

The High Court (Dignam J) considered an appeal by a taxpayer against a Tax Appeals Commission (TAC) determination that he had not been carrying on a trade of land development and thus was not entitled to claim losses against his other income (dental profession).

The taxpayer had purchased a site in 2005 with the intention of developing it, but owing to the economic downturn he did not proceed with the venture. He began claiming losses in respect of costs associated with the project (primarily borrowing costs) for the tax year 2008 and continued in the following years. Revenue subsequently raised assessments covering the years 2008 to 2015, reversing those loss relief claims on the basis that the taxpayer had not provided evidence of a trade. The taxpayer was unsuccessful before the TAC on the substantive point, concerning whether he was carrying on a trade, and on a procedural point, concerning the raising of the assessments beyond the four-year time limit.

The questions before the High Court were:

- whether the TAC was correct to find that the taxpayer was not conducting a trade of land development during the years in question and
- whether the TAC was correct to find that the taxpayer's returns did not contain a full and true disclosure of all material facts.

The High Court:

- Rejected the appellant's contention that the judgment of the High Court in *Revenue Commissioners v O'Farrell* [2018] IEHC 171 was authority for the proposition that an individual should be considered to have commenced a land development trade as soon as he purchased land with the intention of developing it, on the basis that such contention was an oversimplification of that decision. The court noted that the *O'Farrell* decision required that all of the mix of facts (and not merely the fact of purchase and intent) had to be considered.

- Noted that the Commissioner was entitled to treat the facts that planning permission had not been obtained, the zoning status had not changed and financing for the development had not been secured as relevant considerations, and could, as part of an examination of all of the facts, have reached a conclusion that the taxpayer was not trading.
- Found, however, that the Commissioner had erred when making her decision by not considering the fact (as found by her) that the taxpayer had incurred professional fees in respect of design fees and planning applications after purchase and had retained a planning agent. The court considered those facts to be relevant to the question of whether the taxpayer had commenced to trade and noted that those facts had not been referenced alongside the other facts in the "Analysis" section of the TAC's determination.
- Decided, accordingly, to remit the case back to the TAC, so that the Commissioner could reconsider the matter in light of all of the relevant facts.
- Determined, given its determination on the substantive point, that it was not appropriate to consider the second question.

03 Corporation Tax: Arlum Limited v The Revenue Commissioners [2024] IEHC 402

The High Court (Quinn J) considered an appeal by the taxpayer against a TAC determination that had upheld Revenue's decision to treat the release of a €6m debt as a trade receipt pursuant to s87(1) TCA 1997.

The taxpayer, a company, had in 2006 borrowed €9.5m to purchase land on which it intended to develop residential property. The value of that land decreased significantly after the collapse of the property market. The taxpayer had written down the value of the land in its accounts for tax purposes over a number of years. By 2016 the taxpayer had paid more than €5m in interest and capital payments to the bank, and at that time the bank agreed to write off the balance of the loan (€6m) in exchange for a payment of €250,000 (which sum was understood to be the estimated value of the land at that time).

The TAC had accepted Revenue's position that the deduction allowed for such asset value write-downs fell within the wording of s87(1) TCA 1997, i.e. that "a deduction has been allowed for any debt". It therefore upheld Revenue's assessment that the release of €6m of the original debt was a receipt of the trade pursuant to s87(1).

The principal question before the High Court was whether the TAC was correct in its determination that the writing down of the value of the land in the accounts of the taxpayer company meant that "a deduction ha[d] been allowed for any debt" within the meaning of s87(1).

Revenue also attempted to raise as an alternative argument before the High Court that s76A TCA 1997 ought also to apply to treat the amount of the debt written off as a trading receipt.

The court held the following in allowing the taxpayer's appeal:

- The TAC and Revenue were incorrect to apply s87(1) to the facts as "[t]he writing down of the value of the lands, and carrying forward losses as a result, does not equate to having a deduction allowed for a debt". The court noted that the language of the statute was clear and that no deduction had been allowed for the debt – "The lands purchased by the loan are not legally the same thing as the debt due by the Company to the bank".
- As regards the secondary argument, the court concluded that it had no jurisdiction to hear Revenue's s76A argument as it had not been raised in the case stated made to it. However, having allowed Revenue to make its s76A argument notwithstanding the court's jurisdictional concerns, the court further expressed the view that Revenue's s76A argument was without merit.

04 TAC's Jurisdiction: Browne v The Revenue Commissioners [2024] IEHC 258

The High Court (Quinn J) considered an appeal by a taxpayer against a decision of the TAC. As this case concerned VAT rather than direct taxes, the substantive questions are not considered here. However, as regards a procedural point, the High Court reiterated the position that the TAC has no inherent jurisdiction to hear arguments of a judicial review nature. Accordingly, the court held that the TAC was correct in finding that it had no jurisdiction to consider the taxpayer's complaints that Revenue's application of the Value-Added Tax Consolidation Act 2010 was *ultra vires* to the Constitution, fair procedures and the Charter of Human Rights.

05 Corporation Tax: TAC Determination 59TACD2024

In this appeal the TAC considered the application of transfer pricing rules (s835C(2)(b) TCA 1997). The appellant (a software development company) provided certain services to its parent company. The appellant charged a fee based on arm's-length principles – in this case using the transactional net margin method as the transfer pricing method and the net cost plus method as the profit level indicator – which amounted to a mark-up of 10% on its costs.

The dispute between the appellant and Revenue concerned the calculation of the appellant's net costs, in particular whether the value attributed to share-based awards (SBAs) granted by the appellant to its employees should be included. These SBAs were in respect of shares in the appellant's parent company. The appellant attributed an expense value to them in its financial statements in line with FRS 102 (being the "fair value" of the SBAs); however, it excluded their value from the calculation of its "costs" when determining its margin for transfer pricing purposes, on the basis that it did not incur any actual costs as a result of the issue of the SBAs by its parent.

The fundamental question before the TAC was whether the appellant was correct to exclude the value attributed to the SBAs from its cost base when calculating the inter-company services fees that it charged to the parent company.

The TAC held, in allowing the taxpayer's appeal, that it was correct to exclude the notional value attributed (by FRS 102) to the SBAs from the taxpayer's accounts as it found that (1) the costs of the SBAs were borne by the parent company (rather than the appellant) and (2) the OECD guidelines were concerned with the economic costs incurred by the appellant (rather than by its parent company).

06 Income Tax: TAC Determinations 62TACD2024 and 63TACD2024

In these joined appeals concerning the same matter, the TAC considered the disposal of goodwill by a sole trader to a company and the effect of the creating a director's loan account. The appellants were an individual and his company. The individual had transferred goodwill in his sole trader business to his company in exchange for the creation of a €250,000 director's loan account in his favour. He claimed retirement relief in respect of that disposal. He subsequently drew down the balance of the director's loan over a number of years (2013–2016). Four years after the transfer of the goodwill, the appellant sold the shares in the company to his children for €1.

Revenue raised a number of assessments against the individual and his company, subjecting the sums extracted to alternative assessments to PAYE and dividend withholding tax (DWT).

The questions that the TAC had to consider were:

- What was the appropriate value of the goodwill?
- What approach should the TAC take to the alternative assessments?
- How was the creation and draw-down of the director's loan account to be treated?

Valuation of goodwill

The TAC heard evidence from the appellants' and Revenue's expert witnesses on the valuation of the goodwill of the business, and the determination sets out their competing valuation methodologies in some detail. Expert 1 (appellants' expert) had valued the goodwill at €283,736. Expert 2 (Revenue's expert) had valued the goodwill at €41,225.

The two experts had agreed that the key issue in valuing the business was its future profits. Where they disagreed was in the appropriate number of years' profits to take into account when calculating future maintainable profits, with Expert 1 favouring 6.25 years and Expert 2 favouring 3 years. A further difference was that Expert 1 used a simple average of the profits whereas Expert 2 favoured a weighted average approach that placed most weight on the most recent year's profits (which was also the recommended approach in Des Peelo's book on valuation methods, *The Valuation of Businesses and Shares: A Practitioner's Guide*). A further difference arose between the experts concerned the multiple to apply (4.5 vs 2).

The TAC accepted that goodwill existed in the individual's business and that this had been transferred to the company. However, the TAC favoured Expert 2's approach, holding that, on the particular facts (a trend of declining sales), Expert 2's approach was more consistent with Mr Peelo's guidance, and accordingly found that the appropriate value of the goodwill was €41,225.

Alternative assessments

The Commissioner noted that there were no Irish judicial decisions on the issue of alternative assessments but there was a line of UK authority, which held that they were not an unfair practice. In any event, the Commissioner noted Irish judicial authorities to the effect that the jurisdiction of the TAC was to focus on the assessment and charge rather than any incidental questions. The Commissioner also noted that the case before her had been adjourned at an earlier stage to allow the appellants to take judicial review proceedings against Revenue but those judicial proceedings were not then taken. Therefore the Commissioner focused on the correct charge to tax.

Tax treatment of the director's loan transactions

The Commissioner had already found that the goodwill should be valued at €41,225 rather than €250,000. The question then was how the difference of €208,775 was to be treated. Given the choice between confirming the assessments to Schedule E (emoluments/PAYE) or Schedule F (dividends/DWT), the Commissioner chose the PAYE assessments. Regarding whether the tax should be assessed when the amounts were credited to the director's loan account (i.e. the paper transaction when the loan balance was created in the company's books) or when the sums were actually drawn down, the Commissioner opted for the latter, taxing the amounts only as and when they were drawn down. It should be noted that Revenue stated that this was its preferred approach, and the Commissioner further noted that no arguments had been made during the proceedings to support the proposition that the creation of a director's loan in a company's financial accounts is an emolument under s112 TCA 1997.

Finally, having found that the amounts were assessable as emoluments under Schedule E, the Commissioner held that they could not also be assessed as dividends under Schedule F.

07 Capital Gains Tax: TAC Determination 70TACD2024

In this appeal the TAC considered the meaning of "debt on security" (s541 TCA 1997). In 2018 the appellant sold his company to a third-party purchaser at the par value of the shares. The following day he assigned a debt due to him from the company (documented by way of a convertible loan agreement (CLA), which had been entered into in 2013) to the same third party. The nominal outstanding balance of the CLA was €2,135,000 at that time, but it was assigned to the third party in consideration of the sum of €21,350. The appellant therefore made a loss of €2,113,650 on the disposal of the CLA.

The appellant then claimed that loss against a gain that he made on the disposal of shares in another company. Revenue disallowed that loss claim, and the appellant appealed to the TAC.

The TAC held the following, in allowing the taxpayer's appeal:

- *McSweeney v J.J. Mooney (Inspector of Taxes)* [1997] 3 IR 424 was authority for the proposition that it is not a requirement for a debt on a security that interest must actually be paid on the loan but merely that there is an entitlement to interest on the loan.
- Despite the fact that the company had insufficient authorised share capital to allow conversion of the loan to shares, the conversion rights were not thereby rendered merely theoretical, because the company was controlled by the appellant and his son, who operated it "in harmony", and so would have passed the necessary resolutions to increase the authorised share capital if they had been mandated to do so under the terms of the CLA.
- As regards the question of whether the loan had the potential to increase in value such that it would be marketable, the Commissioner noted that:
    - it was improbable that the appellant would have invested the sum of €2,135,191 if he had no realistic prospect of getting a return on his investment; and
    - the company held underlying assets at the time that the CLA was entered into, and since it was possible that those underlying assets "**could** have substantially increased in value at that time or thereafter, the Commissioner finds that the value of the underlying assets in [redacted] had the **potential to increase in value**. As that potential increase in value may have enabled the CLA to be marketable, the Commissioner finds as a material fact that the second test under *McSweeney* is satisfied and as such the CLA entered into by the Appellant is considered a 'debt on security' [emphasis in original]".

- The Commissioner further rejected Revenue's argument that s546A TCA 1997 should apply to disallow the loss, as he rejected its contention that it had arisen consequent upon an arrangement where the main purpose, or one of the main purposes, was to secure a tax advantage.
- The Commissioner further rejected Revenue's argument that the transaction between the appellant and the purchaser of the CLA was not at "arm's length" such that s547 TCA 1997 would deem them to be connected parties, noting that the purchaser had purchased the CLA for real monetary funds.


Direct Tax Cases: Decisions from the UK 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 – Trading Status**	First-tier Tribunal
02	**Corporation Tax – Expenses of Management**	Supreme Court
03	**Corporation Tax – Interest Withholding Tax and Treaty Relief**	Upper Tribunal
04	**Corporation Tax – Treaty Interpretation**	Court of Appeal

01 Capital Gains Tax – Trading Status

In ***J Wardle v HMRC*** [2024] UKFTT 543 (TC) the UK First-tier Tribunal (FTT) allowed an appeal against HMRC's decision to disallow entrepreneurs' relief on the basis that no trade was being carried on at the date of disposal.

Mr Wardle (the taxpayer) had an interest in a limited liability partnership (LLP) that was established to construct and operate a power plant using wood-waste biomass as its fuel. He previously made part-disposals of the partnership interest in 2015 and 2016, which led to unsuccessful appeals to the FTT on similar grounds. In February 2020 he disposed of his remaining interest in the LLP. The taxpayer argued that the LLP was trading on a commercial basis from August 2015. HMRC denied his claim for entrepreneurs' relief and argued that the business had not been trading for the required two-year period before the disposal:

> "Specifically, [HMRC] contended that as at 28 February 2018 the LLP had not set up the business because construction was incomplete, commissioning was outstanding, [Renewables Obligation Certificate] Accreditation had not been obtained, electricity had not been produced and, accordingly, the LLP was not in a position to trade with anyone."

The appellant argued that *Birmingham & District Cattle By-Products Co. Ltd v IR Commrs* [1919] 12 TC 921 was not the correct authority to apply and that *Mansell v R & C Commrs* [2006] UKSPC SPC551 should be applied instead. According to the appellant, the partnership had been trading since August 2015, when the LLP entered into approximately 56 contracts with various parties relating to the construction, operation and financing of the plant.

Although *Birmingham & District Cattle By-Products Co.* was a UK High Court decision, the FTT chose not to apply it, noting that the same judge had later seemingly expressed doubts about the ruling, as had the House of Lords in the non-tax case *Khan v Miah* [2001] 1 All ER 282. Also, *Mansell*, although a decision of the Special Commissioners, was approved and applied by the High Court in *Tower MCashback LLP v R & C Commrs* [2008] BTC 805. The FTT ultimately decided to follow the principles, or three-step test, set out in *Mansell* to establish whether a business was trading.

According to Step 1, before a trade can be said to commence, there must be a fairly specific concept of the type of activity to be carried on: the FTT agreed that the LLP had a specific concept of the type of activity to be carried on, namely, generating profit from the construction and operation of a power plant burning wood waste.

Step 2 provides:

> "that a trade cannot commence until it has been set up (to the extent it needs to be set up), and that acts of setting up are not commencing or carrying on the trade. Setting up trade will include setting up a business structure to undertake the essential preliminaries, getting ready to face your customers, purchasing plant, and organising the decision-making structures, the management, and the financing. Depending on the trade more or less than this may be required before it is set up."

The FTT agreed that this step had been met. The partnership agreement organised the decision-making structure and management. The finance was fully organised, with funds being drawn down from August 2015 and continually thereafter. Furthermore, the LLP had entered into approximately 56 contracts with various parties relating to the construction, operation and financing of the plant in August 2015. The FTT held that "the train was on the tracks travelling to its destination".

The third step states that "it is not always necessary that a sale is made or a service supplied before a trade can be said to be commenced": the FTT held that entering into the power purchase agreement was "operational activity" and further noted that other contracts to purchase wood (the raw material required) and hire and train staff were also operational activities.

The FTT therefore determined that the LLP had been trading throughout the necessary two-year period, and the appeal was allowed.

02 Corporation Tax – Expenses of Management

In July the UK Supreme Court delivered its judgment in ***Centrica Overseas Holdings Ltd v HMRC*** [2024] UKSC 25, where it upheld the Court of Appeal's decision to reject an expenses-of-management claim for certain professional advisory fees when calculating profits for corporation tax purposes, under the UK equivalent of s83 TCA 1997. The Court of Appeal decision was reviewed in "Direct Tax Cases: Decisions from the UK and European Courts", *Irish Tax Review*, 37/1 (2023).

The facts were that an intermediate holding company in the Centrica group claimed management expenses for some professional advisers' fees incurred in connection with the disposal of a Dutch business (Oxxio) that was held through a Dutch BV. HMRC disagreed, however, and argued that the expenses were non-deductible. It was accepted by this stage in the proceedings that the fees in question were expenses of management. The question under consideration was whether the expenditure was of a revenue or a capital nature. UK expenses-of-management legislation expressly prohibits expenses of management "of a capital nature".

The taxpayer argued that the Court of Appeal had erred in finding that, in the context of the expenses-of-management legislation, the scope of "expenses of management" of an investment business that are of "a capital nature" and therefore excluded is to be identified on the basis of the principles that apply for the identification of expenditure that constitutes "items of a capital nature" incurred by a trading company, as provided for in specific UK legislation on trading deductions. The Supreme Court dismissed this ground of appeal, holding that the capital/revenue test in the UK management expenses legislation should be interpreted in the same way as the test for trading companies. Both were intended to carve out expenses that are capital in nature by reference to the concept of expenditure of a capital nature already well established in the tax code and the case law.

The taxpayer's alternative argument was that existing case law in relation to capital expenditure in the context of a trading company emphasises that the capital/revenue analysis turns in large part on the nature of the business in question, and investment businesses present a very different context from the business of trading companies. With that approach applied, the circumstances are such that expenditure relating to the core function of an investment management business is not excluded as capital expenditure. However, the Supreme Court held that the question of whether expenditure is capital or revenue in nature is a question of law. A commercial decision was taken to sell the Oxxio business, an identifiable capital asset. The object and purpose (in an objective sense) of the expenditure in question was to obtain advice and services to achieve that disposal. That different options were considered and there was a possibility of the transaction's not going through do not alter the commercial reality that a decision had been taken to dispose of Oxxio. The expenditure in question was one-off in nature. The fact that the taxpayer had many capital investments apart from Oxxio that might involve management from time to time, including in appraising an acquisition, disposal or restructuring, did not alter that. The day-to-day costs of staff dealing with the business of management, rents, administration costs and repairs are all deductible revenue expenses of management and are not capital in nature. The Supreme Court held that the expenditure was capital in nature; the Court of Appeal made no error in reaching the same conclusion. The taxpayer's appeal was dismissed.

03 Corporation Tax – Interest Withholding Tax and Treaty Relief

In ***Burlington Loan Management DAC v HMRC*** [2024] UKUT 152 (TCC) the UK Upper Tribunal dismissed HMRC's appeal and held that an Irish-tax-resident company was entitled to benefit from the exemption in the UK–Ireland double taxation treaty (DTT) from UK withholding tax (WHT) on UK-source yearly interest. The First-tier Tribunal (FTT) decision was reviewed in "Direct Tax Cases: Decisions from the UK and European Courts", *Irish Tax Review*, 36/4 (2022).[1]

The facts in the *Burlington* case were relatively straightforward. SAAD Investments Company (SICL), a Cayman company, had a debt claim of a principal amount of *circa* £140m against Lehman Brothers International (Europe) (LBIE). LBIE was part of the Lehman Brothers group and went into administration in 2008. SICL, itself, had been in liquidation since 2009. In 2016 the principal amount of the claim was paid in full by LBIE's administrators, leaving *circa* £90m of interest still to be paid. There

[1] See article by Martin Phelan "The "Principal Purpose Test" Tested in Court: Burlington Loan Management", *Irish Tax Review*, 36/3(2023)

was a secondary market in claims against LBIE, and the liquidators of SICL engaged Jefferies, a broker, to sell SICL's claim. In March 2018 the claim was sold by SICL to Jefferies for £82.4m and then by Jefferies to Burlington Loan Management (BLM) for £83.55m. BLM was an Irish-resident company and the principal European fund investment corporate vehicle for Davidson Kempner Capital Management.

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

In determining whether there had been an abuse of the UK–Ireland treaty in the case of the assignment of the debt claim, the Upper Tribunal held that the correct starting point was the proposition that, unless there is an abusive arrangement falling within Article 12(5), BLM, a resident of Ireland and beneficial owner of the debt claim, should be taxed only in Ireland on the interest. The question, therefore, was whether there was something abusive, in the particular circumstances of this case, for Ireland alone to tax interest beneficially owned by a company resident in its territory.

HMRC argued that the taxpayer's main purpose in taking an assignment of the debt claim was to take advantage of the treaty. The Upper Tribunal did not accept this argument as it would, in effect, turn Article 12(5) into something fundamentally different: the provision would be read as if it were directed at the avoidance of UK WHT by the seller and was applicable whether or not the seller actually knew the basis on which the purchaser did not suffer a UK tax charge. If HMRC were correct, Article 12(5) of the UK–Ireland treaty would always apply in a case where the person assigning the interest on a debt claim (in this case, SICL) knew that the purchaser would not suffer UK WHT and consequently sought to obtain an economic advantage for itself by sharing in the saving of UK WHT in circumstances where the purchaser had an exemption from UK WHT. The only thing that mattered was that the exemption was actually attributable to the UK–Ireland treaty even if the seller did not know the basis of the purchaser's exemption.

The Upper Tribunal held that the FTT had been correct to focus on whether the subjective purposes of the buyer and the seller in entering into the assignment constituted an abuse of the treaty. The FTT determined that there was nothing abusive in the taxpayer's taking advantage of the treaty. The Upper Tribunal held that the FTT had not erred in making the evaluative findings that it did. The conclusions reached by the FTT were "well within the range of views that a reasonable tribunal could come to", and HMRC's appeal was dismissed.

04 Corporation Tax – Treaty Interpretation

In ***HMRC v GE Financial Investments Limited*** [2024] EWCA Civ. 797 the Court of Appeal reversed the decision of the Upper Tribunal that a UK-resident company was also US resident for the purposes of the UK–US double taxation treaty. The Upper Tribunal's decision was reviewed in "Direct Tax Cases", *Irish Tax Review*, 36/3 (2023).

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

It was accepted by both parties that the taxpayer was resident in the UK under the wording of Article 4(1) of the UK–US double taxation treaty. The central issue was whether the taxpayer would also be considered a resident of the US under the same Article, which would have been sufficient to establish its entitlement to UK double taxation relief under Article 24. The court overturned the decision of the Upper Tribunal, holding that the company's status as a stapled entity did not amount to a criterion connecting it to the United States per Article 4(1) and therefore it did not meet the treaty definition of a US-resident company. The "stapling" of the relevant shares did not represent a "local connection" attracting worldwide taxation that fell within any of the criteria listed in the treaty or any criteria "of a similar nature" also specified in the treaty.

The parties concurred that, notwithstanding the Article 4 position, the taxpayer would be entitled to a credit against UK tax for US tax paid by virtue of the fact that it was carrying on business in the US through a permanent establishment there. In this regard, the Court of Appeal agreed with the Upper Tribunal that the First-tier Tribunal (FTT) had made no material error of law. There was "nothing surprising" about its conclusion that the taxpayer was not carrying on business through the LP. The question was an evaluative one for the FTT to determine, and it was entitled to conclude as it did.

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

Pillar One update

Amount A

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) has failed to meet the self-imposed 30 June 2024 deadline for finalising the text of the OECD Multilateral Convention to Implement Amount A of Pillar One.

A key component of Pillar One, Amount A will be applicable to multinational enterprises (MNEs) meeting specific criteria, including global revenue exceeding €20bn and profits exceeding 10% of their total revenue. Amount A aims to reallocate 25% of an MNE's excess profit to the market jurisdictions where the MNE generates its revenues. This introduces a new taxing right intended for the largest and most profitable MNEs, even in cases where they lack a physical presence in the market jurisdiction.

The deadline was missed despite officials' assertions in May that efforts to meet the goal were still on track, However, in mid-July it was reported that the Inclusive Framework was nearing completion of a text with respect to Amount A.

30 June 2024 was also the end date for the "unilateral measures compromise" between the US and a number of countries that have digital services taxes (DSTs) in place (Australia, France, Italy, India, Spain, Turkey and the UK). Under the compromise those countries would give credits to US MNEs subject to their DSTs and the US would withdraw its retaliatory tariff threats and hold on introducing further tariffs. The 30 June date has not been extended. Separately, the Canadian DST came into force on 28 June 2024 (see below, under Pillar Two).

Amount B

On 17 June 2024 the OECD/G20 Inclusive Framework published two additional guidance documents on Amount B.

Amount B is a three-step simplified and streamlined approach for determining a return on sales for in-scope distributors. It includes (1) a pricing matrix, (2) a tool to cross-check for operating expenses (OECC) and (3) a mechanism to address instances in which data are unavailable or insufficient in a specific jurisdiction (DAM). It is a framework for the simplified and streamlined application of the arm's-length principle to in-country baseline marketing and distribution activities.

The OECD updated the Amount B approach for jurisdictions that qualify for adjusted treatment. This is of particular relevance to developing countries. Challenges of limited data within jurisdiction combined with high sovereign risk in jurisdictions, and/or situations where there may be reasons why local operating expenses are low compared with sales relative to other jurisdictions, are areas that the adjusted treatment aims to deal with. The Inclusive Framework has also agreed which jurisdictions may benefit from the political commitment to respect Amount B outcomes where the distributor is in a low- or middle-income jurisdiction.

Further work is to be undertaken on the interdependence of Amount B and Amount A under Pillar One before the signing and entry into force of the Amount A multilateral convention.

Governments can use the approach beginning in January 2025 by either (1) allowing tested parties in their jurisdictions to elect to apply Amount B as a safe harbour or (2) mandating that the tax administrations and tested parties in their jurisdictions apply the approach. Work is ongoing by the OECD to identify jurisdictions that plan to adopt the optional Amount B transfer pricing simplification framework (published on 24 February 2024 and added to the OECD Transfer Pricing Guidelines), and a list of theses jurisdictions is expected in October.

Pillar Two update

On 17 June the OECD Inclusive Framework released further administrative guidance on the implementation of the Pillar Two rules, covering:

- recapture of deferred tax liabilities – approaches to how to apply the deferred tax recapture rule in practice;
- divergence between the Pillar Two basis and accounting carrying values – clarification of how the total deferred tax adjustment should be calculated using GloBE carrying values for items such as stock-based compensation and intra-group transfers at cost;
- allocation of cross-border current taxes – providing a formula-based approach for allocation;
- allocation of cross-border deferred taxes;
- allocation of profits and taxes in groups, including flow-through entities; and
- treatment of securitisation vehicles, whereby they may be excluded from the scope of qualified domestic minimum top-up taxes, and interaction with safe harbour provisions – further guidance matters relating to securitisation entities will be considered.

To understand the implications for their Pillar Two tax calculations, taxpayers must consider the guidance as applied to their fact pattern, group structure and the type of entities within the group.

The guidance regarding the divergence between the Pillar Two basis and accounting carrying values may be relevant for many US multinationals where accounting treatment and/or check-the-box rules did not neatly line up against the Model Rules and pre-existing OECD Commentary.

More work will be undertaken on certain matters, including securitisation vehicles. Further guidance on hybrid arbitrage in the main Pillar Two rules is likely to be released, and work is continuing with respect to dispute resolution on interpretation of the rules.

OECD opens consultation on draft user guide for GloBE information return XML schema

The OECD opened a public consultation on 10 July 2024 (which closed on 19 August) for a draft user guide concerning the XML schema for the Global Anti-Base Erosion (GloBE) information return. The GloBE Model Rules provide for the annual submission of a GloBE Information Return (GIR), which sets out information on the tax calculations in accordance with the GloBE Rules. The Inclusive Framework on BEPS has developed the draft XML schema and user guide to facilitate GIR submissions and the enforcement of the GloBE Rules. After finalisation, the GIR XML schema can be utilised for the exchange of information under the Multilateral Competent Authority Agreement.

G20 Finance Ministers and Central Bank governors issue Communiqué after third meeting highlighting progress on Two-Pillar Solution

The G20 Finance Ministers and Central Bank governors welcomed the progress achieved on the OECD/G20 Inclusive Framework's Two-Pillar Solution and reiterated commitment to the Two-Pillar Solution in a statement released on 26 July 2024. The third meeting of the leaders took place during the Brazilian G20 Presidency in Rio de Janeiro from 25 to 26 July 2024. The statement commented positively on the advancements in implementing the Global Anti-Base Erosion (GloBE) Rules under Pillar Two. The leaders encouraged swift resolution of the remaining issues related to Amount B under Pillar One, in order to facilitate the opening of the Multilateral Convention to Implement Amount A of Pillar One for signature at the earliest opportunity. Also, the Rio de Janeiro G20 Ministerial Declaration on International Tax Cooperation was issued, reaffirming the G20's dedication to tax transparency and progressive taxation and voicing support for constructive discussions at the UN Ad Hoc Committee to Draft Terms of Reference for a United Nations Framework Convention on International Taxation Cooperation.

Belgium: Parliament adopts new Pillar Two law

The Belgian Parliament approved a new Pillar Two law on 2 May 2024, which integrates specific provisions outlined in the administrative guidance issued by the OECD/G20 Inclusive Framework on BEPS in 2023. The new law also addresses certain legislative errors identified in the original Pillar Two law, dated 19 December 2023.

Furthermore, the law includes adjustments to the Belgian innovation income deduction (IID) to maintain the effectiveness of the IID for groups affected by the Pillar Two legislation in Belgium. Without these adjustments the benefit of the IID would have been partially lost, as groups with a GloBE tax rate in Belgium of lower than 15% owing to the IID would have been required to pay a top-up tax.

Isle of Man: Update on implementation of Pillar Two issued

On 17 May 2024 the Isle of Man government, together with Guernsey and Jersey released a joint statement outlining the next steps for the three Crown Dependencies in implementing the OECD's Pillar Two global tax framework. This reaffirmed their "shared commitment to international tax standards and the ongoing value of inter-island collaboration in areas of mutual interest in international tax policy".

Subsequently, on 20 May 2024, the Isle of Man issued a news release confirming the following:

- The Isle of Man plans to introduce a qualified domestic minimum top-up tax (QDMTT), to apply to accounting periods commencing on or after 1 January 2025.
- The QDMTT will be a new tax, distinct from the existing Isle of Man income tax, and is intended to qualify as a QDMTT under the OECD's Inclusive Framework on BEPS.
- A decision on whether to implement an income inclusion rule will be made in 2024.
- It is anticipated that the legislation to implement the Isle of Man's response to Pillar Two will be presented in autumn 2024.
- The Isle of Man Income Tax Division will maintain engagement with affected businesses while preparing the necessary legislation.

The QDMTT will ensure that multinational enterprises with an annual consolidated turnover exceeding €750m operating within the Isle of Man will be subject to a minimum tax rate of 15% on the profits that they generate on the island. Consequently, the majority of businesses in the Isle of Man will not fall within the scope of the rules and will continue to be governed by its 0%/10% corporate tax regime.

Barbados: Tax reform enacted, including Pillar Two legislation

After the Barbados Prime Minister's statement in November 2023 regarding proposed rules to implement Pillar Two, tax legislation was approved in Barbados in May 2024. The Income Tax (Amendment and Validation) Act 2024 and the Corporation Top-Up Tax Act 2024 include significant corporate income tax measures, such as:

- a new domestic corporate income tax rate of 9% effective from 1 January 2024;
- the introduction of a tax that is intended to be a qualified domestic minimum top-up tax (QDMTT) with a 15% rate, applicable to in-scope multinational enterprise (MNE) groups (certain MNE groups with annual global consolidated revenue of €750m or more);
- a carve-out rule (for both the domestic corporate income tax rate and the QDMTT) for fiscal year 2024, under which the new tax regime should apply only if the group income is subject to an income inclusion rule or an undertaxed profits rule elsewhere; and
- changes to the rules on advance payments ("prepayments") of corporate income tax and the rules relating to tax losses and group relief.

Italy: Ministry of Finance issues decree on Pillar Two transitional safe harbours

The Italian Ministry of Finance has issued a decree to implement the Pillar Two transitional safe harbours in line with the OECD *Safe Harbours and Penalty Relief* document and subsequent administrative guidance. These transitional safe harbours are designed to alleviate the compliance burden on in-scope taxpayers during the initial years of the GloBE Rules' application by avoiding detailed GloBE calculations for jurisdictions with low risks of significant top-up tax liabilities.

Specifically, the decree includes provisions for:

- The transitional country-by-country reporting safe harbour, whereby the top-up tax for a jurisdiction is considered to be zero if the in-scope group meets at least one of the following tests for that jurisdiction:
  - the *de minimus* test (Article 3 of the decree),
  - the simplified effective tax rate test (Article 4 of the decree) and
  - the routine profits test (Article 5 of the decree).

  This safe harbour, available on taxpayers' election, applies to fiscal years commencing before or on 31 December 2026 and ending by 30 June 2028. Additionally, under the "once out, always out" approach, if an in-scope group has not applied for the safe harbour regarding a jurisdiction in a fiscal year when it is subject to the GloBE Rules, it cannot qualify for that safe harbour in a subsequent year.
- The transitional undertaxed profits rule (UTPR) safe harbour, whereby the UTPR top-up tax for the ultimate parent entity's jurisdiction is deemed to be zero if that jurisdiction applies a nominal corporate income tax rate of at least 20% (Article 15 of the decree). This safe harbour, also available on election, has a temporary nature and is applicable for fiscal years commencing on or before 31 December 2025 and ending before 31 December 2026.

Belgium: Mandatory Pillar Two notification for MNEs and large domestic groups imminent

Registration of multinational enterprise (MNE) groups and large Belgian domestic groups under the Belgian Pillar Two Regulations opened, initially with a deadline of 13 July 2024 for those whose financial year aligns with the calendar year and a deadline of 30 days after the start of the first Pillar Two reporting year for other taxpayers. However, the deadline was later extended to 16 September 2024.

Taxpayers must submit a Pillar Two notification form to the Belgian tax authorities to register. Belgium was the first to initiate registration steps, and the initial deadline is likely to have taken many taxpayers by surprise.

Spain: Council of Ministers approves Bill implementing Minimum Taxation Directive (Pillar Two)

In early June the Spanish Council of Ministers approved the Bill implementing the EU Pillar Two Directive. The Bill, which requires approval by Congress and for which the urgent parliamentary procedure has been requested, would seek to implement the EU Directive on Pillar Two.

Luxembourg: Chamber of Deputies publishes draft legislation to amend Pillar Two law

The Luxembourg Chamber of Deputies released draft legislation on 12 June 2024 proposing amendments to the Pillar Two Law of 22 December 2023. The draft legislation seeks to incorporate clarifications and additional technical provisions arising from the OECD administrative guidance of 2023. The proposed modifications are intended to take effect for fiscal years starting on or after 31 December 2023.

Canada: Legislation for implementation of Pillar Two rules enacted

On 20 June Canada implemented new legislation introducing a 15% global minimum tax on profits for Canadian multinational corporations and those engaged in activities within Canada with consolidated annual revenues exceeding €750m. The new Global Minimum Tax Act (GMTA) encompasses an income inclusion rule (IIR) and a qualified domestic minimum top-up tax (QDMTT). The GMTA applies retroactively and enforces the IIR and QDMTT for fiscal years commencing on or after 31 December 2023 (i.e. from 1 January 2024 for calendar-year taxpayers). The undertaxed profit rule (UTPR) is anticipated to take effect on 31 December 2024 (i.e. from 1 January 2025 for calendar-year taxpayers).

The Department of Finance is seeking public comments on draft legislative proposals that reflect additional guidance and amendments based on the OECD Model Rules, including on asset transfers before transferor transition year, deferred tax assets and liabilities, and the definition of a securitisation entity. The draft legislation also covers proposals for implementation of the UTPR.

Italy: Decree on Pillar Two QDMTT published

The Italian Ministry of Finance issued a decree on 1 July 2024, which was published in the Italian Official Gazette on 9 July 2024. The decree implements the qualified domestic minimum top-up tax (QDMTT) for the purposes of implementing the EU Pillar Two Directive into Italian law. Italy's Pillar Two, or Global Anti-Base Erosion (GloBE), rules generally came into effect on 1 January 2024, with the exception of the undertaxed profits rule, which is set to be effective from 1 January 2025.

The Italian QDMTT applies to fiscal years commencing on or after 31 December 2023 for Italian entities within multinational enterprise groups and large-scale domestic groups with annual revenue of €750m or more. The QDMTT entails the imposition of a top-up tax in Italy when the jurisdictional effective tax rate falls below the minimum of 15%.

Australia: Pillar Two primary legislation – Bills introduced

In early July Australia took a further step towards implementing Pillar Two by putting forward the following Bills to Parliament, along with an Explanatory Memorandum:

- Taxation (Multinational–Global and Domestic Minimum Tax) Bill 2024,
- Taxation (Multinational–Global and Domestic Minimum Tax) Imposition Bill 2024,
- Treasury Laws Amendment (Multinational–Global and Domestic Minimum Tax) (Consequential) Bill 2024 and
- the Explanatory Memorandum for the above three Bills.

The accompanying media release emphasised the Government's dedication to enhancing tax transparency and integrity and reaffirmed the Australian commencement date of 1 January 2024. The rules are applicable to multinational groups with a global turnover of at least €750m (approximately AUD1.2bn) and impose a 15% global minimum tax calculated on a jurisdictional basis.

Canada: Introduction of Digital Services Tax Act

Canada's Digital Services Tax Act came into force on 28 June 2024. The 3% digital services tax (DST) is effective for the 2024 calendar year and applies to in-scope revenues in the period since 1 January 2022. Companies are in the scope of the DST where they have a global consolidated revenue of €750m or more and Canadian digital services revenue of more than CAD20m in a calendar year. Revenues in the scope of the DST include those from:

- online marketplace or advertising services,
- social media services and
- the sale or licensing of user data obtained from an online marketplace, social media platform or search engine.

The first payment of the DST liability would be due on 30 June 2025 (i.e. 30 June of the year following the calendar year) and would include the DST on in-scope revenues arising in the period from 1 January 2022 to 31 December 2024.

India to scrap equalisation levy to pave way for OECD tax deal

The Indian Finance Minister, Nirmala Sitharaman, proposed the elimination of the 2% equalisation levy in the interest of supporting the advancement of the OECD-brokered two-pillar global tax reform plan. This announcement was made during her speech to Parliament introducing the 2024–2025 Budget on 23 July. Sitharaman later commented that the decision was influenced by continuing multilateral discussions within the OECD Inclusive Framework on Base Erosion and Profit Shifting, which are nearing conclusion.

UK to publish further guidance on determining top-up tax, entities and structures

In early August HMRC released guidance regarding the preparation for "multinational top-up tax and domestic top-up tax". The guidance includes information on reporting obligations for taxpayers related to multinational top-up tax (MTT) and domestic top-up tax (DTT) liabilities, as well as the process for registering with HMRC's online services. It also clarifies common misconceptions – for example, that taxpayers have no reporting obligations if there is no MTT/DTT liability. Details regarding the transitional safe harbour rules and the requirement to make an election for applying safe harbour rules are provided in the updated guidance. Further guidance on determining top-up tax amounts and specific entity and structure types is expected to be published.

Irish Revenue releases Pillar Two guidance

Irish Revenue recently released two new Tax and Duty Manuals, Part 04A-01-01 and Part 04A-01-02, providing administrative guidance in relation to Pillar Two. The manuals contain an overview of the main Pillar Two charging rules, along with a detailed correlation table cross-referencing the legislation contained in Part 4A of TCA 1997, as well as an overview of the administrative provisions for the Pillar Two rules.

Fiji joins Inclusive Framework on BEPS

Fiji has joined the international fight against tax avoidance by becoming a member of the OECD/G20 Inclusive Framework on BEPS, a global collaboration comprising more than 145 countries and jurisdictions. As part of its membership, Fiji has pledged to confront the tax challenges stemming from the digitalisation of the economy by engaging in the Two-Pillar Solution to revamp international taxation regulations and guarantee that multinational enterprises contribute a fair share of tax in all of their operating locations. Operating on an equal footing with all other members of the Inclusive Framework, Fiji will take part in the implementation of the BEPS package to combat tax avoidance, enhance the consistency of international tax regulations and establish a more transparent tax environment.

Switzerland: Proposed draft legislation seeks to address position post-Pillar Two

The Swiss canton of Zug released a press statement on 16 May 2024 outlining its objectives to enhance the appeal of Switzerland, particularly the canton, as a business destination post-Pillar Two, with an emphasis on subsidies linked to sustainability and innovation. A preliminary version of Zug's Location Development Act is set for a public vote in 2025 and is scheduled to take effect from 1 January 2026. Other cantons have been considering their approach.

02 EU Tax Developments

Belgium: Law amending investment deduction regime to support "green" transition passed

On 29 May 2024 the Belgian Parliament approved tax legislation introducing changes to the investment deduction regime. The reform aims to broaden the range of investments that are eligible for the investment deduction linked to energy-saving technologies and increases deduction rates to promote investments in "green" technologies and related software. The next step is for Belgium's incoming federal and regional governments to validate the changes formally before the end of 2024 to allow application of the incentives to investments made from 1 January 2025.

Germany: New guidance on advance pricing agreements

On 26 June new administrative guidance regarding advance pricing agreements (APAs) was published by the German Ministry of Finance. This guidance was welcome, as s89a of the Fiscal Code (AO), which provides for filing APA requests, was introduced in 2021 whereas the previous APA guidance dated from 2006.

DAC consultation

In early May the Directorate-General for Taxation and Customs Union announced that the European Commission will evaluate Directive 2011/16/EU on administrative cooperation. The evaluation included a public consultation, which was open for feedback up to 30 June. DAC7 and DAC8 are not covered by this evaluation. Feedback from respondents to the consultation reflected concerns regarding mandatory reporting under DAC6, including that it is costly, burdensome and potentially of limited value.

Lithuania: Guidelines issued on collection of beneficial-ownership data

Guidelines were issued in August by the Lithuanian tax authority regarding the mandate to collect beneficial-ownership data for the purpose of compliance with the Global Forum on Transparency and Exchange of Information for Tax Purposes. Entities are required to identify and retain information about beneficial owners of foreign entities operating in Lithuania. The data must be retained for five years and must be accessible to the tax authority.

03 UN Tax Developments

UN Ad Hoc Committee for Framework Convention on International Tax Cooperation publishes revised draft terms of reference

The UN Ad Hoc Committee has released a revised draft of the terms of reference for the Framework Convention, incorporating minor updates based on Member States' responses to the public consultation. This revised draft served as the basis for discussions and negotiations during the Committee's second session (29 July to 16 August). The objective is for the Ad Hoc Committee to present the final texts of the UN Framework Convention and the early protocols to the General Assembly for consideration during its session in September 2024.

Ireland, among the "cautious" responders, reiterated concerns that it had previously expressed regarding the Framework Convention, even voting against it as a minority. These concerns include:

- Emphasising the critical need to ensure that discussions and associated work on ongoing tax reforms are as complementary and coordinated as possible with the work at other international forums, to avoid duplication, undermining or inadvertently creating new issues and/or mismatches.
- Insisting that decision-making and voting processes must be via consensus and unanimity, in line with other international tax forums, to ensure the respect of tax sovereignty.
- Exercising caution against committing to fair allocation of taxing rights, including equitable taxation of multinational enterprises, owing to ongoing critical negotiations at the OECD/Inclusive Framework and existing commitments made by many participants. Ireland believes that the commitments should be high level and complementary to existing commitments, suggesting a focus on domestic resource mobilisation, capacity building and fostering tax compliance. The updated draft not only retained these commitments but also added "other subjects as are necessary or appropriate...to achieve the objective".
- Additionally, Ireland expressed concerns about specific priority areas to be addressed, highlighting the instruction to negotiate early protocols only if there is sufficient agreement on certain action items and noting that it does not believe that the draft list of protocols meets this test.

04 Australia

ATO releases final guidance on aspects of hybrid mismatch rules

On 3 July 2024 the Australian Taxation Office (ATO) issued the final tax determination, TD 2024/4, concerning the hybrid mismatch rules and the interpretation of "liable entity" and "hybrid payer" in Division 832. This follows the release of the draft TD for consultation in March, with the final position remaining substantially unchanged. The following questions were considered and were affirmed in the TD:

- whether hypothetical income or profits within the tax base of a country can be used to identify a "liable entity" or entities in the country for the purpose of section 832-325; and
- whether a "non-including country" for the purpose of sub-section 832-320(3) of the "hybrid payer" definition can be a jurisdiction other than the country where the payee of the relevant payment is located or resides.

The implications are that it is possible for the hybrid mismatch rules to disallow an Australian deduction for a payment made to a group member where that entity indirectly or directly pays a non-taxable subsidiary of a US group via a disregarded entity. The TD may warrant review of group payments involving Australian entities.

Consultation on foreign-resident capital gains tax changes

On 23 July a consultation paper and draft legislation on capital gains tax (CGT) were released by the Australian Treasury. The consultation was open until 20 August, and comments on the draft legislation could be made up to 5 August. This followed the announcement in the Budget of the intention to extend the application of the country's CGT regime to non-residents. The proposed changes are designed to capture gains on assets that have a close economic connection to Australian land/natural resources within the Australian CGT net. There is also a proposal to increase the withholding tax rate under the capital gains withholding tax regime that applies to non-residents.

05 Hong Kong

Hong Kong Bill to enact tax measures in 2023 Policy Address and 2024–25 Budget passed

On 22 May 2024 the Legislative Council of the Hong Kong Special Administrative Region (SAR) approved the Inland Revenue (Amendment) (Tax Concessions and Two-tiered Standard Rates) Bill 2024. This Bill was proposed in the 2023 Policy Address and the 2024–25 Budget and includes the following tax measures:

- a one-off 100% reduction in profits tax, salaries tax and personal assessment tax for the 2023–24 assessment year, capped at HKD3,000 in each instance;
- the introduction of a two-tiered standard rates system for salaries tax and personal assessment tax from the 2024–25 assessment year, with a 15% rate on the first HKD5m of net income and 16% on any amount above that; and
- an increase in the deduction limits for home loan interest and domestic rents from HKD100,000 to HKD120,000 for qualifying taxpayers from the 2024–25 assessment year.

The Bill is now awaiting the signature of John Lee Ka-Chiu, the Chief Executive of the Hong Kong SAR. Once signed, it will come into effect on its publication in the Official Gazette.

Inland Revenue Department updates FAQs on foreign-source income exemption scheme

On 5 July the website of the Hong Kong SAR's Inland Revenue Department (IRD) was updated to include some frequently asked questions and illustrative examples setting out the IRD's views on the application of the foreign-source income exemption scheme (FSIE). The FSIE commenced more than a year ago, and the IRD updates its guidance regularly to capture relevant information for taxpayers and tax practitioners.

06 United Kingdom

HMRC updates large business tax strategy publication guidance

Updated guidance from HMRC at the end of June provides clarity on which large businesses in the UK are required to publish their tax strategy and related details. The requirement applies to (1) UK companies, partnerships, groups and sub-groups with a turnover exceeding £200m or a balance sheet totalling more than £2bn in the previous financial year and (2) UK companies or groups that are part of a multinational enterprise group meeting the OECD country-by-country reporting framework threshold of global turnover above €750m.

HMRC publishes manual on creative industries' expenditure tax credit

HMRC released a guidance manual on the creative industries' expenditure tax credit at the end of July. The audio-visual expenditure credit (AVEC) and the video games expenditure credit (VGEC) were introduced by the Finance Act 2024. The manual covers the initial four chapters of AVEC and VGEC guidance, addressing:

- expenditure credit calculations,
- expenditure credit redemption,
- claims and corporation tax administration and
- commencement and transitional rules.

VAT Cases and VAT News

Gabrielle Dillon
Director – VAT, PwC Ireland

VAT Cases

01 Taxable Amount: CJEU Judgment C-241/23

On 8 May 2024 the Court of Justice of the European Union (CJEU) delivered its judgment in the case of ***P. sp. z o.o. v Dyrektor Izby Administracji Skarbowej w Warszawie, intervening party: Rzecznik Małych i*** Średnich ***Przedsiębiorców*** C241/23. The Polish appellate authority had refused to refund input VAT claimed by P that was charged on invoices issued by W and B in respect of property contributions made by those companies to P's share capital. The court was asked to provide an interpretation of Article 73 of the VAT Directive, which sets out the general rule in relation to taxable amount in the context of shares issued for in-kind property contributions.

P sought to increase its share capital through in-kind contributions from W and B. The companies concluded several contracts with P for the transfer of properties that they owned and a cash contribution in exchange for shares in P. W transferred 23 properties and a certain sum of money to P in exchange for shares issued by P, and B transferred two properties and a certain sum of money to P in exchange for shares issued by P. The contracts stipulated that the consideration for the in-kind contributions to P's capital was shares in P valued at their issue price. VAT was charged by W and B in respect of the property contributions to P's capital. The amounts were calculated on the basis of the issue value of the shares in P that they received as consideration for those contributions.

The tax authority considered that the taxable amount for VAT purposes of the contributions made by W and B for increasing P's capital should be based on the nominal value of shares in that company and not their issue value. The tax authority questioned P's right to deduct the input VAT. The appellate authority upheld that decision, taking the view that the invoices issued by W and B relating to the property contributions in exchange for shares must be evaluated on the basis of the shares' nominal value. P argued that a correct interpretation of the legislation requires that the issue price of the shares be taken into account to calculate the taxable amount of the contribution in question and, where appropriate, it should be reduced by the value of the cash contribution received by P.

The question therefore referred was whether Article 73 must be interpreted as meaning that the taxable amount of a contribution of property by one company to the capital of a second company in exchange for shares in the latter must be determined in relation to the nominal value of those shares where those companies agreed that the consideration for that capital contribution was to be the issue value of those shares.

Article 73 provides that the taxable amount includes everything that constitutes consideration obtained or to be obtained by the supplier in respect of the supply of goods or services. The court noted that the consideration does not necessarily have to be monetary, which would be the case in barter scenarios, but there must still be a direct link between the goods/services traded and the value of the goods/services provided in exchange. It reiterated the point that a direct link is established where there is a legal relationship between the parties with reciprocal performance, andthe remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient.

The consideration received by W and B for the contribution of their properties to P's capital corresponds to the shares in P that it issued in return, providing a direct link, as the value of the shares can be expressed in monetary terms. The court noted that previous cases have indicated that the taxable amount for a supply of goods effected for consideration is represented by the consideration actually received by the taxable person. According to it, the value actually received is therefore a subjective value and not a value estimated according to objective criteria. In this case the subjective value of the consideration for the property contributions corresponds to the monetary value that the companies granted to the shares in P that were accepted in exchange for the contributions. This means that the subjective value of each of those shares acquired by W and B corresponds to the issue price of those shares. Therefore the issue price of the shares equates to the monetary value agreed by the parties and actually received by the companies.

The parties agreed that the issue price of the shares represented the taxable amount of the properties being transferred. W and B had obtained valuations of the properties, but the court indicated that even though the price agreed corresponded to the market price, this did not mean that the taxable amount was determined using an objective value. This is because the parties had agreed a subjective value, i.e. the issue price of the shares in P that W and B had received.

The court held that Article 73 must be interpreted as meaning that the taxable amount of a contribution of property by one company to the capital of a second company in exchange for shares in the latter must be determined in relation to the issue value of those shares where those companies agreed that the consideration for that capital contribution was to be that issue value. This case highlights the importance of recognising the correct taxable amount where there is a barter-type transaction or cross-supplies.

02 Place of Establishment: CJEU Judgment C-533/22

The judgment of the CJEU in the case of ***SC Adient Ltd & Co. KG v Agenția Națională de Administrare Fiscală, Agenția Națională de Administrare Fiscală – Direcția Generală Regională a Finanțelor Publice Ploiești – Administrația Județeană a Finanțelor Publice Argeș*** C-533/22 was published on 13 June 2024. This case related to the interpretation of Articles 44 and 192a of the VAT Directive and Articles 10, 11 and 53 of Council Implementing Regulation (EU) No 282/2011 ("the Regulation") in the context of the existence of a fixed establishment. A summary of the Advocate-General's opinion was provided in "VAT Cases & VAT News" in *Irish Tax Review*, Issue 1 of 2024, and the background facts are reiterated below.

Adient Ltd & Co. KG ("Adient DE") has its place of establishment in Germany and belongs to the Adient group, which has its head office in Europe. The group is a global supplier to manufacturers in the automotive industry. It has a global network of manufacturing and assembly facilities that supply complete seating systems, modules and components to original equipment manufacturers. Adient DE entered into a contract with SC Adient Automotive România SRL ("Adient RO") to provide a comprehensive service consisting of both the manufacture and the assembly of upholstery components plus ancillary and administrative services ("the services"). Adient RO has two establishments in Romania with responsibility for manufacturing the goods for Adient DE. All expenses incurred by Adient RO are included in the fee invoiced to Adient DE. Adient DE purchases the raw materials, which it sends to Adient RO for treatment. Adient DE is the legal owner of the raw materials, semi-finished products and finished products throughout the treatment process.

Adient DE was directly registered for VAT purposes in Romania, was assigned a VAT number and uses this number both for domestic and intra-Community purchases of goods in Romania and for supplies to its customers of the products manufactured by Adient RO. It supplied its German VAT number when receiving the services supplied by Adient RO. Adient RO considered that the place of supply of its services was the place of establishment of Adient DE, as recipient of the services, namely, Germany, i.e. the reverse charge applied.

The Romanian tax authority argued that Adient RO was required to charge Romanian VAT on the grounds that the place of supply of the services was Romania. It also found that Adient DE had technical and human resources there via the branches of Adient RO, which in its view comprised a fixed establishment. The employees of Adient RO communicate with customers and suppliers; they represent Adient DE vis-à-vis third parties; and they are involved in organising and compiling an annual inventory of assets belonging to Adient DE and in audits requested by customers of Adient DE. The tax authority also considered that the VAT number issued by the German authorities had been improperly used by Adient DE, and it registered it for tax purposes through a fixed establishment located in Romania (same address as one of the Adient RO branches).

Adient DE argued that it does not have a fixed establishment in Romania and that Adient RO fulfils its obligations to it as a manufacturer. The two companies share the same accounting system as they are part of the same corporate group. Adient DE argued that it has no staff in Romania and that employees working in Romania are employed by Adient RO, which agrees their terms of employment and pay conditions. Adient DE has no role in relation to the equipment used by the manufacturer. The supply of the goods from Romania is undertaken by Adient DE. Adient RO has an administrative role in relation to the supplies, e.g. preparing the goods for loading. Adient ROs employees do not make decisions in relation to the sale or purchase of goods by Adient DE.

The referring court raised eight questions, which can be categorised into three groups.

Under group 1 the issue was whether a taxable transaction actually takes place at all if the facilities and human resources of one group company (Adient RO), which is claimed to be a fixed establishment of the other group company (Adient DE), are used both to provide the service and to receive it. Under group 2 the questions referred related to how a fixed establishment (regarded as the recipient of a service) is to be defined within a group, such that the place of supply of services is determined by reference to the location of the fixed establishment and not by reference to the location of the HQ. The group 3 category of questions sought to establish whether Adient DE is to be regarded as a resident person or a non-resident person in Romania (this question presupposes that Adient DE has a fixed establishment in Romania).

The key points highlighted by the court in determining the existence of a fixed establishment can be summarised as follows:

- The primary point of reference for determining the place of supply of services for VAT purposes is the place where the taxable person has established his or her business.
- The taxable person's fixed establishment is a secondary point of reference, which is an exception to the general rule, and is taken into consideration provided that certain conditions are satisfied.
- The "fixed establishment" concept is to cover any establishment, other than the place of establishment of a business. It is characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.
- The treatment of an establishment cannot depend solely on the legal status of the entity concerned.
- The fact that parties are bound by an exclusive service contract does not, of itself, mean that the service provider's resources become those of his or her customer, unless that contract shows that the provider does not remain responsible for his or her own resources and does not provide his or her services at own risk.
- The question of whether there is a fixed establishment, within the meaning of Article 44 of the VAT Directive, must be determined in relation to the taxable person receiving the services at issue.
- In applying other provisions of the VAT Directive that refer to the fixed establishment concept, the question must be determined by reference to the taxable person supplying the services.
- In assessing whether there is a fixed establishment for the purpose of determining the place of supply of services, the focus must be on the activity of receiving services.
- When assessing where the supplies of services are received, it is necessary to identify the place where the human and technical resources used by that company for that purpose are situated.
- The taxable person is regarded as established in the Member State (MS) in which it makes a supply of goods or services only if it has in that MS a structure having a minimum degree of stability derived from the permanent presence of human and technical resources, which intervenes in the taxable transactions in question, before or during their performance.
- The same means cannot be used both by a taxable person established in one MS to provide services and by a taxable person established in another MS to receive the same services within a supposed fixed establishment situated in the first MS.
- It was previously held that preparatory or auxiliary activities needed for carrying out the company's tasks cannot determine that there is a fixed establishment.

In respect of the eight questions referred to the CJEU for a ruling, the court held the following:

> “Article 44 of the VAT Directive and Article 11(1) of Implementing Regulation No 282/2011 must be interpreted as meaning that a company subject to VAT having its business in one Member State, which receives services provided by a company established in another Member State, cannot be regarded as having a fixed establishment in that other Member State, for the purposes of determining the place of supply of those services, solely because the two companies belong to the same group or those companies are bound as between themselves by a contract for the provision of services.”

Those provisions:

> “must be interpreted as meaning that neither the fact that a company subject to VAT having its business in one Member State, which receives manufacturing services provided by a company established in another Member State, has in that other Member State a structure which intervenes in the supply of the finished products arising from those manufacturing services, nor the fact that those supply transactions are carried out mostly outside that Member State and that those that are carried out there are subject to VAT are relevant to establishing, for the purposes of determining the place of supply of services, that that company has a fixed establishment in that other Member State.
>
> Articles 44 and 192a of the VAT Directive and Articles 11 and 53 of Implementing Regulation No 282/2011 must be interpreted as meaning that a company subject to VAT having its business in one Member State, which receives services provided by a company established in another Member State, does not have a fixed establishment in that other Member State if its technical and human resources in that Member State are not distinct from those by which the services are supplied to it or if those human and technical resources perform only preparatory or auxiliary activities.”

This is an important decision in the context of ascertaining what constitutes a fixed establishment, which is highly relevant to all entities operating in more than one jurisdiction.

03 VAT Groups: CJEU Judgment C-184/23

On 11 July 2024 the CJEU delivered its judgment in the case of ***Finanzamt T v S*** C184/23, where it was required to provide an interpretation of Article 2(1) and the second sub-paragraph of Article 4(4) of the Sixth Directive (by virtue of the date of the facts at issue, the Sixth VAT Directive is the relevant legislative basis). S is a German foundation governed by public law; it is the controlling company of a university, manages a university medicine department and also controls U GmbH. U GmbH provided S with cleaning, hygiene and laundry services, as well as patient transport services. The cleaning services were provided in respect of the university medicine department, including patients’ rooms, corridors, operating theatres, lecture rooms and laboratories. S carries out taxable activities in the building complex. It uses the lecture rooms and other parts of that complex for teaching students (approximately 7.6% of the building area used for this purpose), which it carries out as a public authority and in respect of which it is not regarded as a taxable person for the purposes of VAT. The tax authority was of the view that S and U GmbH were a VAT group, that the cleaning services provided by U GmbH to S were services provided within the VAT group and that those services were not subject to VAT. It was also of the view that the cleaning services provided for S’s non-taxable activities were carried out “for purposes other than that of the business” and were a “supply of services free of charge, treated as a supply of services for consideration”.

A request for an earlier preliminary ruling resulted in the judgment in *Finanzamt T v S* (internal supplies within a VAT group) C269/20. The court considered that a Member State was not precluded from designating as a single taxable person of a VAT group the controlling company of that group, where that controlling company is in a position to impose its will on the other entities forming part of that group and provided that such designation does not entail a risk of tax losses. It also held that EU law must be interpreted as meaning that where such a controlling company carries out economic activities for which it is subject to VAT and activities in the exercise of its powers as a public authority (where it is not a taxable person), the provision of services by an entity forming part of that group in connection with that exercise of powers must not be taxed under Article 6(2)(b). The referring court referred a further question to the CJEU resulting in this judgment – namely, whether supplies made for consideration between persons belonging to the same VAT group fall within the scope of VAT and whether the fact that the recipient of that service cannot deduct input VAT due or paid must be taken into account on the grounds that such a situation would entail a risk of tax losses.

In considering the question referred, the court reiterated the requirement that for there to be a supply of services subject to VAT, there must exist between the service supplier and the recipient a legal relationship in which there is a reciprocal performance, the remuneration received by the supplier constituting the value actually given in return for the service supplied to the recipient. In ascertaining whether a legal relationship exists, it is necessary to consider whether the service supplier carries out an independent economic activity.

In this case, in ascertaining whether there is a supply of services between group members, account must be taken of whether the members belong to the same VAT group and the requirement that a taxable person is a person who carries on an economic activity on an independent basis. When VAT grouping applies, the entities are treated as a single taxable person and are no longer treated as separate taxable persons. As a supplier that is a member of a VAT group is not treated as a separate taxable person, the independence condition when it provides a service for consideration to another entity of that VAT group does not need to be considered. This means that the provision of services by a group member to another group member cannot fall within the scope of VAT, and therefore, the court noted, transactions between members of the same VAT group do not exist for VAT purposes.

The court held that Article 2(1) and the second sub-paragraph of Article 4(4) of the Sixth Directive must be interpreted as meaning that services provided for consideration between persons belonging to the same VAT group are not subject to VAT, even where the VAT due or paid by the recipient of those services cannot be subject to an input deduction. This case essentially reiterates the fact that supplies between members of a VAT group are disregarded for VAT purposes.

04 Economic Activity and Services for Consideration: CJEU Judgment C-87/23

The judgment in the CJEU case of ***Biedrība ‘Latvijas Informācijas un komunikācijas tehnoloģijas asociācija’ v Valsts ieņēmumu dienests*** C87/23 was published on 4 July 2024. The Latvian tax authority refused to allow Biedrība (“the Association”) to deduct input VAT in respect of invoices sent to it by sub-contractors providing it with training services. The court was requested to provide an interpretation of Articles 2(1)(c), 9(1), 28 and 73 of the VAT Directive in the context of the Association’s carrying on of economic and non-economic activities and its entitlement to input VAT.

The Association (established in Latvia) concluded two contracts with Centrālā finanšu un līgumu aģentūra (CFLA) concerning the implementation of two training projects financed by the European Regional Development Fund (ERDF). The first was a training project for information and communication technology professionals (“the ICT project”), and the second a training project for micro- and small enterprises (“the MSE project”). The tenderer for the first project could be an association and for the second project an association or a public authority.

In relation to the ICT project, the Association concluded contracts to provide training services to recipients. The recipients had to pay the costs of the training plus VAT to the Association. In some cases management costs (plus VAT) (equal to 5% or 10% of the amount of aid granted to the Association by the CFLA) had to be paid by the recipients at the end of the ICT project. The Association sub-contracted the training services to external providers. The sub-contractors invoiced the Association for the full cost of the services plus VAT. The Association paid the invoices and reclaimed the VAT charged. At the end of the project the Association paid the funds received from CFLA to the recipients of the training and invoiced them for the management costs of the project.

In relation to the MSE project, the Association paid the training service providers in full (plus VAT). The contract was tripartite as of between the Association, the training service provider and the recipient of the services. The recipient undertook to co-finance the training, and the service provider was required to pay the amount corresponding to that co-financing (30% of the total payment, including VAT) to the Association. The funding granted by the ERDF constituted 70% of the total payment, paid at the end of the project to the Association by CFLA, excluding VAT.

The tax authority took the view that the Association was not engaged in an economic activity as it did not have a profit-making motive and profits were not expected to be made from the implementation of those projects. The Association managed the projects and made payments from EU funds, which benefited the recipients of the training services, but it did not, itself, provide the training services. The tax authority therefore submitted that it does not have the right to deduct input VAT. The Association took the view that its status as an association had no bearing on its right to deduct input VAT. It argued that it was registered for Latvian VAT and that, in the context of the ICT and MSE projects, it had provided training services as an intermediary. The first question referred concerned the interpretation of “economic activity”, and the second related to the concept of “supply of services for consideration”. The third question related to the subsidies paid to the Association and whether they formed part of the taxable amount for the services supplied.

The court dealt with question 2 first, as it had to determine whether there was a chargeable event in the first place. It had to consider whether the supply of training services invoiced by a non-profit association, which supply is sub-contracted for the most part to third parties and has received subsidies from European funds of up to 70% of the total amount of those services, constitutes a supply of services for consideration. The court referred to the “direct and immediate link” requirement for a supply to come within the scope of the tax and to the fact that it is not necessary that the consideration for the supply of services be obtained directly from the recipient thereof, as it may be obtained from a third party. It considered the circumstances of each of the projects separately.

On the ICT project, the court noted that two supplies of services appear to coexist. The first supply binds the recipient of the training to the Association, to which the recipient pays the full price charged. After receipt of the grant by CFLA, the Association transfers the amount due to each recipient. This reduces the price originally paid by each recipient to the Association. The second supply follows from the contract between the Association and the training provider that it pays for the services provided. The court indicated that it is clear that the Association must be regarded as the supplier of the training services vis-à-vis the recipient of the training. The fact that the Association sub-contracted the services to an external provider instead of using its own staff is irrelevant.

Regarding the MSE project, the contractual position is different as there is a contract between the Association and a sub-contractor for the supply of the training service to the recipients of that training and there is a tripartite contract between the Association, the training provider and each recipient of the training. Under the tripartite contract the recipient is to bear 30% of the cost of the service (this is invoiced by the Association). The 70% subsidy provided by CFLA ensures that the Association obtains the full cost of the services. The court noted that the services were supplied by the Association in its own name and on its own behalf, albeit through a sub-contractor.

Even though the funding was provided by the ERDF/CFLA, this did not mean that it could not be classified as a supply of services, as consideration can be received from a third party. The Association's costs of providing the training services are covered by the funding and the consideration paid by the recipients. The fact that it did not make a profit did not, according to the court, prevent it from supplying services for consideration. In the absence of an express agency agreement, the court held that the supply by the Association constituted a supply of services for consideration (i.e. an economic activity).

The third question, relating to the taxable amount, was considered next by the court. The issue was whether the subsidy impacted the taxable amount as the recipient made only partial payment. The court held that subsidies paid to a service provider by a European fund for a specific supply of services are, under Article 73, included in the taxable amount as a payment obtained from a third party.

The first question sought to determine whether a non-profit association that implements State Aid schemes funded by the ERDF is treated as a taxable person carrying out an economic activity. Under question 2, the supply of training services was classified as a supply of services for consideration. As noted by the court, the concept of economic activity is objective in nature and it was misinterpreted by the tax authority, which took the view that the mere fact that the Association was a non-profit association precluded it from carrying on an economic activity.

The court considered all of the circumstances surrounding the activities of the Association and noted that even though the training courses were funded largely by the ERDF, this cannot affect the economic or non-economic nature of the activity carried out by the Association. This is because the objective nature of the concept of "economic activity" applies without regard to the method of financing chosen by the taxable person. A significant part of its funding came from public subsidies, which could cast doubt on its economic viability, but the subsidies and the quantum of same were known in advance, which allowed the Association to prepare its business plan and look for clients.

After an analysis of all of the circumstances, the court held that the provisions of Article 9(1) must be interpreted as meaning that the status of non-profit association enjoyed by an association does not preclude it from being regarded as a taxable person carrying out an economic activity within the meaning of that provision. It is up to the referring court to decide whether the services fall within the exemption for vocational training. The concept of economic activity and what constitutes such an activity are key issues that can arise in a wide variety of transactions, and the commentary of the court here in relation to funding and subsidies is particularly relevant.

05 Taxable Supplies: Irish High Court [2024] IEHC 258

On 3 May 2024 the High Court delivered its judgment in the case of *Colum Browne v The Revenue Commissioners* [2024] IEHC 258. The Tax Appeals Commission (TAC) had made a determination in October 2022 agreeing with the refusal by Revenue of a VAT refund claim by the appellant. The appellant was a fisherman and had held "capacity" that enabled him to carry on his business. The capacity was held as security by the bank over other borrowings, and it appointed a receiver to sell the capacity. The capacity was sold by the receiver and was not treated as a taxable supply. In the course of the sale, the receiver incurred professional fees (including receiver fees) and provided the VAT invoices to the appellant. The appellant re-registered for VAT and reclaimed the VAT incurred on the professional fees. Revenue refused the claim on the grounds that the VAT invoices were addressed to the receiver. The central issue for determination by the TAC was whether the appellant had an entitlement to the input VAT incurred.

The High Court summarised the reasons for the determination of the TAC as follows: (1) if the sale of the capacity was taxable, a refund did not arise where VAT had not been charged; (2) if the sale of the capacity was not taxable, there were no other taxable supplies resulting in an entitlement to deduct; and (3) the appellant was not VAT registered until after the invoices were issued. The determination was appealed by way of a case stated, and ten questions were addressed to the court. The court indicated that the core question was whether the TAC had correctly decided as a matter of law that the appellant was not entitled to a refund of the VAT incurred on the professional fees (which were paid for by the receiver).

The appellant submitted that the costs should be treated as if he had incurred the costs, as the receiver was acting as his "agent"; that the VAT recovery rules applicable to his fishing business should extend to the professional services fees incurred on the sale of the capacity; and that he should be regarded as still being in business owing to the ongoing costs of the business. Revenue submitted that the taxpayer must be an accountable person (engaged in taxable supplies) to claim the refund and argued that the appellant was not making taxable supplies at the relevant time and that therefore there were no taxable supplies against which a VAT reclaim could be made. Revenue submitted that if the sale of the capacity was taxable, a refund did not arise where VAT had not been charged, and if the sale of capacity was not taxable, there were no other taxable supplies against which a claim could be made.

The High Court decided, with reference to s59 VATCA 2010, that the submissions by Revenue and the determination by the TAC were correct. It found that the appellant was not making taxable supplies during the relevant period (i.e. the period when the capacity was being sold and professional fees were incurred by the receiver) and therefore was not an accountable person at the material time.

The court held in relation to other, non-core issues that the decision of the TAC to refuse to deal with complaints of a judicial review nature was correct; that the burden of proof rests with the appellant and there was no evidence adduced in relation to the carrying on of an economic activity at the material time; and, finally, that ongoing costs incurred by the appellant in relation to boat maintenance and harbour dues did not amount to taxable economic activity.

The case highlights the two key criteria to be satisfied for a right to deduct to arise – the taxable person must hold a valid VAT invoice, and the VAT incurred must be for the purposes of his/her taxable supplies or qualifying activities.

VAT News

Ireland

Revenue eBrief 147/24 issued on 4 June 2024 regarding the Value-Added Tax (Refund of Tax) (Flat-rate Farmers) Order 2012. It highlights the publication of a new Tax and Duty Manual in relation to the Order (SI 201 of 2012), which outlines how VAT can be reclaimed by flat-rate farmers. The manual sets out the conditions that apply, the types of expenditure that qualify and the information required by the flat-rate farmer to submit a claim.

Revenue eBrief 191/24 issued on 7 July 2024 and outlines updates to the Customs Manual on Import VAT. It highlights changes that were made to the manual – deletion of references to AEP; deletion of Appendix A, relating to goods diverted to home use; minor text changes; and updating of details for the Anti-Fraud Unit.

UK

Revenue and Customs Brief 8 (2024), published on 29 July 2024, relates to the removal of the VAT exemption for private school fees and boarding services. The UK Chancellor announced that all education services and vocational training supplied by a private school (or connected person) for a charge will, with effect from 1 January 2025, be subject to VAT at the standard rate (currently, 20%). Any fees invoiced or paid on/after 29 July 2024 relating to school terms after 1 January 2025 will be VATable. A number of documents relating to this issue (draft legislation, explanatory note and technical note) can be found on the HMRC website at https://www.gov.uk/government/publications/revenue-and-customs-brief-8-2024-removal-of-vat-exemption-for-private-school-fees-and-boarding-fees.

Accounting Developments of Interest

Aidan Clifford
Advisory Services Manager, ACCA Ireland

Company Law

Company size limits have increased

The European Union (Adjustments of Size Criteria for Certain Companies and Groups) Regulations 2024 have increased the size limits for companies to qualify under the various size criteria in the Companies Act 2014. There is still the requirement that the company meet two of the three criteria, and none of the other terms and conditions in s280A to s280G have changed – just the size limits. The change is effective for financial years beginning on or after 1 January 2023; the legislation was backdated by one year.

	New	Old
Micro company		
Balance sheet	€450,000	€350,000
Turnover	€900,000	€700,000
No. of employees	10	10
Small company		
Balance sheet	€7.5m	€6m
Turnover	€15m	€12m
No. of employees	50	50
Small group		
Balance sheet net (gross)	€7.5m (€9m)	€6m (€7.2m)
Turnover net (gross)	€15m (€18m)	€12m (€14.4m)
No. of employees	50	50
Medium company		
Balance sheet	€25m	€20m
Turnover	€50m	€40m
No. of employees	250	250

The change reflects roughly a 25% increase to the previous limits and approximately adjusts the limits for inflation since they were set.

Reckless trading evidential requirements lowered in new legislation

The Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Act 2024 has removed the word “knowingly” from s610 of the Companies Act 2014 and introduced other changes that provide for civil liability of directors and officers of a company where there was fraudulent or reckless trading. The amendment effectively lowers the evidence requirement under s610. The amended section is below, with deleted words struck out and insertions underlined:

> *610. (1) If in the course of the winding up of a company..., it appears that –*
>
> *(a) any person was, while an officer of the company, ~~knowingly~~ a party to the carrying on of any business of the company in a reckless manner*
>
> [they can be made personally liable for the debts of the company]...
>
> *(3) ...an officer of a company ~~shall be deemed to have been knowingly~~ <u>may be found to have been</u> a party to the carrying on of any business of the company in a reckless manner if –*
>
> *(a) ...the person ought to have known that his or her actions or those of the company would <u>be likely to</u> cause loss to the creditors of the company...”.*

The new legislation also amends the requirements for liquidators, particularly in respect of the provision of information to employees of the company in liquidation.

Accounting

Early Childhood Care and Education scheme reporting

The Department of Children, Equality, Disability, Integration and Youth recently issued a document, “Guidance Note for Core Funding Reporting Requirements: Transitional Arrangements Year 1 and 2”, to entities providing childcare and early education services regarding the transitional arrangements for the application for funding under a new funding model called Together for Better. These transitional arrangements will be in place for the next two reporting periods (years ended 31 August 2023 and 31 August 2024).

However, there is a potential issue with auditors’ assisting clients in submitting the Income and Expenditure Template: a potential conflict is with the Ethical Standard for Auditors (Ireland). Where the auditor is not in a position to do the work, the in-house qualified accountant may perform the mapping exercise and the client can use the self-submission functionality on www.cfcrrs.ie.

Narrow-scope amendments to IFRS 9 and IFRS 7

The amendments to IFRS 9 and 7 are effective for annual reporting periods beginning on or after 1 January 2026 and clarify:

- how the cash-flows on loans with features linked to ESG (environmental, social and governance) should be assessed and
- the date on which a financial asset or financial liability is derecognised when settled through electronic payment systems.

See more at this link.

IAS 1 replaced by IFRS 18

The International Accounting Standards Board (IASB) has published IFRS 18: Presentation and Disclosure in Financial Statements. The new standard will be effective for periods commencing on or after 1 January 2027.

Contracts for Renewable Electricity

The IASB has proposed an amendment with narrow scope to the accounting for contracts for renewable energy in an Exposure Draft for public comment. The feedback period closed on 7 August, and the IASB aims to finalise any changes by the end of 2024.

Compendium of IFRS issues arising in EU companies

The European Securities and Markets Authority (ESMA) published the 29th Extract from its database of enforcement decisions taken by EU accounting enforcers. These enforcement decisions serve almost as a fully comprehensive FAQ document on issues arising in IFRS financial statement reporting. A list and descriptor of the issues dealt in all 29 extracts up to May 2024 is at this link. ESMA decisions, although anonymised, serve to confirm the accounting and disclosures required under IFRS and can be very useful guidance for companies struggling to understand a specific requirement. For example, the 29th Extract deals with related-party disclosures, measurement of expected credit losses, alternative performance measures and the calculation of return on capital employed.

Charity legislation passed

The Charities (Amendment) Act 2024 contains a series of revisions and updates to the Charities Act 2009, including the provisions for greater financial transparency and defining charity trustee duties. The changes will require Ministerial Commencement Orders before they come into operation. The Act also introduces a number of long-anticipated amendments to the requirements regarding financial reporting. The changes if commenced include the following.

Accounting

- A charitable organisation that is not a company and not an education body and that has gross income or expenditure of more than €250,000 will prepare financial statements the form and content of which can be specified in Regulations (we expect the Charities SORP to be so specified).

- A charitable organisation that is not a company and not an education body and that has gross income or expenditure of €250,000 or less may prepare an income and expenditure account and a statement of assets and liabilities instead of full financial statements. The form and content of this reduced set of financial statements can be specified in Regulations (we expect FRS 102 to be so specified).

- Not caught by the requirements above is a charitable organisation that is not a company and not an education body and that meets two of the following criteria: a balance sheet of under €10,000; gross income not exceeding €10,000; and no employees. The €10,000 can be increased in both cases by the Minister to up to €50,000. (Expect cash receipts and payments accounting for these very small entities.)

- A charitable organisation that is a company will prepare financial statements in accordance with the Companies Act 2014 and any Regulations made by the Minister (expect the Charities SORP to be required for companies with income or expenditure of more than €250,000).

Audit

- All charities with income over a prescribed limit must be audited within nine months of the year-end. The Minister may set an audit exemption limit for income of no more than €1m. The Minister has been reported to have decided to set the limit at €500,000, notwithstanding the larger limit allowed for in the legislation. Revenue will currently not grant charitable tax status to an entity with income of more than €250,000 (until recently this was €100,000) that does not undergo an audit. It is hoped that these limits will be aligned after the relevant section is commenced.

- For charities with income below the prescribed threshold above, the trustees have the option either to have the accounts examined by an independent person or to have them fully audited.

Charitable secretarial matters

- All charities, regardless of their legal structure, need to keep a register of members.

- For charities that are companies, the members are considered to be those persons who are company members within the Companies Act 2014 definition. "Member" in the context of a CLG (company limited by guarantee) remains a problematic definition, and it will be important for charities to look carefully at their constitution to identify who is considered to be a member within the meaning of the 2024 Act.

- For charities that are not companies, the members are those with the power to appoint, nominate or vote for the appointment of a person as a charity trustee of that organisation.

- Every charity must have a minimum of three trustees, the majority of whom are natural persons who are resident in the EU or the UK and who are not "a connected relative of another trustee". "Connected relative", in relation to a person, means a child, step-child, parent, step-parent, brother, sister, spouse, civil partner, cohabitant, grandparent or grandchild, or a child of the person's civil partner or cohabitant.

Sustainability

Sustainability assurance standard announced

The Irish Auditing and Accounting Supervisory Authority (IAASA) has announced that it intends to adopt the International Standard on Assurance Engagements 3000 (ISAE 3000). Other options were available, but this is the one that the majority of respondents called for in their submissions to the public consultation. ISAE 3000 will be used in Ireland until there is an EU-finalised ISSA 5000 standard. The IAASA also said that it intends that sustainability assurance providers will be obliged to comply with the relevant provisions of the IESBA (Ethics) Code. Sustainability assurance interim audit assignments will be starting shortly for very large quoted companies, with the majority of the fieldwork taking place in early 2025. Large quoted and large unquoted company assignments will be starting this time next year, by which time the EU should have approved the ISSA 5000 standard. Therefore small and medium-sized practices will be able to adopt the ISSA 5000 standard immediately, unlike the larger audit firms starting audit assignments in early 2025, which will have to transition though ISAE 3000 before adopting ISSA 5000 in a year's time.

ESRS guides

Accountancy Europe has published guides to help with some of the more difficult aspects of European Sustainability Reporting Standards (ESRS). This page has links to guides on materiality assessment and value-chain reporting. The European Financial Reporting Advisory Group (EFRAG) has also produced ESRS guides, including a spreadsheet of ESRS data points that are colour-coded for mandatory or voluntary etc. EFRAG has also published a set of explanations of/answers to technical questions on ESRS implementation on its ESRS Q&A Platform. Finally, EFRAG has issued three new guidance documents for companies that are preparing sustainability reports under ESRS: EFRAG IG Materiality Assessment, EFRAG IG 2 Value Chain and EFRAG IG 3 ESRS Datapoints.

ESRS and ISSB sustainability standards are interoperable

The International Financial Reporting Standards Foundation and the European Financial Reporting Advisory Group have published guidance material to illustrate the alignment between the IFRS Sustainability Disclosure Standards of the International Sustainability Standards Board (ISSB) and the European Sustainability Reporting Standards (ESRS). The guidance shows how a company can apply both sets of standards and includes detailed analysis of the alignment in climate-related disclosures.

ESRS are compulsory in the EU on a phased implementation basis from 1 January 2024, with the bulk of Irish companies coming in scope from 1 January 2025. Much of the rest of the world has made commitments to adopt the ISSB standards (some have said that they will adapt them). For multinational companies, this raised the spectre of making reports under two sets of standards and perhaps even the reporting of sustainability GAAP reconciliations.

Sustainability is good for business

The Department of Enterprise, Trade and Employment has published a web page resource bringing together many of the Government sustainability supports and grants available to SMEs.

Corporate Sustainability Due Diligence Directive

The Corporate Sustainability Due Diligence Directive has been finally approved by the European Parliament and the Council. Member States can now start transposing the Directive into national laws. Details about the Directive can be obtained at this link. The new rules will ensure that the larger businesses to whom the rules apply will address human rights and environmental considerations in their operations and across their value chains inside and outside the EU.

Independent sustainable assurance services providers

The Department of Enterprise, Trade and Employment recently closed a public consultation on one of the Member State options in the Corporate Sustainability Reporting Directive: to introduce independent sustainability assurance services providers (i.e. non-auditor sustainability assurers, such as environmental engineers) pursuant to Article 34(4) of the Directive. The Directive allows Member States the option to have independent sustainability assurance services providers but only where a full system of education, standards, supervision and monitoring analogous to the requirements for statutory auditors is in place. Putting such a system in place will take time and be expensive, and it is unclear whether there would be sufficient demand from non-auditors to make the licensing arrangements for them financially viable.

EU Taxonomy Regulation for sustainability activities

The Irish Auditing and Accounting Supervisory Authority undertook a desktop examination of the Taxonomy Regulation disclosures of a sample of issuers' financial statements and has published a report setting out its findings. The EU Taxonomy is a classification system that defines criteria for economic activities that are aligned with a net-zero trajectory by 2050 and the broader environmental goals other than climate.

SMEs reporting sustainability information

Large corporate customers are now frequently specifying sustainability criteria in procurement contracts with their SME suppliers. The sustainability criteria will usually include a section requiring that the SME confirm that it has strategies in place related to matters such as energy use and source of energy, effluent, water use, ecosystem interaction, workforce equality and safety, and corporate governance. Some customers will go further and ask for a sustainability report, which will detail the SME's strategies and the measurement basis for and success in achieving the goals.

Skills for international financial services

The Government has published a report on Skills for International Financial Services, which identifies that the "current level of supply of candidates at various qualification levels will be insufficient to meet the skills needs of the industry". The employment potential "will expand by between 5,900 and 9,300 persons, with totals reaching between 59,000 and 62,500 persons by 2027". Sustainability was identified as "a key new horizontal skill requirement" for everybody in the sector. The report recommends the establishment of a national oversight group; collaboration on the development of a world-class skills framework; a single portal for skills training; and enhanced provision and promotion of upskilling. Other recommendations include the promotion of diversity and inclusion in the sector, apprenticeship programmes and closer collaboration between the industry and education providers.

Anti-Money Laundering

AMLA formally established

Regulations and Directives have been published, and the legislation establishing the Anti-Money Laundering Authority (AMLA) is now in place. A new EU authority for anti-money laundering and countering the financing of terrorism (AML/CFT) has been established to enhance supervision and cooperation across the EU. The Authority, which will be headquartered in Germany, aims to implement harmonised AML/CFT rules, reducing divergences in national legislation and supervisory practices. The Authority will directly supervise high-risk entities and coordinate with national supervisors for other entities. A central AML/CFT database will be created for better data sharing and analysis, promoting efficient cooperation among supervisory authorities.

The Authority will develop a framework for peer-reviews to identify good practices and shortcomings, publishing reports and guidelines to foster convergence of supervisory practices. The Authority can investigate breaches or incorrect applications of the law by supervisors where they supervise entities in indirect scope and issue recommendations or warnings. In Ireland the supervisor is the Central Bank. The Authority will also support and coordinate financial intelligence units for effective cross-border cooperation and joint analyses of suspicious activities.

Other anti-money laundering developments

The Sixth Anti-Money Laundering Directive will shortly be formally adopted by the European Council. Included are provisions that will limit cash transactions to €10,000 (except between private individuals in a non-professional context) and additional controls over "ultra-rich individuals" (those with total wealth of at least €50m, excluding their residence). Click here for a press release from the European Parliament on the package.

Miscellaneous

Parents' leave

The Parent's Leave and Benefit Act 2019 (Extension of Periods of Leave) Order 2024 has increased parents' leave from seven to nine weeks. Originally, in 2019, this was two weeks, and it has been increased over time, now to nine weeks. The new limits are effective from 1 August 2024.

Liquidator, receiver and examiner appointments

Between 1 January 2024 and the end of June 2024 nearly 250 insolvency practitioners accepted between them 1,350 Irish insolvency appointments. Although a numerical comparison is almost meaningless – because a single creditors' voluntary liquidation might take a year's worth of hours to complete and a members' voluntary liquidation might take a day – there were some notable figures in terms of the number of appointments taken by individuals in the period.

Corporate Enforcement Authority annual report

The Corporate Enforcement Authority (CEA), formerly the Office of the Director of Corporate Enforcement, has published its first annual report , which includes 17 case studies that provide an insight into how the CEA operates. The case studies cover most of the common company law infringements, from the simple examples of not filing an annual return and directors' loans to more detailed examples of detailed account of the actions taken by the CEA.

IAASA publishes annual report

The Irish Auditing and Accounting Supervisory Authority (IAASA) has published its 2023 annual report, which identifies some of IAASA's activities of during the year, including:

- examining 43 public-interest entity (PIE) corporate reports for compliance with accounting and disclosure requirements;
- completing a thematic review across the six Prescribed Accountancy Bodies on aspects of Investigation and Disciplinary systems;
- inspecting 31 PIE audit files for compliance with auditing standards;
- entering into six enforcement settlement agreements, resulting in fines totalling more than €50,000, and enforcing one prohibition from signing audit reports; and
- launching a public awareness campaign to highlight the benefits of engaging an accountant who is regulated by a prescribed accountancy body.

FRC summarises issues in audit in the UK

In its Annual Enforcement Review 2024 the UK regulator, the Financial Reporting Council (FRC), identified a number of specific issues, all of which have resonance in Ireland:

- not properly understanding the entity being audited, including the business's risks, leading to inadequate auditing of those risks (ISA 315 and ISA 330);
- not exercising professional scepticism (ISA 200), not having a questioning mind and not critically assessing the audit evidence;
- accounting for long-term contracts: not auditing the judgements and estimates involved in the accounting and not fully understanding the terms and conditions in the contract; and
- going concern: failing to evaluate and challenge management's assessment of the business's ability to continue as a going concern.

Appendix A to the review should be compulsory reading for all auditors as it summarises the issues identified in each of the FRC reviews concluded during 2023/24.

Report on the charity sector

The Charities Regulator has issued a report analysing the financial and other information provided by charities in their annual reports for 2019 to 2022. There are currently just over 11,500 registered charities in Ireland, including almost 3,700 schools. One finding of the report is that Government funding to charities increased by 25% over the four years whereas income from non-Government sources remained mostly static over the period. The Regulator recorded a presentation on the report, available at this link. See article by Madeleine Delaney (Chief Executive, The Charities Regulator) "Key Considerations When Engaging With Charities" in this issue.

Data Protection Commission

The Data Protection Commission has published its 2023 annual report.

Central Bank of Ireland

The Central Bank of Ireland has published its Annual Report and Performance Statement for 2023.

Legal Monitor

Nicola Corrigan
Senior Associate, William Fry Tax Advisors

Selected Acts Signed into Law from 1 May to 31 July 2024

No. 12 of 2024: Court Proceedings (Delays) Act 2024

This Act provides for the right of persons who are party to proceedings, where such proceedings are not concluded within a reasonable time, to seek a declaration of that fact and, in certain cases, compensation. The Act also provides for the appointment of a Chief Court Delays Assessor and Court Delays Assessors and establishes a process for making and assessing applications for declarations and compensation.

No. 14 of 2024: Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Act 2024

This Act:

- amends certain provisions of the Protection of Employment Act 1977;
- provides for the establishment of an employment law review group to monitor, review and advise the Minister on employment law matters;
- amends certain provisions of the Companies Act 2014 to improve the quality and circulation of information to workers as creditors and ensure that remedies for transactional avoidance are more accessible to creditors; and
- provides for related matters.

No. 16 of 2024: Future Ireland Fund and Infrastructure, Climate and Nature Fund Act 2024

This Act provides for:

- the establishment of the Future Ireland Fund with the purpose of supporting State expenditure from 2041 onwards;
- the establishment of the Infrastructure, Climate and Nature Fund with the purpose of:
  - supporting State expenditure from 2026 onwards where there is a deterioration in the economic or fiscal position of the State and
  - supporting State expenditure on certain environmental projects between 2026 and 2030;
- the control and management of those funds by the National Treasury Management Agency;
- the transfer of certain assets to the above-mentioned funds;
- the dissolution of the National Surplus (Exceptional Contingencies) Reserve Fund and the transfer of the assets of that fund to the above-mentioned funds; and
- related matters.

This Act amends various miscellaneous provisions of the Taxes Consolidation Act 1997 (TCA 1997) and the Stamp Duties Consolidation

Act 1999 in the context of the establishment of the Future Ireland Fund and the Infrastructure, Climate and Nature Fund.

No. 17 of 2024: Employment Permits Act 2024

This Act provides for the grant of employment permits to certain foreign nationals for the purpose of permitting such persons to be in employment in the State and:

- prohibits employment in the State of certain foreign nationals who do not have such permits;
- imposes certain restrictions and conditions in respect of the grant of such permits;
- enables the Minister for Enterprise, Trade and Employment to make Regulations to impose certain other restrictions and conditions in respect of the grant of such permits;
- provides for the enforcement of provisions of this Act and the imposition of penalties for contraventions of this Act;
- provides for civil proceedings to recompense certain foreign nationals for work done or services rendered in certain circumstances;
- otherwise regulates the employment in the State of certain foreign nationals;
- repeals the Employment Permits Act 2003 and the Employment Permits Act 2006;
- provides for consequential amendments to certain other enactments; and
- provides for related matters.

No. 20 of 2024: Automatic Enrolment Retirement Savings System Act 2024

This Act provides for:

- the establishment of a body to be known as An tÚdarás Náisiúnta um Uathrollú Coigiltis Scoir;
- An tÚdarás Náisiúnta um Uathrollú Coigiltis Scoir to establish, maintain and administer an automatic enrolment retirement savings system for employees in employment not covered by qualifying schemes;
- automatic enrolment and re-enrolment of participants in that system and for opting into and out of the system;
- the payment of contributions by participants, their employers and the State;
- the investment of contributions and the payment of retirement savings out of participants' accounts;
- consequential amendments of certain enactments; and
- related matters.

This Act contains various references to TCA 1997.

No. 21 of 2024: Charities (Amendment) Act 2024

This Act makes various amendments to the Charities Act 2009. The Act also amends paragraph (f) of sub-section (8) of s851A TCA 1997, which deals with circumstances in which a Revenue officer may disclose information in relation to a charity.

No. 23 of 2024: Health (Miscellaneous Provisions) Act 2024

This Act amends s45, s45A, s58, s58A and s59 of the Health Act 1970, which deal with eligibility for certain health care services. In particular, this Act provides that, having regard to a person's overall financial situation, the Health Service Executive shall disregard any relevant sums within the meaning of s216A TCA 1997 (Rent-a-Room relief) arising to the person (or the person's spouse or civil partner).

The Act also amends various miscellaneous provisions of the Irish Medicines Board Act 1995, the Pharmacy Act 2007, the Health (Pricing and Supply of Medical Goods) Act 2013 and the Patient Safety (Notifiable Incidents and Open Disclosure) Act 2023 and provides for related matters.

No. 26 of 2024: Digital Services (Levy) Act 2024

This Act amends the Broadcasting Act 2009 to extend the power of Coimisiún na Meán to raise a levy on providers of intermediary services and hosting services to cover its new functions under the Digital Services Regulation (EU) 2022/2065 and the Terrorist Content Online Regulation EU 2021/784.

The Act also amends the Digital Services Act 2024 to introduce a power for the Competition and Consumer Protection Commission to impose a levy, on providers of online platforms that allow consumers to conclude distance contracts with traders, to fund its new functions under the Digital Services Regulation (EU) 2022/2065.

The Act also provides for related matters.

Selected Bills Initiated from 1 May to 31 July 2024

No. 43 of 2024: Motor Insurance Insolvency Compensation Bill 2024

This Bill aims to transpose Articles 10a and 25a of Directive 2009/103/EC (as amended) ("the Motor Insurance Directive") pursuant to Directive (EU) 2021/2118 into Irish law. The Bill also aims to make certain related amendments to a number of Acts, including an amendment to s28 of the Value-Added Tax Consolidation Act 2010.

No. 62 of 2024: Companies (Corporate Governance, Enforcement and Regulatory Provisions) Bill 2024

This Bill aims to enhance and amend the legislative framework provided by the Companies Act 2014 in the areas of governance, administration, insolvency, enforcement and supervision by:

- making permanent the provisions giving companies and industrial and provident societies the option to hold fully virtual general meetings;
- amending the audit exemption regime for small and micro companies to remove automatic loss of exemption;
- facilitating improved operational efficiencies and enhancing the powers of the Companies Registration Office, the Irish Auditing and Accounting Supervisory Authority and the Corporate Enforcement Authority;
- addressing recommendations of the Company Law Review Group in respect of enhanced transparency and accountability in receiverships, corporate governance, and administration around mergers in certain circumstances, and certain technical and procedural matters relating to public limited companies; and
- providing for various technical and procedural amendments to improve the operation of the Small Companies Administrative Rescue Process (SCARP).

No. 63 of 2024: Residential Tenancies (Amendment) (No. 3) Bill 2024

This Bill aims to make various amendments to the Residential Tenancies Act 2004, including to provide for the sharing of certain information by the Revenue Commissioners with the Residential Tenancies Board where the latter considers that such a request is necessary and proportionate for the performance of its functions.

No. 65 of 2024: Finance (Provision of Access to Cash Infrastructure) Bill 2024

This Bill aims to provide for the continued provision of sufficient and effective access to cash infrastructure in the State by establishing a framework to provide that any future evolution of the cash infrastructure is managed in a fair, orderly, transparent and equitable manner. In particular, the Bill:

- defines access to cash;
- provides for measures to be taken to address local deficiencies;
- provides for the monitoring and enforcement of access to cash criteria;
- provides for the collection and publication of certain information by the Central Bank of Ireland ("the Bank");
- provides for the oversight of ATM deployers and cash-in-transit providers by the Bank via a registration mechanism that can be enforced by the Bank;
- provides for the sharing of information and cooperation between the Bank and the Private Security Authority; and
- provides for the amendment of the Central Bank Act 1942, the Central Bank Reform Act 2010, the Central Bank (Supervision and Enforcement) Act 2013 and the Companies Act 2014 for those and other purposes.

Selected Statutory Instruments from 1 May to 31 July 2024

No. 217 of 2024: Disabled Drivers and Disabled Passengers (Tax Concessions) (Amendment) Regulations 2024

These Regulations came into effect on 15 May 2024 and make amendments to:

- Regulation 6: Medical Board of Appeal;
- Regulation 8B: Reliefs for adaptations for wheelchair-accessible vehicles (disabled drivers); and
- Regulation 10B: Reliefs for adaptations for wheelchair-accessible vehicles (disabled passengers)

of the Disabled Drivers and Disabled Passengers (Tax Concessions) Regulations 1994.

No. 259 of 2024: Employment Equality Act 1998 (Section 20A) (Gender Pay Gap Information) (Amendment) Regulations 2024

These Regulations came into operation on 31 May 2024 and update the Employment Equality Act 1998 (Section 20A) (Gender Pay Gap Information) Regulations 2022. In particular, these Regulations bring employers who employ not less than 150 employees (previously, 250 employees) into the scope of gender pay gap reporting in Ireland. The Regulations make a number of other updates, including:

- an amendment to the formula used to determine the total number of working hours of an employee;
- an update to the definition of "benefit in kind" to include share options and interests in shares and deletion of these items from the definition of "bonus remuneration"; and
- the insertion of a definition of "basic pay", which includes payments made to employees while on adoptive, maternity, paternity or parent's leave.

No. 301 of 2024: European Union (Adjustments of Size Criteria for Certain Companies and Groups) Regulations 2024

These Regulations come into operation on 1 July 2024 and transpose Commission Delegated Directive No. 2023/2775/EU of 17 October 2023. The Regulations amend the Companies Act 2014 by increasing the company size thresholds. The balance sheet and turnover thresholds for micro, small, medium and large companies as set out in the Companies Act 2014 are to be increased by approximately 25% to account for inflation. The balance sheet and turnover thresholds for the purposes of determining group size have also increased.

No. 336 of 2024: European Union (Corporate Sustainability Reporting) Regulations 2024

These Regulations transpose Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No. 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, into Irish law.

These Regulations require all large companies, and all listed companies (except listed micro enterprises), to provide information on sustainability matters, defined as environmental, social and governance (ESG), including human rights matters, according to mandatory European Sustainability Reporting Standards in the directors' report.

The Regulations amend various relevant provisions of the Companies Act 2014. The sustainability reporting is gradually applicable over the period 2024 to 2028, depending on the size and nature of the entities in scope.

Tax Appeals Commission Determinations

Catherine Dunne
Barrister-at-Law

Published from 1 May to 31 July 2024

Income Tax

55TACD2024

Appeal regarding relief claimed for health expenses that did not match receipts supplied by the appellant and the appellant's spouse

s469 TCA 1997

Case stated requested: Unknown

57TACD2024

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

s865 TCA 1997

Case stated requested: Unknown

61TACD2024

Appeal regarding a claim for relief on qualifying pension premiums

s787 TCA 1997

Case stated requested: Unknown

64TACD2024

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

s865 TCA 1997

Case stated requested: Unknown

78TACD2024

Appeal regarding an assessment to tax raised by the Criminal Assets Bureau

s18 TCA 1997, s58 TCA 1997, s924 TCA 1997

Case stated requested: Unknown

87TACD2024

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

s865 TCA 1997

Case stated requested: Unknown

Income Tax and PRSI

60TACD2024

Appeal regarding the treatment of payments to employees as payments made as a consequence of the termination of their employment rather than as profits or gains from employment

s12 TCA 1997, s19 TCA 1997, s112 TCA 1997, s123 TCA 1997

Case stated requested: Unknown

Corporation Tax

59TACD2024

Appeal regarding the cost of share-based awards for transfer pricing purposes and the interpretation of s835C and s835D TCA 1997

s835 TCA 1997, s835D TCA 1997, s959AA TCA 1997

Case stated requested: Unknown

77TACD2024

Appeal regarding the treatment of payments to a shareholder (to be read in conjunction with 76TACD2024)

s19 TCA 1997, s28 TCA 1997, s81 TCA 1997, s112 TCA 1997, s532 TCA 1997, s959AA TCA 1997

Case stated requested: Unknown

Capital Gains Tax

70TACD2024

Appeal regarding the treatment of loan notes as a debt on security and the application of loss relief on their disposal

s541 TCA 1997, s546 TCA 1997

Case stated requested: Unknown

Capital Acquisitions Tax

69TACD2024

Appeal regarding whether an entity falls into the definition of a discretionary trust

s2 CATCA 2003, s19 CATCA 2003, s20 CATCA 2003, s49 CATCA 2003

Case stated requested: Unknown

73TACD2024

Appeal regarding the application of the CAT exemption "Exemption of certain securities" to shares received on an inheritance

s81 CATCA 2003

Case stated requested: Unknown

Relevant Contracts Tax

72TACD2024

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

s865 TCA 1997

Case stated requested: Unknown

82TACD2024

Appeal regarding the classification of the appellant as a of sub-contractor for the purposes of RCT

s530 TCA 1997, s530A TCA 1997, s530F TCA 1997, s530I TCA 1997

Case stated requested: Unknown

Artists' Exemption

58TACD2024

Appeal regarding the application of the artists' exemption

s195 TCA 1997

Case stated requested: Unknown

65TACD2024

Appeal regarding the application of the artists' exemption

s195 TCA 1997

Case stated requested: Unknown

74TACD2024

Appeal regarding the application of the artists' exemption

s195 TCA 1997

Case stated requested: Unknown

80TACD2024

Appeal regarding the application of the artists' exemption

s195 TCA 1997

Case stated requested: Unknown

81TACD2024

Appeal regarding the application of the artists' exemption

s195 TCA 1997

Case stated requested: Unknown

84TACD2024

Appeal regarding the application of the artists' exemption

s195 TCA 1997

Case stated requested: Unknown

Vehicle Registration Tax

56TACD2024

Appeal relating to the availability of relief from VRT under "transfer of residence relief" in accordance with s134(1)(a) of Finance Act 1992

Case stated requested: Unknown

79TACD2024

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

s133 Finance Act 1992

Case stated requested: Unknown

Employment Wage Subsidy Scheme

67TACD2024

Appeal regarding the application of the EWSS and the requirement that a business would experience a 30% reduction in turnover

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

Case stated requested: Unknown

68TACD2024

Appeal regarding the application of the EWSS and the requirement that a business would experience a 30% reduction in turnover

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

Case stated requested: Unknown

71TACD2024

Appeal regarding the application of the EWSS and the requirement that a business would experience a 30% reduction in turnover

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

Case stated requested: Unknown

75TACD2024

Appeal regarding the application of the EWSS and the requirement that a business would experience a 30% reduction in turnover

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

Case stated requested: Unknown

Customs and Excise

83TACD2024

Appeal regarding exemption from customs duties and VAT under returned goods relief, Article 203, Union Customs Code

Commission Delegated Regulation (EU) 2015/2446 and (EU) No 952/2013

Case stated requested: Unknown

86TACD2024

Appeal regarding liability to anti-dumping duty and Common Customs Tariffs from importation to the EU of iron and steel fastener products originating from China

Council Regulation (EC) No 91/2009 ("Anti-Dumping Regulation")

Case stated requested: Unknown

Corporation Tax, Dividend Withholding Tax, PAYE/PRSI/USC

62TACD2024

Appeal regarding the treatment of goodwill transferred from a sole trade to the appellant. A related appeal is covered in 63TACD2024

s19 TCA 1997, s20 TCA 1997, s112 TCA 1997, s130 TCA 1997, s548 TCA 1997

Case stated requested: Unknown

63TACD2024

Appeal regarding the treatment of goodwill transferred from a sole trade to the appellant. A related appeal is covered in 62TACD2024

s19 TCA 1997, s20 TCA 1997, s112 TCA 1997, s130 TCA 1997, s548 TCA 1997

Case stated requested: Unknown

Corporation Tax and Dividend Withholding Tax

66TACD2024

Appeal regarding the deductibility of expenses incurred on the acquisition of and professional fees associated with employee benefit trusts for corporation tax purposes

s10 TCA 1997, s81 TCA 1997, s81A TCA 1997, s433 TCA 1997, s436A TCA 1997

Case stated requested: Yes

Corporation Tax and Income Tax

76TACD2024

Appeal regarding the treatment of payments to a shareholder (to be read in conjunction with 77TACD2024)

s19 TCA 1997, s28 TCA 1997, s112 TCA 1997, s532 TCA 1997, s959AA TCA 1997

Case stated requested: Unknown

Corporation Tax, Dividend Withholding Tax and Preliminary Tax

85TACD2024

Appeal regarding the tax treatment of expenses related to an employee benefit trust

s81 TCA 1997, s112 TCA 1997, s118 TCA 1997, s436A TCA 1997

Case stated requested: Yes

Tax Technology Update: Autumn 2024

Tim Duggan
Director, Tax Transformation and Technology, KPMG
Caitríona Sweeney
Manager, Tax Transformation and Technology, KPMG

What Is Artificial Intelligence?

AI is an umbrella term that encompasses a range of interrelated techniques and technologies, from simple rule-based logic to more advanced and complex algorithms. AI is not a single capability, technology or vendor platform; rather, it is a spectrum of capabilities and technologies that mimic cognitive processes of the human brain and learn or evolve over time. Generative AI is a component of AI that focuses on creating new and original content such as text, images and videos. Unlike traditional AI, which operates based on pre-existing data and rules, generative AI uses sophisticated machine learning to generate new data and ideas. This learning over time is what sets AI apart from technology that has gone before it, and the last four to five years have seen staggering leaps in the ability of the technology to learn. The ability to learn is based on being able to consume incredibly large volumes of data quickly.

How Can AI Be Leveraged Within Tax Departments and Tax Functions?

AI can be leveraged in tax to improve efficiency, streamline time-consuming processes and empower users to focus on value-adding work. It can also strengthen decision-making by providing instant access to aggregated knowledge and insights, and the ability to collate, access and analyse data to derive insights and optimise decision-making.

AI thrives with large volumes of data and making sense of it. It can do this much more quickly than a human. As tax gets more complicated and moves to a more global view (Pillar Two), the ability for a tax professional to utilise AI tools to cope with vast quantities of data will be vital.

AI can improve tax compliance by streamlining and rendering obsolete time-consuming processes. This is an ideal opportunity where data has to be computed or reconciled and then an output has to be created. AI can work simultaneously with existing compliance technologies and can often complement them.

As a very simple real-life example, AI could be used to categorise expense data between allowable or disallowable for corporation tax purposes. This would be done by training the AI model on previous data sets where the data has been categorised by a human. Once the AI model has been trained, it can then predict whether the current-year data is allowable or disallowable for corporation tax purposes. This will, of course, be dependent on the data from prior years and will also need to be reviewed by a human.

A more complicated use case would be the analysis and summary of data relating to due diligence. AI's ability to consume this data quickly and present it back to the human in a summarised format can lead to quicker decision-making for the human.

Tax Authorities' Use of AI

As tax authorities receive more and more data from taxpayers, AI will be used frequently by them to analyse and gain insight into that data. Tax professionals can also use AI to anticipate tax authorities' needs, preparing information and communications and helping to identify and cite relevant legislation, case law or rulings.

AI Risks

Although there are significant advantages to the adoption of AI within the tax function, there are also risks associated with its use. One of the risks is the potential for AI to produce false outputs or, as they are called within the AI community, hallucinations. In layperson's terms this means that the AI model has simply made something up. In a 2023 court case in New York a lawyer was found to have cited six cases that did not exist, which were being used to prove precedence in a personal injury case. The lawyer explained that the cases had been sourced from ChatGPT. The problem is that these hallucinations can look extremely credible and difficult to spot as being made up.

Another risk with AI is that the data that the algorithm used to learn may be biased. In 2021 the Dutch tax authority was fined by the privacy regulator for misuse of data. The tax authority was using an AI model to create risk profiles to detect fraud among people who apply for childcare benefits. These risk profiles were then used to claim back benefits from individuals who were flagged by the AI model. Unfortunately for the individuals involved, there was often no proof of fraud whatsoever. When it came to light that these individuals had been flagged by an AI model, an audit of the model found that it had inherent biases, with certain races being targeted specifically without any reason.

One final risk to consider is the use of open AI tools and the potential for data breaches under the General Data Protection Regulation (GDPR). Users must consider whether they are uploading confidential information to these tools and understand where the data may end up or whether it will be reused. ChatGPT, for example, saves all user prompts and data that have been uploaded to it. This data can then be used to train future models. Clearly, a lot of consideration needs to be given to whether this is acceptable from a tax function perspective.

How To Mitigate These Risks

To mitigate these risks, governance around the review of AI in tax is crucial. Governance will involve input from various stakeholders, be that IT to understand infrastructure requirements or legal teams to understand the type and flow of data within the AI tool. Consideration must be given to whether this data is still fully restricted to the organisation or is available outside of the organisation. If the data has left the organisation, has it moved outside of the EU?

Following on from governance and having seen the risks already identified, clearly output from AI tools must be reviewed. AI tools should not be a substitute for our professional expertise or judgement. The best AI tools will have audit trails to their sources, and their results or output are easily verified. This is such an important factor for the adoption of AI technology. The human with expertise in the field – in our case the tax professional – must be able to understand the output and, more importantly, why the technology is generating it. All too often with these tools the answer to how the output was generated can simply be that the algorithm said so. As was seen in the Dutch tax authority's case, this can have very negative outcomes when the algorithm is not challenged and the training data understood.

New Data Skills Requirement

The impact of AI on the work that tax teams currently do could be significant. It will mean that routine tasks are handled by AI so that tax professionals can focus on higher-value work, such as advising on complex tax issues and freeing up time for strategic planning. It is worth bearing in mind that although AI offers many benefits, it requires high-quality, organised data to function effectively. This data component will be crucial to be of benefit to the tax function. The ability for tax professionals to understand the organisation of data and how to improve data quality will therefore come to the fore over the next few years.

Conclusion

AI has the potential to revolutionise the way in which tax functions and departments operate. By leveraging AI, tax professionals can improve efficiency, streamline time-consuming processes and focus on value-adding work. However, there are clear risks associated with the use of AI, such as the potential for it to produce false outputs, inherent biases in the data used to train the algorithm and the potential for data breaches under the GDPR. To mitigate these risks, governance around the review of AI in tax is crucial. Additionally, output from AI tools must be reviewed, and AI tools should not be a substitute for professional expertise or judgement.

Compliance Programme for Central Register of Beneficial Ownership of Trusts (CRBOT)

CRBOT Team
The Revenue Commissioners

European anti-money laundering directives require each European Union (EU) Member State to establish a Central Register of Beneficial Ownership of Trusts (CRBOT) to help prevent money laundering and terrorist financing by improving transparency on who, ultimately, owns and controls a trust.

Revenue has confirmed that it will write to trusts registered for tax purposes to remind them of their separate obligations under anti-money laundering legislation. The legislation requires them to register on the CRBOT and to ensure that the details registered are accurate and kept up to date.

Revenue will also continue with a programme of checks in sectors where trusts are commonly used to ensure compliance with filing obligations. These checks will now include compliance and outreach visits to trusts, trust service providers and others who act as agents for trusts to ensure compliance with the regulations. These checks are separate to interventions carried out under Revenue's Code of Practice for Revenue Compliance Interventions and compliance framework.

Details on registering trusts can be found on the webpage below. Related queries can be made via My Enquiries by logging into myAccount or ROS.

https://www.revenue.ie/en/crbot/documents/crbot-user-questions-troubleshooting.pdf

Junior Chapwanya
Manager – Deals Tax, PwC Ireland

Stephanie Curtin
Director – Deals Tax, PwC Ireland

Nicola Carter *(not pictured)*
Director – Deals Tax, PwC Ireland

Tax in Deals: Beyond Mergers and Acquisitions: Part 1

Introduction

The aggregate value of Irish mergers and acquisitions (M&A) reached €11.8bn in 2023,[1] and Irish M&A activity has increased in 2024, with 207 deals completed in the first half of the year compared to 195 in the first half of 2023.[2] Tax is a crucial factor in M&As that cannot be overlooked as it goes beyond the initial acquisition and is present throughout the life cycle of the investment. The increasing number of tax audits and tax appeals point to the potential cost of tax not being given due consideration as part of M&A. Therefore, although tax may not be a key driver of M&A activity, it should be considered throughout the deal process to achieve maximum returns for investors and adequately protect, and mitigate potential risks to, the investment. A well-planned and well-executed deal looks beyond the M&A transaction and considers the full span of the investment. It seeks to implement tax structures that maximise the value of the investment and considers the tax position at acquisition, as well as at exit.

1 William Fry, *M&A Review 2023* (Dublin: 2024).

2 Renatus, *Private Equity Ireland M&A Report – H1 2024* (Dublin: 2024).

The purpose of this article is to discuss the key tax considerations at each stage of a deal. The article, the first of two, will look at the due diligence process and pre-acquisition tax considerations when approaching a deal from both a due diligence and a tax-structuring perspective. The article primarily focuses on deals involving the sale or acquisition of shares and does not consider asset sales in detail. Where shares in a company are acquired, the buyer will take on the tax legacy of the company acquired, which might leave the buyer open to historical tax exposures, and the aim of a tax due diligence review is to examine the tax affairs in more detail in order to (1) reach a sufficient level of comfort for the buyer, (2) ensure that necessary tax warranties and indemnities are included in the legal documents and/or (3) facilitate price negotiations. These points are discussed in further detail in the sections that follow.

The life cycle of a deal typically takes the following shape:

- pre-acquisition,
- completion,
- post-acquisition,
- value creation and
- exit.

Pre-acquisition Tax Considerations

At the pre-acquisition stage, heads of terms are agreed as a starting point, and the due diligence (DD) approach is agreed in terms of timing, scope and process. The indicative enterprise value for the deal is negotiated, and financing of the deal is also considered. Tax due diligence is undertaken, and the tax structuring for the acquisition is considered. At this stage DD is also completed in other areas, such as financial, commercial, legal, IT and ESG (environmental, social and governance). Following on from the DD process, share purchase agreements (SPAs) and other legal documents are negotiated.

Due diligence

As noted, the purpose of a tax DD is to identify, assess and mitigate a buyer's tax risk, and to ensure that the prospective purchaser has a clear picture of the company/group to be acquired across all tax aspects of its business and to identify any major issues. It is effectively a review of all taxes that affect or apply to a company and allows all parties to understand a company's tax liabilities and how these should be dealt with in the context of a transaction. Taxes that are covered as part of the DD include corporation and withholding tax, employment taxes, VAT, relevant contracts tax, customs and stamp duty. Depending on the size of the deal and the target company, a separate review of transfer pricing (TP), R&D and other incentives and a more detailed review of capital allowances may be carried out. The DD focuses on historical tax compliance, and it involves risk identification, risk quantification and recommendations for risk mitigation. Where such risk cannot be mitigated before a transaction, this will typically be managed through the SPA/tax deed, price adjustments or warranty and indemnity (W&I) insurance, which is further discussed below. Tax due diligence is a starting point for SPA negotiations and also feeds into structuring and post-acquisition integration.

As each deal is unique, a good understanding of the company or group to be acquired and the transaction (i.e. commercial terms agreed, intention for the investment, head of terms etc.) is important because it allows the DD team to ask the correct questions and investigate the most relevant areas. Therefore, the scope of a DD should be tailored to the specific facts of the deal to enable identification of tax issues relevant to the transaction and the industry in which the company operates. For example, relevant contracts tax (RCT) is a big focus for construction industries; for the healthcare industry, key employment tax risk areas would be around self-employed contractors, reimbursement of expenses and payments made outside of the payroll process; and VAT would be a key risk in management service companies. By understanding the buyer's intentions, the DD team can assess the importance or relevance of identified tax issues for the buyer. For example, in cases where the company/group has significant trading tax losses, the value of such losses may be factored in to price negotiations. Understanding the buyer's intentions guides the tax adviser in assessing the ability to utilise future tax losses in a trading context where the growth strategy envisages a change to the business (particularly where value has been placed on tax losses in the purchase price) or as regards ongoing management and control of the business where the purchaser is not resident in Ireland (i.e. triggering exit taxes/permanent-establishment risk). In Tax Appeals Commission determination 24TACD2017 Revenue refused the carry-forward of trading losses of €129m under s396(1) TCA 1997 on the basis that there had been both a change in ownership and a major change in the nature or conduct of the company's trade within three years and therefore s401 TCA 1997 applied. The Tax Appeals Commissioner, in upholding Revenue's assessment, determined that "the trade that gave rise to the loss is not the same trade as the trade which gave rise to the income against which the Appellant sought to offset the loss", and therefore the losses were disallowed.

Therefore, although tax DD looks at the historical compliance, it brings to attention key issues that may impact current or future tax positions.

The main types of DD are a buy-side due diligence, a sell-side due diligence, a health check and a tax fact book., with each of these types of DD reviewed in further detail below.

Buy-side/Purchaser Due Diligence

A buy-side (i.e. purchaser) due diligence (PDD) is one undertaken by a buyer when assessing a company/group before an acquisition. This type of DD involves a detailed review of the tax issues that contribute to the company's/group's value as well as issues that detract from it. As noted, the review is done across multiple tax heads, focusing on corporation tax, employment taxes, VAT, RCT, customs and TP. The focus on different tax heads may vary depending on the industry.

Vendor due diligence

Before a sale a vendor may also seek to carry out due diligence on its own company/group. A vendor due diligence (VDD) is effectively an independent and objective review of a company/group undertaken before a sale or refinancing that sets out an overview of the tax position and highlights any tax risks. A VDD identifies tax risks and makes appropriate recommendations to rectify them (or mitigate if the risks cannot be fully eliminated). By undertaking a VDD the seller can maximise value through implementing corrective actions before the sale process commences. It also minimises the time required for buyers to complete buy-side due diligence before making an offer, which can speed up a sale process, particularly where there are multiple bidders. This is increasingly an approach that sellers are willing to spend time and money on.

Health check

A tax health check enables investors/shareholders to review the tax affairs of a company in order to get it sale ready. This is typically done at the end of the investment's lifespan. Similar to a VDD, a health check allows for value maximisation through risk identification, assessment and mitigation before a sale process commences.

Tax fact book

A tax fact book summarises the tax profile of the company/group. It provides factual information about the entities – for example, the group structure and the tax profile, including details of tax residency, compliance history, interactions with authorities and tax attributes.

Tax Aspects of Key Acquisition Documentation

In addition to providing comfort for the buyer, a tax due diligence ensures that appropriate tax warranties and indemnities are included in the acquisition documents and facilitates price negotiations. A key document to be reviewed as part of a share deal is the share purchase agreement. The SPA is key to an M&A deal as it supports the purchase price for stamp duty (SD) filing and future disposal and the closing date as defined in the SPA might inform the date on which the instrument will be executed. The execution date triggers the SD filing deadline. As the SD filing and payment deadline is only 44 days after execution of the transfer, it is important that the buyer is satisfied that it will have received everything that it needs from the vendor to allow for the filing of the SD return. This is particularly important where there are multiple vendors and/or non-resident vendors or if the buyer is non-resident and needs to apply for a local tax reference number.

Additionally, the buyer should be satisfied that there are no withholding tax obligations. Section 980 TCA 1997 imposes a 15% withholding tax obligation on the purchaser where the shares being acquired derive the greater part of their value from Irish specified assets. Where the provisions of s980 apply, the buyer should obtain CG50 certificate from the seller or withhold 15% from the consideration, or confirmation should be obtained that the shares do not derive more than 50% of their value from Irish specified assets before the sale. A purchaser who retains 15% of the purchase price of the asset must, within 30 days, deliver an account of the amount retained to the Revenue Commissioners and pay that amount to the Collector-General. The vendor is entitled to relief for the amount paid by the purchaser as a credit against the capital gains tax (CGT) liability.

The tax due diligence report findings feed into the SPA and, in particular, the tax warranties and tax deed sections of the SPA. The Tax Deed may also be a standalone document but is negotiated with the SPA. This enables allocation of risk between the parties in an agreed manner. Certain clauses in the SPA can have unwanted tax effects if not fully considered – for example, a clause that contains an obligation for the purchaser to repay/procure repayment of existing debt in the company/group to be acquired can have significant SD implications for the buyer and CGT implications for the seller.

The SPA also supports the substance of the transaction (or other transactions preceding the sale). In Tax Appeals Commission determination 03TACD2023 the SPA was central in determining the substance of the transactions entered into shortly before the acquisition. The SPA and supporting schedules formed the basis for the Commissioner's upholding of Revenue's decision to deny an interest relief claim of €518m. In this case the interest was deemed to be capital in nature and therefore not tax-deductible under s81 TCA 1997.

Warranties and indemnities

Protection against risks identified as part of the DD is sought by way of tax warranties and indemnities. Warranties are statements of fact regarding the tax affairs of a company against which a seller must disclose to the extent that these are not true. Indemnities can be specific or general and protect against an actual loss or liability and are provided by the seller in relation to the period before acquisition.

W&I insurance policies have become more popular in recent years, replacing the traditional seller indemnification. This type of insurance covers liabilities arising from breach of warranties. The W&I policy can be taken by either party. The benefit to the seller is the removal of uncertainty during the warranty period. For the buyer there is better protection (e.g. risk from insolvency of the seller is removed) and the opportunity to negotiate a lower price. For both parties W&I policies allow the buyer and the seller to maintain commercial relationships that could otherwise be damaged by legal disputes. It is important to note that some risks will not be covered by the W&I policy.

Tax claims and warranties within the tax deed are typically limited to the period ending on or before the fifth anniversary of the end of the chargeable period. The five-year clause in the tax warranties is guided by s959(Z)(3) TCA 1997, which provides for a period of four years from the end of the year in which a tax return is filed for Revenue to carry out inquiries into the return. Tax advisers are reminded that a return must be a "true and full disclosure of all material facts" to rely on the aforementioned four year limitation section. This principle was reiterated in the recent case of *Revenue v Tobin* [2024] IEHC 196, where it as found that the "true and full" requirement is a matter of fact and the return must be accurate in every material aspect without regard to the taxpayer's subjective view of its accuracy. Where a return is not "true and full", then the Inspector of Taxes is entitled to raise an assessment "at any time" if he or she is of the view that a return is incomplete. It is therefore important that the buyer is satisfied with the tax warranties and indemnities and that it has a clear understanding of the tax risks that impact previously submitted tax returns and that Revenue could seek to challenge after the typical four-year period.[3]

Tax Structuring and Modelling

As noted above, tax DD findings feed into tax structuring and post-acquisition integration. A tax DD identifies opportunities, deal breakers and key tax attributes and prepares for integration of existing structures with buyer structures. With the Corporate Sustainability Reporting Directive already in effect from FY2024, alignment of ESG strategies is even more important. Where ESG strategies are not aligned, this can pose difficulties for the investor. ESG will be discussed in more detail in the second article of this series.

Tax structuring

A tax structure is a holistic approach to an organisation, and in the context of M&As it looks at how an acquisition is to be made and funded and how the company/group to be acquired aligns with existing structures. Key objectives of a tax structure include managing future tax costs, facilitating future expansion and exit strategies. Where debt is being introduced in the acquisition, tax structuring facilitates interest relief from a tax perspective on that debt and the identification of any proposed changes that may affect interest deductibility, e.g. liquidation/reorganisations in the acquiring group, which may trigger a restriction of interest relief, together with consideration of interest limitation rules, transfer pricing or debt capacity.

Tax modelling

A financial model is prepared in order to forecast the financial performance of a company. A key component of the financial model is the tax charge/tax payable for the investment period. In addition to understanding the model and reviewing assumptions and bottom-line figures, tax advisers are guided by the financial model in assessing the feasibility of the tax structure, taking into account financing and interest deductibility, transfer pricing, interest limitation rules, Pillar Two impacts and tax attributes.

Conclusion

Tax is a crucial factor in M&As that cannot be overlooked as it goes beyond the initial acquisition and is present throughout the life cycle of the investment. The increasing number of tax audits and tax appeals point to the potential cost of tax not being given due consideration as part of an M&A. Deals work is aimed at creating and delivering long-term business value beyond an M&A transaction.

As outlined in this article, the benefit of undertaking a tax DD is that it provides the buyer with robust value-add insights and a good understanding of the company being acquired or sold and of how it aligns with existing structures. The tax DD findings feed into the SPA – in particular, the tax warranties and tax deed – which enables allocation of risk between the parties in an agreed manner.

3 See article written by Dearbhla Cunningham "High Court Considers Limited Reopening of Old Cases in *The Revenue Commissioners v Tobin*", *Irish Tax Review*, 37/2 (2024).

The tax DD findings also feed into the tax structuring and post-acquisition integration. As noted, the tax DD identifies opportunities, deal breakers and key tax drivers and prepares for integration of existing structures with buyer structures. Alongside this, the financial model will consider the tax impacts of the investment, taking into account financing and interest deductibility, transfer pricing, interest limitation rules, Pillar Two impacts and tax attributes.

The second article in this series will look in more detail at acquisition structuring and post-acquisition tax considerations, value creation and exit planning, as well as recent tax developments relevant to deals. With new tax laws and developments in an Irish and international tax context (e.g. Pillar Two, outbound-payments provisions), the environment for M&A is becoming increasingly complex.

Conor Kennedy
Barrister-at-Law, Head of Tax Strategy and Disputes, EY Law Ireland

Possible Impact of Anti-Avoidance Measures on Business Decisions: Part 2

Introduction

This is the second in a two-part series of articles that reviews the possible impact of anti-avoidance measures on business decisions in the context of recent judgments of the courts and tribunals and discusses the crucial role that evidence plays in support of the commercial legitimacy of impugned or contemplated transactions. As noted in the first article, the Irish courts have yet to consider the meaning of the concept of a mainly tax-driven non-genuine commercial transaction; however, recent Supreme Court and Court of Appeal decisions in England and Wales provide some judicial clarification. Although not binding, such authorities are persuasive in this jurisdiction, specifically where similar statutory wording is under consideration.

The following recent decisions confirm the extent to which the courts and tribunals were influenced by the evidence adduced at the hearings.

Delinian

A case in which tax was a motivational but not the primary factor was considered in *Delinian Ltd (Formerly Euromoney Institutional Investor Plc) v Revenue* [2023] EWCA Civ 1281.

Euromoney agreed in principle to sell its shares in Capital Data Ltd to Diamond Topco Ltd for $80.44m, consisting of $21m in cash with the remaining $59m in the form of ordinary shares in Diamond Topco. Euromoney subsequently renegotiated the form of the consideration, such that it would receive preference shares in place of $21m in cash as it was more tax-efficient.

Euromoney submitted its tax return on the basis that the exchange-of-shares and schemes-of-reconstruction relief applied to the exchange of Capital Data shares for ordinary and preference shares in Diamond Topco Ltd. As with the Irish provisions, the relief applies only to an exchange that is "effected for bona fide commercial reasons and does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to capital gains tax". However, HMRC amended the return to include a liability to corporation tax on a chargeable gain on the entire exchange and issued an assessment.

The First-tier Tribunal (FTT) found, having regard to the share-for-share relieving provision, that a consideration of the scheme or arrangements as a whole was required and not just the replacement of the cash with preference shares. While noting that one of the purposes of the arrangements was avoidance of tax, the FTT found that the evidence supported the conclusion that Euromoney's main purposes were commercial and the tax considerations were not important. The Upper Tribunal agreed with the FTT.

The Court of Appeal also agreed with the FTT's finding that the starting point was to identify the "exchange, reconstruction or amalgamation in question", which was the exchange. The "exchange" was the entire transaction agreed and not a part or parts of it. The court ruled that the FTT had been correct in holding that the entire exchange was for bona fide commercial reasons which did not form part of a scheme or arrangements of which the main purpose, or one of the main purposes was tax avoidance. In coming to its decision, at paragraph 32, the court was influenced by the following findings of fact determined by the FTT:

- the potential tax saving was not important to Euromoney;
- tax was not a main driver of the transaction, which would have gone ahead whether or not tax could be saved;
- it was Euromoney's intention to proceed with the cash deal if its request for preference shares had been refused;
- Euromoney devoted limited resources to the tax aspects of the transaction;
- the application to HMRC for tax clearance did not hold up the transaction timetable; and
- the exchange was completed without waiting for HMRC's response to that clearance application.

The court ultimately agreed with the reasoning of the FTT, observing at paragraph 4:

> "that avoiding a liability to corporation tax on chargeable gains was one of the purposes of the arrangements as a whole because there was no commercial purpose for receiving consideration in the form of preference shares rather than cash. Because the preference share arrangements were not significant in the context of the arrangements as a whole, the FTT decided...that avoiding a liability to corporation tax on chargeable gains was a purpose, but not one of the main purposes, of the arrangements."

HMRC's appeal was therefore dismissed.

It is clear that the evidence was instrumental in convincing both tribunals and the Court of Appeal that the entire exchange was for bona fide commercial reasons and not part of a scheme or arrangements where the main purpose, or one of the main purposes, was the avoidance of tax.

The Tower

As with the case of *Fisher v HMRC* [2023] UKSC 44 (discussed in the first article in this series), unforeseen tax consequences were unearthed in *The Tower One St George Wharf*

Ltd v HMRC [2022] UKFTT 154 (TC). This was a case in which the FTT found that a corporate group had bona fide commercial reasons for transferring a property ("the Tower") from a group company (SGSL) to a special-purpose vehicle (SPV). The FTT accepted that the transfer was to ring-fence risks and potential liabilities associated with the development and to provide greater financial flexibility by opening up the prospect of securitised borrowing from a wider group of lenders.

Based on the advice of its tax advisers, the group undertook a complex series of steps to ensure that a significant corporation tax saving could be achieved. Unfortunately, however, the tax advice was incorrect, and the group's tax position "was ultimately no more advantageous, and possibly less advantageous, than if the Tower had been transferred directly from SGSL to the intended SPV". The corporation tax relief was therefore denied.

To compound matters, HMRC also denied the availability of stamp duty land tax (SDLT) group relief on the transfer of the Tower as the main purpose of the transaction was to avoid corporation tax even though there was no corporation tax saving. SDLT group relief is statutorily precluded if the transaction is not effected for bona fide commercial reasons or forms part of arrangements of which a main purpose is the avoidance of liability to tax.

The FTT accepted the evidence that if the group had never been made aware by its advisers of the possible corporation tax advantage, the Tower could have been transferred by way of direct intra-group transfer, thereby achieving the transaction's original commercial objective. However, despite the failure of the corporation tax scheme, the FTT held that because the transactions were executed in a carefully planned sequence, obtaining the tax advantage was a main purpose of the arrangements. At paragraph 87(8) the FTT concluded that the:

> "step plan was a bespoke plan, devised by professional advisers, for an arrangement that would not only reduce or eliminate the tax costs of transferring the Tower from SGSL to the Appellant, but would in fact confer a very substantial positive financial gain on the Appellant. It involved a complicated series of transactions that were the result of a concerted plan. A consideration of the whole of the transactions shows that there was concerted action to an end of the avoidance of tax (paragraph 61 above). Moving the Tower to an SPV, the other main purpose, could have been achieved by far less complicated means. The complicated series of transactions can only have been intended to place the relevant group members outside liability to tax that would otherwise have attached to the group, whether or not the Tower had been transferred from SGSL to another group company. The step plan itself indicated that the intended effect of this series of transactions was to obtain this tax advantage."

Therefore, although initially the transfer had a bona fide commercial purpose, the elaborate tax-planning steps created an additional purpose, which triggered the anti-avoidance provision. Consequently, HMRC's SDLT assessment of £8m was confirmed. The decision has been appealed to the Upper Tribunal. At the time of writing, the outcome of this appeal is unknown.

Wilkinson

The bona fide credentials of a share-for-share exchange were considered again in *Wilkinson and others v Revenue and Customs Commissioners* [2023] UKFTT 695 (TC). In that case Mr and Mrs Wilkinson ("the parents") gifted to each of their three daughters 6,951 ordinary shares in Paragon Automotive Limited ("the Company") on 14 July 2016. The Company was sold to TF1 Ltd on 18 July 2016 for £130m.

The parents received "earn-out loan notes" and B loan notes, while the daughters received A loan notes and B ordinary shares, in TF1 Ltd.

On 19 July 2017 (one year and one day after completion of the share purchase agreement) the daughters redeemed their £10m nil-rate deferred-payment A loan notes. On the same day, each of the daughters sold their 500 ordinary B shares in TF1 Ltd to an affiliated company of TF1 Ltd at their nominal value (£50).

The daughters claimed entrepreneurs' relief ("the relief") on the full amount of the gain arising on their disposals of the nil-rate deferred-payment A loan notes and ordinary B shares in TF1 Ltd (the effect of which was to reduce the rate of CGT on the gain from 20% to 10%).

HMRC raised assessments denying the relief on the basis that the exchange formed part of a scheme or arrangements of which the main purpose, or one of the main purposes, was the avoidance of capital gains tax. Although the raising of the assessments on the parents did not change the amount of tax due, the tax became due for the earlier tax year. The assessments were appealed, and the matter proceeded before the FTT.

Based on the evidence adduced, at paragraph 84 the FTT made the following significant findings of fact:

- the "main purpose" of the deal was that the shareholders in the company sell their shares to TF1 for a value of £130m;
- the large minority shareholding bloc, which held approximately 42% of the company's ordinary shares, had no stake in the Wilkinsons' CGT planning;
- even for the Wilkinsons, as the majority shareholders, viewed in isolation, the value of the CGT planning was small, at £3m – about 4% of their proceeds of approximately £73m;
- it was not one of the agreed terms, at "heads of terms" stage, that the structuring required for the Wilkinsons' CGT planning be adopted;
- emails between Mr Wilkinson and his advisers confirmed that Mr Wilkinson was not prepared to scupper the deal even if the CGT planning could not be achieved;
- the share purchase agreement gave no protection or price adjustment if the Wilkinsons' CGT planning did not have the desired effect.

Although neither Mrs Wilkinson nor the daughters gave evidence, the FTT had "plentiful contemporaneous documentary evidence about the deal", and "this was sufficient basis on which to make a finding of fact as to the main purposes of the deal". The FTT concluded that the Wilkinsons' CGT planning was not a self-standing scheme or arrangements separable from the deal as a whole. The Wilkinsons' CGT planning was a plan for reducing the family's overall CGT liability in the event of a sale of their shares to a third party and could not be viewed as a scheme or arrangements distinct from the wider scheme or arrangements aimed at selling all of the shares to a third party. Furthermore, the exchange was a significantly larger endeavour than the Wilkinsons' CGT planning, not least because it involved shareholders who had no part or interest in the Wilkinsons' CGT planning. The FTT therefore found in favour of the appellants.

Commentary on the Decisions from England and Wales

The importance of facts and, crucially, the ability to provide evidence in support of arguments justifying the transactions are common features in all of these cases. Furthermore, it is unlikely that the Irish tribunals and courts would follow the reasoning of the FTT and Court of Appeal in *Fisher* (see the first article in this series) for the following reasons:

- Following the decision in *Sassoon v CIR* [1943] 25 TC 121, the FTT determined that a "liberal interpretation in favour of the Crown" was required for the word "taxation". Therefore, the avoidance of betting duty invoked the anti-avoidance income tax provisions. However, and as confirmed in

Bookfinders v Revenue Commissioners [2020] IESC 60 at paragraph 54, the principle against doubtful penalisation could be applied in this jurisdiction to ensure that the text construed be "given a strict construction to prevent a fresh and unfair imposition of liability by the use of oblique or slack language".

- The clear purpose and wording of s806 TCA 1997 is the avoidance of income tax, and therefore the legal principle of *ejusdem generis* could be applied in a case such as *Fisher* to ensure that "where a general word follows particular and specific words of the same nature as itself, it takes its meaning from them and is presumed to be restricted to the same genus as those words" (Carroll J in *M Cronin (Inspector of Taxes) v Lunham Brothers Ltd* [1985] III ITR 363).
- In the application of s806 TCA 1997 it is not possible to assume that wording such as "quasi-transferor" should be incorporated into that provision as "a court cannot speculate as to meaning and cannot import words that are not found in the statute, either expressly or by necessary inference" (O'Donnell J in *Bookfinders* at paragraph 66).
- In context of ambiguous statutory wording, courts "are not empowered to disallow a relief or to apply any taxing provision, since to do so would be to exceed the proper function of the courts in the Constitutional scheme" (O'Donnell J in *The Revenue Commissioners v O'Flynn Construction Company Limited, John O'Flynn and Michael O'Flynn* [2013] 3 IR 533 at paragraph 74).

Non-Contentious Expenditure

As considered above, "bona fide commercial reasons" in the targeted tax-avoidance provisions is in its normal context a legal and business term that refers to genuine and commercial business purposes. Furthermore, to limit the threat of the general anti-avoidance provision, s811C TCA 1997, it is necessary to demonstrate that the expenditure was incurred in the "realisation of profits in the course of the business activities". Therefore, indicative examples of non-contentious expenditure could include expenditure on:

- protecting a company and its employees from a hostile corporate takeover (*Inland Revenue Commissioners v Brebner* [1967] 1 All ER 779 – see the first article in this series);
- transferring a business to protect commercial operations (*Fisher*);
- protecting property from threats of litigation (*The Tower One St George Wharf*);
- transferring property to secure investment (*The Tower One St George Wharf)*;
- removing a troublesome shareholder (company share buy-back);
- encouraging a non-productive share-holding employee to dispose of shares (company share buy-back);
- encouraging shareholders over 55 to retire to make way for new talent (retirement relief);
- protecting a business/reducing costs/flexible ownership structures (transfer of a business to a company);
- attracting and retaining employees (assortment of share incentives);
- business expansion;
- product development;
- company reorganisations/amalgamations;
- acquiring IP/brands/markets/employees;
- reducing business costs;
- operational efficiencies;
- strategic alliances;
- customer service improvements;
- reducing overheads (redundancies, termination packages);
- relocating to another EU jurisdiction;
- increasing profitability;
- risk management;
- meeting regulatory obligations;
- succession planning to ensure ongoing business viability; and
- business investment.

Conclusion

The common feature in all of the cases brought before tribunals and courts is the extensive evidence adduced and the significance of that evidence in the findings of fact and ultimate conclusions. Where cases are fact dependent, the failure to adduce evidence at the Tax Appeals Commission (TAC) not only reduces the chance of success but also prohibits new grounds of appeals or additional facts being introduced before the Superior Courts, as only matters on fact and points of law ventilated at the TAC are relevant.

It is of particular concern that many cases are unsuccessful at the TAC owing to the inability of taxpayers to provide the requisite level, or the right type, of evidence. Furthermore, in *The Tower One St George Wharf*, currently under appeal to the Upper Tribunal, the evidence of the complex arrangements to save corporation tax and the expensive fees to put those arrangements in place was the rock on which the taxpayer perished.

What is clear from a review of the published decisions from the tribunals and courts is that, when advising on a transaction, the following points are recommended to be observed:

- Ensure that there are good commercial reasons for the transaction.
- Be able to demonstrate the economic reality and consequences.
- Appreciate the need to provide evidence supporting all of the grounding facts.
- Recognise that many of the disputes and the subsequent raising of assessments can be several years after the transactions took place.
- Keep adequate and accurate records, documentation and contemporaneous file notes on the decision-making process.
- Keep in mind that for many of the tax-avoidance provisions, although a tax saving may be enjoyed, it is necessary that the transaction is not primarily motivated for tax-avoidance reasons.
- Be mindful that any tax motivation is sufficient so as not to invoke the transfer-of-assets-abroad and Schedule F avoidance schemes, governed by TCA 1997 s806 and s817, respectively.
- Consider any potential adverse tax consequences of all transactions.
- Be familiar with the relevant tax laws, regulations, case law, academic commentary and guidance notes.
- Be aware of the published guides, areas of focus and sensitivities of Revenue, the TAC and the courts.
- Where required to do so, report the transaction and its tax implications in a timely and transparent manner.

As with many of the targeted tax-avoidance measures, including the application of the general anti-avoidance provisions, although tax mitigation may be a factor, it must not be the primary motivation. Furthermore, practitioners will be acutely aware of the implications of the introduction of “Pillar Two” into domestic law and the requirement to review transactions, arrangements, acquisitions, disposals and mergers, including a review of the potential application of s811C TCA 1997.

Finally, as highlighted in *Fisher* and *The Tower One St George Wharf*, arrangements put in place to avoid one category of taxes could have significant ramifications for the imposition of other forms of taxation. The materialisation of unexpected tax consequences in those cases was a very unpleasant surprise for the tax advisers and their clients, and therefore it is important to remember the caution of Sergeant Phil Esterhaus, for those old enough to remember the US police drama *Hill Street Blues*: “Let’s be careful out there”.

Marianne Donaghy
Solicitor and Tax Director, Deloitte Ireland LLP
Matthew Greene
Trainee Solicitor and Tax Associate, Deloitte Ireland LLP

Stamp Duty Group Relief: Requirement to Remain Associated

Introduction

Associated companies relief (ACR) provides full relief from Irish stamp duty for transfers between group entities in certain circumstances. Section 79 of the Stamp Duties Consolidation Act 1999 (SDCA 1999) lists the full conditions of the relief, one of which is that the parties must remain associated (within the meaning of s79) after the transfer, except in certain limited instances.

There are two strands to this requirement: first, the relief can apply only if the instrument is not executed in pursuance of or in connection with an arrangement under which the parties will cease to be associated at any point in the future (s79(5)(c)); and, second, even if the relief applies at the time of transfer, a clawback will arise if the parties cease to be associated within two years following the transfer (s79(7)(b)). Although the legislation does not generally require the assets to remain within the group (save as set out below), the purpose of the relief is to ensure that no charge to stamp duty arises on transfers of assets within a corporate group. Therefore the requirement to remain associated is designed to prevent a situation where relief is claimed on an intra-group transfer and the assets are then moved outside the group on a sale of the transferee.

This article is not intended to be a general discussion of the scope of and conditions for ACR but to summarise the circumstances in which the requirement to remain associated does not apply, either as set out in s79 SDCA 1999 or in accordance with concessionary treatment provided for in Revenue's Stamp Duty Tax and Duty Manual, which was most recently updated in June 2024.

Legislative Position

Before Finance Act 2017 there were no legislative exceptions to the requirement that the transferor and transferee remain associated. This created difficulties where, as is common with corporate reorganisations, one of the parties to the transfer subsequently ceased to exist on a merger, liquidation or dissolution, at which point the parties were no longer associated, or where the transfer, itself, occurred as a result of one of the parties' ceasing to exist (e.g. where assets were transferring on a merger).

A practice developed whereby practitioners advising on such reorganisations would make a submission to Revenue asking it to allow a claim for relief in such circumstances and to confirm that no clawback would arise when one of the parties ceased to exist. Revenue would generally issue a positive response on the condition that the liquidation/merger etc. was being carried out for bona fide commercial reasons and not for the avoidance of tax and provided the assets being transferred on which relief was being claimed remained within the group for the two-year period.

Finance Act 2017 for the first time put this concessionary treatment on a legislative footing, albeit in limited circumstances, through the insertion of s79(7A) SDCA 1999, which provides that:

> *"(7A) Where a transferor –*
>
> *(a) is liquidated, or*
>
> *(b) is dissolved without going into liquidation and a conveyance or transfer has been effected as a result of a merger by absorption (within the meaning of section 463 or 1129 of the Companies Act 2014) by reason of which the foregoing dissolution of the transferor has taken place,*
>
> *the transferor and the transferee shall, for the purposes of subsections (5)(c) and (7)(b), not be regarded as ceasing to be associated where, for a period of 2 years from the date of the conveyance or transfer –*
>
> *(i) the beneficial interest that was conveyed or transferred from the transferor continues to be held by the transferee, and*
>
> *(ii) the beneficial ownership of the ordinary share capital of the transferee remains unchanged."*

These exceptions to the requirement to remain associated refer only to a transferor's ceasing to exist and only in two circumstances:

- liquidation and
- dissolution without liquidation on a merger by absorption occurring under s463 or s1129 of the Companies Act 2014 where the transfer happens as a result of that merger.

Section 79(7A) does not apply in the numerous other situations where a transferor may cease to exist or in any situation where the transferee may cease to exist. For example, in referring only to transfers happening by way of a merger by absorption under s463 or s1129 of the Companies Act 2014, the sub-section excluded transfers happening by way of other types of mergers, such as a domestic merger by acquisition or a merger happening under foreign law, or a transfer of assets that occurs before the transferor ceases to exist on a subsequent merger of any kind.

It also applies only where the following two conditions are met:

- the assets remain in the ownership of the transferee for a period of two years following the transfer and
- the ownership of the ordinary share capital of the transferee remains unchanged for that two-year period.

Where a transfer of assets occurs as part of a wider corporate restructure, compliance with these two conditions may not be practical, particularly where the restructuring involves a subsequent transfer of or elimination of a transferee.

Therefore, the impact of s79(7A) SDCA 1999 is limited. Prior to the guidance in the Tax and Duty Manual being published, in lieu of making a specific submission to Revenue seeking concessionary treatment, relief either could not be claimed or would be clawed back on a genuine transfer of intra-group assets that did not fall squarely within the provision.

Tax and Duty Manual

In recognition of these gaps in the legislation, Revenue has, through its Tax and Duty Manual ("Stamp Duties Consolidation Act 1999 – Part 7: Section 79 – Conveyances and Transfers of Property Between Certain Bodies Corporate"), set out a number of additional circumstances where it accepts, on a concessionary basis, that ACR can apply and will not be clawed back if other conditions for the relief are met. This manual has been updated on several occasions since Finance Act 2017 was introduced, most recently in June 2024.

Although s79(7A) SDCA 1999 refers to an entity's ceasing to exist in the two circumstances listed above, Revenue has outlined in the TDM that this sub-section can also be relied on where an entity ceases to exist owing to wind-up or dissolution or strike-off from the Companies Registration Office register, on a merger by acquisition and where the assets transfer before a merger. The concessionary treatment also extends to situations where companies cease to exist as a result of foreign liquidations and mergers.

Perhaps most importantly, Revenue has confirmed that it will accept that the relief can continue to apply even where the two conditions set out in s79(7A) are not met provided that any one of seven "alternative conditions" is met. These seven "alternative conditions" can be summarised as a requirement for the transferred assets to remain within the group for a two-year period following their transfer, except in certain prescribed circumstances where it would be unreasonable to expect the assets to be so retained. This affords corporate groups greater flexibility in decisions relating to the future of a transferee. For example, should a transferee be liquidated, merged or itself transferred within the group, a clawback of previous relief claimed should not arise provided one of the alternative conditions is met.

The Alternative Conditions

The seven alternative conditions listed in the Tax and Duty Manual are as follows.

(a) The assets transferred are retained within the corporate group for the two-year period following the transfer (no further transfers). Where no corporate group exists, this condition cannot be met. The Tax and Duty Manual includes an example of a transfer of assets to a company that holds 90% of the shares in the transferor where the transferor subsequently liquidates. Although the two companies together formed a group, on the liquidation of the transferor the transferee no longer formed part of a group. This alternative condition cannot then apply. To avoid a clawback of relief in these circumstances, in accordance with s79(7A) SDCA 1999, for a two-year period following the transfer the transferee must retain the assets and the beneficial ownership of the ordinary share capital of the transferee must remain unchanged. In contrast, if in this example there had been a third company in the corporate group, for example where the shares in the transferee company were held by a corporate shareholder, this alternative condition could be met and a clawback would not arise if the assets remained within that group for the two-year period.

(b) Similar to the above, the transferred assets are retained within the corporate group, even if they are transferred onward within the group. In this case the Tax and Duty Manual states that the assets must remain in the group for two years following the most recent transfer of the assets.

(c) The transferred assets consist of book debts that are repaid within the two-year period. A transfer of book debts would commonly occur as part of an intra-group transfer of a business. A repayment of such debts within two years would result in those debts' ceasing to exist. In the absence of such a concession, the book debts would have to remain outstanding for two years to avoid a clawback of relief claimed. However, Revenue has accepted that no clawback should arise on their repayment.

(d) For reasons similar to the above, the transferred assets comprise loans that are paid off within the two-year period. However, Revenue has stated that if the loans are waived, cancelled, forgiven or capitalised into shares within the two-year period, this concessionary treatment will not apply.

(e) The transferred assets comprise redeemable shares that are redeemed within the two-year period following the transfer.

(f) In the case of a merger of a trade, the transferred assets comprise trading assets that are naturally utilised during the course of the trade within the two-year period following the transfer. Revenue lists stock, plant and equipment as examples of such assets, but this would appear to be an inclusive rather than an exhaustive list.

(g) The transferred assets comprise shares in a company that is liquidated or dissolved within the two-year period following the transfer, resulting in the extinguishment of those shares. However, where the value of the shares was attributable to property held by the company at the time of transfer, that property must continue to be retained within the corporate group (unless one of the conditions set out in (c) to (f) above applies in relation to the property).

Conclusion

It must be remembered that, in general, ACR does not require the transferred assets to remain within the group for two years following the transfer. A clawback generally arises only where the parties do not maintain the required level of association for that two-year period. However, where that requirement is not met, a clawback can be avoided where either s79(7A) SDCA 1999 or the concessionary treatment set out in the Tax and Duty Manual applies, which in most of those cases will require the assets to remain within the group for two years.

Charlotte Cumiskey
Tax Director, BDO Ireland

When All Is Forgiven: High Court Ruling on s87(1) TCA 1997

Introduction

The High Court decision in *Arlum Limited v The Revenue Commissioners* [2023] IEHC 72 has provided significant clarification of the tax treatment of debt forgiveness under s87(1) of the Taxes Consolidation Act 1997 (TCA 1997). The case centred on whether a debt write-off constituted a taxable receipt for a company where the debt was incurred to purchase an asset that was subsequently written down for tax purposes.

Background

Arlum Limited ("the Company") took out a €9.6m bank loan in December 2006 to fund the acquisition of a site of *c.* 23 acres in County Galway. The Company's intention was to develop the site as a residential development, but owing to the economic circumstances the development did not materialise.

The loan was secured on the site as well as another residential development that the

Company was in the process of completing. The sales proceeds of this development allowed the Company to repay a portion of the loan.

By 2016 there was a balance of €6m of the loan outstanding, but the site was deemed to be of little value. From 2010 the Company had been writing down the value of the site in its accounts and legitimately claiming a trading deduction for these write-downs, which culminated in carried-forward trading losses in excess of €7m.

It was agreed with the bank that the balance of the debt would be waived in return for a final payment of €250,000 from the Company. In the Company's financial statements for the year ended 31 October 2016 the forgiveness of the debt was shown as a credit below the gross profit line. This amount was not included as taxable income in the Company's corporation tax return for the corresponding period on the basis that the amount of the debt write-off did not represent a trading profit but was a transaction on a capital account. In May 2021 Revenue determined that the debt write-off constituted taxable income. The result of this would be to reduce the carried-forward losses from €7.1m to €1.1m.

The Company submitted an appeal to the Tax Appeals Commission in June 2021.

Tax Appeals Commission Determination

The Company's appeal centred on s76(1) and s76A(1) TCA 1997, which say that the computation of taxable income should follow generally accepted accounting principles (GAAP). It argued that because the debt forgiveness was not considered to be income under GAAP, it should not be taxable.

Section 76(1) TCA 1997 provides that:

> *"Except where otherwise provided by the Tax Acts, the amount of any income shall for the purposes of corporation tax be computed in accordance with income tax principles, all questions as to the amounts which are or are not to be taken into account as income, or in computing income, or charged to tax as a person's income, or as to the time when any such amount is to be treated as arising, being determined in accordance with income tax law and practice as if accounting periods were years of assessment."*

Section 76A(1) TCA 1997 states that:

> *"For the purposes of Case I or II of Schedule D the profits or gains of a trade or profession carried on by a company shall be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law in computing such profits or gains for those purposes."*

Revenue countered that s87(1) TCA 1997 takes precedence, which states:

> *"Where, in computing for tax purposes the profits or gains of a trade or profession, a deduction has been allowed for any debt incurred for the purposes of the trade or profession, then, if the whole or any part of that debt is thereafter released, the amount released shall be treated as a receipt of the trade or profession arising in the period in which the release is effected."*

Although there could be little doubt that the debt was incurred for the purposes of the Company's trade, Revenue argued that the write-down of the asset purchased with the loan constituted a "deduction allowed for any debt" within the meaning of s87(1) TCA 1997.

In May 2023 the Tax Appeals Commission (TAC) determined that where the "debt" was a loan used to purchase an asset and that asset had been written down in the Company's accounts, creating trading losses available for use in future years, the claiming of the losses would come within the meaning of "a deduction allowed for any debt" under s87(1) TCA 1997. The Commissioner also found that the Company had failed to demonstrate that Revenue's assessment was incorrect. Therefore, the TAC upheld Revenue's assessment that the debt forgiven was taxable income for the company in its tax return for the year ended 31 October 2016.

The Company appealed the decision to the High Court.

High Court Submissions

The Company submitted that as the debt release was recorded "below the gross profit line", it was a contribution to the balance sheet and was not a trade receipt, unless captured by s87(1) TCA 1997. Additionally, it contended that the term "deduction allowed for any debt" does not encompass the write-down of asset value, regardless of whether the asset was purchased with a loan. The Company emphasised that no deduction was or could be claimed for the loan itself.

Revenue submitted that this matter should, in fact, be governed by s76A(1) TCA 1997, and as the Company had included the debt release in its profit-and-loss account, it should have been included in the computation of the Company's taxable profit for that period, irrespective of whether any deduction had been claimed for the original debt or whether any security had been impaired.

Revenue's second argument was that the release of the debt should be treated as a "receipt of the trade" in accordance with s87(1) TCA 1997. This was on the basis that a debt (being the loan) was used to purchase the site and the value of that site was subsequently written down in the Company's accounts, creating allowable trading losses to carry forward for use in subsequent years. In Revenue's view this meant that a "deduction has been allowed for any debt" that was thereafter released.

High Court Decision

The case was heard in the High Court in June 2024. It was agreed that there were two relevant questions of law for the opinion of the court:

- whether the TAC was correct in determining that the write-down of the value of the site meant that a tax deduction had been allowed for the loan in computing the company's trading profits for the purposes of s87(1) TCA 1997; and
- whether the TAC was correct in determining that the forgiveness of the loan gave rise to a taxable receipt.

Both of these questions ultimately hinged on whether the Commissioner had been correct in her interpretation of s87(1) TCA 1997.

Question of fact vs question of law

The court found that the TAC's decision that writing down the value of the lands should come within the meaning of "a deduction has been allowed for any debt" for the purposes of s87(1) TCA 1997 should not be categorised as a "material finding of fact". It had been reached by applying interpretation of the words in s87(1) TCA 1997 to a set of facts. Therefore the core question was whether the interpretation of the law was correct, and that is a question of law.

Mr Justice Oisín Quinn determined that, as the above matters were a question of law, consideration of the principles of statutory interpretation was crucial in understanding the meaning and application of the law in question. Conversely, it was not appropriate to consider burden of proof or curial deference in this case.

Sub-section 76A(1) TCA 1997: no jurisdiction to consider

Despite the fact that Revenue's argument involving s76A(1) TCA 1997 was not considered in the TAC determination, Revenue claimed that the debt release was a Case I taxable receipt in accordance with this section, irrespective of s87(1) TCA 1997. It was determined that because this issue was not raised in the case stated, the High Court did not have jurisdiction to consider this argument.

Interestingly, despite this jurisdictional issue, Quinn J outlined how he would have concluded on the s76A(1) TCA 1997 argument in case he was incorrect on the jurisdictional point. His reasoning for deeming Revenue's argument on s76A(1) TCA 1997 incorrect were as follows:

- Section 76A(1) TCA 1997 is a procedural rule that reflects existing case law; it is not a tax-charging provision.
- It was an agreed fact that the Company's accounts were prepared in accordance with accepted accounting practices and that the debt release was not included in the Company's gross profit.
- It was an agreed fact that the debt forgiven was properly included as a credit entry below the gross profit line and that this was done on the basis that it did not represent a trading profit.
- If Revenue's argument were correct, it would render s87(1) TCA 1997 redundant in the context of a company. If s76A(1) TCA 1997 deemed the release of a debt to be a trading profit, then whether or not a tax deduction had been claimed for the debt would be irrelevant.

Revenue's argument against the last point was that, in the context of a company, s87(1) TCA 1997 should be inverted, i.e. it means that a debt release is taxable, and once the release occurs, a deduction can be taken for the original loan. Quinn J's view on this was incorporated in his findings regarding s87(1) TCA 1997, below.

Sub-section 87(1) TCA 1997

Fundamentally, the court found that the decision of the TAC was incorrect and constituted an error of law.

Quinn J noted that if the Oireachtas had intended to provide that a release of debt should be treated as a Case I receipt where that debt had been used to purchase assets that were subsequently written down in value, it would have so provided.

The court emphasised that the plain language of s87(1) TCA 1997 points to a company's claiming a deduction for a debt and thereafter the creditor's writing off all or part of that debt. This was clearly not the circumstances of the case in hand. The Company did not claim a deduction for the debt. The site and the bank loan are two different things that existed independently of each other. This was demonstrated somewhat by the fact that the loan was also secured on another asset of the Company.

Revenue contended that the "narrow meaning" of s87(1) TCA 1997 argued by the Company was too narrow to make sense. Quinn J explained that, in fact, such a narrow meaning can successfully be applied to other scenarios; he used an example of a washing-machine manufacturer buying parts on credit and taking a trading deduction before it actually paid for them. Should the creditor write off part or all of the outstanding balance, that amount would constitute a Case I taxable receipt, fitting neatly into the "narrow meaning" of s87(1) TCA 1997.

In the court's opinion, Revenue's interpretation of s87(1) TCA 1997 could create illogical scenarios, and there is no basis for applying the section even if the debt release was directly linked to the impairment of the site.

The court also found that Revenue's view on s76A(1) TCA 1997 (i.e. that the release of debt must be treated as a taxable receipt in any event) leads to an incorrect interpretation of s87(1) TCA 1997. Revenue's suggestion of inverting s87(1) TCA 1997 in the case of a company that has had debt released would mean that the section allowed for the company to take a tax deduction for the original loan if it had not already done so. It is clear that the section is designed solely to bring a specific item into taxable trading profits where it otherwise may not have been, and the plain meaning of the wording reflects this.

Ultimately, the court found that the plain and ordinary meaning of the words contained in s87(1) TCA 1997 is "clear, obvious and self-evident". Specifically, there is no basis for either inverting the meaning of a provision or interpreting the word "debt" to mean "asset purchased using a debt". Therefore, the writing down of the value of the site and carrying forward of the resulting losses do not constitute having a deduction allowed for a debt, and the release of the balance of the loan in this case should not be treated as a receipt of the Company's trade.

Conclusion

In the author's view a consideration of the plain meaning of the wording in s87(1) TCA 1997 leaves little ambiguity regarding the intended application of the section. As Quinn J has noted, should the intention of the Oireachtas have been to target the tax deductions claimed for the writing down of sites that had been funded by debt that was later forgiven, it would have legislated accordingly. The wording of the section as enacted logically relates to tax deductions taken for purchases bought on credit where some or all of the creditor balance was then written off.

This ruling provides much-needed clarity on the interpretation of s87(1) TCA 1997, particularly in the context of corporate property developers that may be in the process of agreeing settlement terms with lenders on debt arrangements dating back to the financial crash. It is common that such arrangements result in at least a partial release of debt, and there have been differing views among practitioners on the tax treatment of such releases. It should be noted that although this case is the highest ruling at the time of writing, we are not aware of whether Revenue intends to appeal the decision to the Court of Appeal. It is also possible that legislative changes may be introduced that would give a less favourable treatment to companies that have future debt released in similar scenarios.

Eoin Brennan
Managing Director, SciMet R&D

Review of TAC Determination on R&D Tax Credit Science Test

Introduction

In September 2023 an animal breeding company appeared before the Tax Appeals Commission (TAC) in Dublin in the appeal 162TACD2023. For three days those representing the company sought to convince the Appeal Commissioner that activities on three projects included in the company's 2017 R&D tax credit claim meet the definition of R&D activities set out in s766 TCA 1997. Revenue had refused R&D tax credits for the projects on the basis that they did not meet this definition and therefore failed the "science test". The company was unsuccessful in its appeal, the Commissioner finding in favour of Revenue in its refusal of tax credits totalling €42,647.

Below I review this important case that relates to the science test aspect of the R&D tax credit. However, first, I take a look at the science test itself, what it is and what it means for companies seeking to avail of the R&D tax credit.

The Science Test

The R&D tax credit consists of two key tests: a science test and an accounting test. The science test ensures that only qualifying R&D activities are included in claims, and the accounting test focuses on the expenditure incurred on those activities. Both tests must be fully complied with for a robust claim to be made.

Central to the science test is the definition of R&D activities set out in s766 TCA 1997. This definition applies to all companies, irrespective of size or industry. In the instructions provided by Revenue to the external experts whom it can appoint to assist in evaluating the science test, this definition is broken down into the following five questions (Tax and Duty Manual Part 29-02-05, p. 9):

> "(1) Are there systematic, investigative or experimental activities?
>
> (2) Are they in a field of science or technology?
>
> (3) Are those activities undertaken with a view to one or more of the following:
>
> (i) basic research, namely, experimental or theoretical work undertaken primarily to acquire new scientific or technical knowledge without a specific practical application in view,
>
> (ii) applied research, namely, work undertaken in order to gain scientific or technical knowledge and directed towards a specific practical application, or
>
> (iii) experimental development, namely, work undertaken which draws on scientific or technical knowledge or practical experience for the purpose of achieving technological advancement and which is directed at producing new, or improving existing, materials, products, devices, processes, systems or services including incremental improvements thereto?
>
> (4) Do those activities seek to achieve scientific or technological advancement?
>
> (5) Do those activities involve the resolution of scientific or technological uncertainty?"

Regarding question (2) above, SI 434 of 2004 sets out the prescribed fields of science and technology for R&D tax credit purposes. The instrument also contains a list of proscribed activities (e.g. research in the social sciences, arts or humanities) that must be excluded from claims.

Revenue's Tax and Duty Manual (TDM) Part 29-02-03, often referred to as the R&D Tax Credit Guidelines, is a useful resource for guidance on many of the terms and definitions found in the tax legislation, including those pertaining to the science test.

Like in many other jurisdictions around the world, when the R&D tax credit was being introduced in Ireland, in 2004, some definitions were based on those in the OECD's *Frascati Manual*. First published in 1963, the *Frascati Manual* provides guidelines on the collection and interpretation of R&D statistics, aiming to ensure consistency and comparability across countries.

Background to the Case

The three projects at the centre of the case were: nutritional trials, semen extenders and genotype development.

The nutritional trials project was described by the company as an investigation into the impact of feed additives on the growth performance, health, vigour and condition of its animals. The project involved four trials – two focused on the diets of growing offspring and the other two concerned lactating dams.

In the semen extenders trial the impact of different semen extenders on the motility, morphology and longevity of sires' semen cells was investigated. Semen extenders are solutions used in animal breeding to dilute and preserve the semen collected for artificial insemination. According to the company, its goal was to maximise the performance of the semen cells, including fertility performance.

The company described how activities in the genotype development project were carried out to ensure the genetic progress of its gene pool. Its research looked at inputs to the best linear unbiased predictor (BLUP) by reference to feed intake and other factors. BLUP, a statistical method used in animal breeding to estimate breeding values for animals based on performance data and pedigree information, was used in the project to explore interactions between genotype and nutrition.

The three projects were included in the 2017 R&D tax credit claim, along with other projects, on the basis that, in the company's view, they satisfied the science test. After an audit Revenue disagreed with respect to the three projects, and on 20 November 2020 an amended notice of assessment issued. The company appealed this amended assessment, which lead to its attendance at the TAC in September 2023.

The Appeal

The appeal proceeded by way of an oral hearing on 11, 12 and 13 September 2023. The company's R&D coordinator and two expert witnesses testified on behalf of the company. Both expert witnesses held relevant qualifications: one an MSc in Animal Physiology and a PhD, and the other an MSc in Animal Breeding. Both also had industry experience.

The external expert appointed by Revenue to assist with the audit also appeared before the Commissioner to explain why, in his view, the science test had not been met. The expert was also qualified in the field, holding an MSc in Animal Science, and had worked in animal feed and nutrition. Additionally, he had a company through which he assisted firms in Ireland and the UK with applying for R&D tax credits.

Over the three days both sides presented their cases before the Commissioner, addressing numerous contentious issues. For example, it was put to the company that some of the nutritional trials could not qualify as R&D because the proportion of active ingredients used was unknown, making the trials non-repeatable. This was challenged by the company's representatives, one expert witness explaining that its R&D focused on "the influence of medium-chain fatty acids, short-chain fatty acids, and so on, on health and performance" and not the proportion of active ingredients present. The relevance of previous research papers to current projects was also strongly debated. In his determination the Commissioner noted a "lack of proper engagement by the expert witnesses retained by both sides with the arguments of the other".

Determination

On 5 October 2023 the Commissioner published his determination, finding in favour of Revenue in its decision to refuse R&D tax credits totalling €42,647 for the three projects. The Commissioner held that the projects did not seek to achieve scientific or technological advancement and did not involve the resolution of scientific or technological uncertainty. As a result, they did not meet the definition of R&D activities under s766 TCA 1997 and did not qualify for R&D tax credits.

The material facts leading to the Commissioner's conclusion are set out in the determination. These include his opinion that:

- The projects did not seek to achieve scientific or technological advancement but, instead, advanced the appellant's own state of knowledge regarding its gene pool by means of routine activity.
- The company was engaged in routine engineering on the projects rather than the resolution of scientific or technological uncertainty.
- It was inherent in the nutritional trials and semen extenders projects that the tests would prove or disprove the hypotheses being tested. There was no uncertainty involved in the genotype development project at all.
- The nutritional trials and semen extenders projects involved standard product assessment to ascertain commercial viability. The genotype development project could be described as in the nature of a design objective.
- The company did not know the composition of the active ingredients involved in some of the nutritional trials.

Further detailed analysis of his decision is provided by the Commissioner in the determination.

Analysis

This case offers insights into the complexities of the science test and what can be expected when the test becomes the subject of an appeal. The decision underscores many of the long-established requirements of the R&D tax credit, such as the importance of being able to demonstrate the scientific/technological advancements sought and uncertainties encountered on projects. Additionally, it reaffirms the necessity of maintaining contemporaneous documentation to support such claims.

It is not known whether the company appealed the determination, as it was entitled to do within 42 days. In my view there are some aspects of the determination that would benefit from further analysis, whether in the courts, through updated guidance or some other forum.

For example, the significant role played by the *Frascati Manual* in the appeal was somewhat surprising as it was not clear where the Irish tax legislation and accompanying guidance were deemed deficient in dealing with the matters in hand. This resulted in terms such as the "transferability", "reproducibility" and "dissemination" of knowledge featuring prominently in the determination despite not being present in the R&D tax credit legislation or the TDM. "Transferability" of knowledge appears to be a factor in the following statement from the determination:

> "it is not necessary for [the Commissioner] to decide whether the knowledge sought by the Appellant was reasonably available to it prior to carrying out the research projects, because he is satisfied that, even if it was not, the evidence before him failed to prove that the projects resulted in an advancement in general understanding, rather than merely led to an advancement in the Appellant's own state of knowledge regarding its own gene pool".

Guidance contained in the TDM may have to be updated to reflect this position, as currently it states that "the knowledge or capability reasonably available to the company or a competent professional working in the field" is "the test" to be applied when evaluating scientific or technological advancement.

Other queries that have arisen since publication of the determination include whether formal dissemination of knowledge is a requirement for eligibility and whether the following wording in the determination means that for an uncertainty to be a valid technological uncertainty, it must not be capable of being resolved by another competent professional in the field:

> "It seems to the Commissioner that the uncertainties that existed, such as they were, were capable of being resolved by competent professionals working in the field of...breeding and...husbandry."

The answer to both queries is "no". Formal dissemination of knowledge is not required. Regarding the latter query, if other competent professionals in the field would need to conduct R&D to resolve the uncertainties, the fact that they might be capable of doing so does not negate the existence of technological uncertainties. This is different from a situation where the solution would be considered as known to, or readily deducible by, a competent professional in the field.

These queries illustrate the intricacies that can arise in evaluating activities for the science test. The combination of a science test and an accounting test means that preparing an R&D tax credit claim requires input from the company's tax/accounting and science/technology personnel. This interaction makes it even more crucial to address any potential misunderstandings promptly and transparently.

Some procedural aspects of the R&D tax credit audit process also emerged during the appeal that could possibly be improved. For instance, we learned that no request was made to the company for details of the active ingredients in the products used in the nutritional trials, despite this information being deemed important to the project's eligibility. Additionally, the company received no response to a submission that it made after receiving the draft report from Revenue's appointed expert after the audit. Better engagement during the audit process would benefit all parties and, in some cases, might eliminate the need for an appeal altogether.

Conclusion

This case provides valuable perspectives on the nuances of the science test and insight into the appeal process for R&D tax credits. It reinforces the importance of meticulous preparation and comprehensive documentation, not only in submitting R&D tax credit claims but also in preparing for audits and appeals. Companies should not be deterred by this decision if they have diligently evaluated their projects and ensured compliance with the legislation. The determination serves as a reminder that understanding the science test and being prepared for potential challenges are key to a successful claim.

Lauren Clabby
Director, KPMG

Preparing for Pay & File 2024

Introduction

At the time of writing this article the date for Budget 2025 has been set for 1 October 2024 and the Tax Strategy Group papers have recently been published, which means that there is one major hurdle to be overcome before the end of 2024 – the filing of 2023 tax returns! Although the outcome of these filings is key to the Budget and the tax strategy, generally, this will not be known until after the Budget. Revenue has announced that for those who file their 2023 tax returns and pay the related tax liabilities through ROS, both tasks must be undertaken on or before 14 November 2024. The information contained in the Tax Strategy Group income tax paper reflects the level of detail that CTAs, in particular, are expected to understand and, in turn, populate the tax returns that they prepare. In this article we will navigate our way through the complexities that we are likely to face during the upcoming compliance season.

The Administrative Basics

Background

Before you embark, ask whether your client is definitely a chargeable person and, therefore, required to file a tax return! Revenue's Tax and Duty Manual (TDM) "Part 42-04-13 – PAYE Taxpayers and Self-Assessment" outlines that an individual will not be a chargeable person where he or she is in receipt of:

- PAYE income only or
- PAYE and non-PAYE income where:

- the total non-PAYE income assessable to tax does not exceed €5,000 (€3,174 for 2015 and prior years) and is "coded" into the individual's tax credit certificate and
- the gross non-PAYE income does not exceed €30,000 (€50,000 for 2015 and prior years).

Those criteria do not apply to proprietary directors, who are automatically obliged to file a tax return unless the company is inactive.

Preliminary tax

Preliminary tax for 2024 should be equal to:

- 90% of the final liability for 2024,
- 100% of the final liability for 2023; or
- 105% of the final liability for 2022.

Compliance with preliminary tax obligations has come under increased Revenue scrutiny in recent years. Interest on underpayments is charged at a rate of 0.0219% per day and is charged from 31 October of the year in question to the date of payment. In addition, the amount on which the interest is charged is 100% of the final liability for the year in question.

Typically, the 105% option is not considered. This is available only where preliminary tax is paid by direct debit, and it does not apply where the tax payable for the pre-preceding year was nil. It is worth considering that where this option is availed of on a continuing basis, there must be at least eight equal monthly instalments during the year in question. The number of monthly instalments is reduced to three where the option is being availed of for the first time, thus facilitating the late preparation of the taxpayer's tax return. This option is useful where a taxpayer's income has increased significantly over the previous two years but he or she has not made adequate cash-flow provisions to facilitate availing of either of the other options above.

Taxation of married couples

Joint assessment is the default method of assessing married couples/civil partners. The deadline for claiming separate assessment for 2023 income tax purposes was 31 March 2023. Such a claim cannot be backdated and continues into future years until it is withdrawn. The spouse or civil partner who made the initial claim for separate assessment must be the person to withdraw it, and a 31 March deadline in the year in question again applies.

Should it transpire that one spouse has some unused standard rate band or personal tax credits, it may be possible to transfer these to the other spouse after a review of both spouses' taxes for the year in question. This ensures that, in net tax terms, the couple are in the same position as if they had been jointly assessed. This is not possible where a couple opt for separate treatment. A spouse can elect separate treatment. It must be done within the year in question, and again if the couple decide to withdraw the election, that same spouse must withdraw the original election.

Self-correction

Taxpayers can "self-correct" a return without penalties where they realise after filing that the return is not entirely accurate. Revenue allows a taxpayer to "self-correct without penalty" if the following conditions are satisfied:

- the self-correction is notified to Revenue within 12 months of the due date for filing the return that is being adjusted; and
- the taxpayer notifies Revenue in writing of the adjustment to be made.

A self-correction will not, in itself, result in a Revenue audit, but a taxpayer who has been notified of an audit or who has been contacted by Revenue in respect of an enquiry/investigation cannot avail of self-correction.

Local property tax

Failure by the taxpayer to file a local property tax (LPT) return and/or pay the LPT liability by the tax return deadline deems the tax return to be late, and therefore the late-filing surcharge applies **automatically**. Revenue has clarified that this surcharge will not exceed the amount of LPT due where the LPT return and/or payment due is subsequently paid or a payment arrangement is agreed. Taxpayers should also be mindful that outstanding LPT returns and liabilities are taken into account for tax clearance purposes.

Finance Act Changes

Finance Act 2022: December 2022

Rent tax credit

This credit is available for the years 2022 to 2025 inclusive. The credit per claimant is capped at €500 for 2023. Jointly assessed couples are entitled to a maximum credit of €1,000 (i.e. €500 each). Subject to meeting the required conditions, rental payments in respect of an individual's main residence, or a residence to facilitate work or college, qualify for relief.

In addition, the credit may also be available to parents who pay rent on behalf of their student child. The child must have entered a college course qualifying for tax relief on tuition fees before reaching the age of 23 to be eligible. The relief will be given on foot of a claim's being made to Revenue by the individual, such claim to include full details in relation to the rental arrangements and landlord's details.

Relief for investment in corporate trades

Before Finance Act 2022 an individual could not qualify for relief for investment in a company if that individual or an associate of that individual was connected with the company. There are specific rules that define when an individual or their associate is connected with the company for these purposes. The definition of "associate" includes a partner of the individual. Finance Act 2022 introduced an amendment to ensure that individuals who are partners only because they are invested together in a qualifying investment fund (i.e. a fund set up to invest in Employment Investment Incentive companies) will not be viewed as partners for the purpose of these rules. This exception does not extend to partnerships arising in any other circumstances.

Pan-European personal pension products

Finance Act 2022 introduced a new acronym to the field of personal pensions – the PEPP, or pan-European personal pension product. This was brought in on the back of an EU Regulation for a personal pension product that is recognised throughout and is transportable across the EU. In particular, individuals are now able to continue to contribute to their PEPP even if they move residence between EU jurisdictions. Other features include the concepts of flexibility and transferability as regards the product provider and affordability from a cost perspective. For example, the provider of the PEPP to an Irish individual would not need to be located in Ireland and will be governed by the EU Regulation. The structure of the PEPP in Ireland is very similar to that of the personal retirement savings account (PRSA). The Act also provides that an employer can make contributions to a PEPP or a PRSA on a basis consistent with that of employer contributions to occupational schemes.

Foreign pension lump sums

The purpose of the amendment introduced by Finance Act 2022 was to bring the taxation of lump sums received on retirement from non-Irish pension schemes in line with the treatment of such payments from domestic pension schemes. This will mean that lump sums received from a foreign pension can qualify for the lifetime tax exemption of €200,000, with the balance of any lump sums up to €500,000 taxable at the standard rate of 20% and amounts thereafter subject to tax at the individuals' marginal tax rate. The relief has a lifetime limit, and the foreign pension lump sums are aggregated with lump sums from domestic schemes.

Exemption in respect of incorrect birth registration payment

Finance Act 2022 set out a new exemption from income tax, for a payment (commonly known as the "ex-gratia payment in respect of an incorrect birth registration") made by the Minister for Children, Equality, Disability, Integration and Youth to an individual who was the subject of an incorrect birth registration for the purposes of the Birth Information and Tracing Act 2022. This is on foot of a decision by the Government on 8 March 2022.

An ex-gratia payment received by an individual who was the subject of an incorrect birth registration will be exempt from income tax up to a maximum amount of €3,000. The exemption applies to all such payments received on or after 1 January 2023 but will also apply retrospectively to treat any such payments received before 1 January 2023 as being exempt for the relevant year of assessment.

Relief arising in special circumstances (Week 53 scenario)

Given the variations that can occur in how certain days fall in a calendar year, it is possible that in certain years employers who pay staff on a weekly or fortnightly basis have an additional payment date in a year (i.e. a "Week 53"). As tax credits and bands for employees are usually split on the basis of 52 weeks (or 26 weeks, where paid fortnightly), an extra payment date could mean that an employee gets paid with no access to tax credits or bands without legislative relief (which is provided in the form of a flexing of tax credits and bands by a fraction of 1/52 or 1/26 to cater for the extra payment date).

Finance Act 2022 provided for such relief for the Sea-going Naval Personnel Credit from 1 January 2023, as well as the home carer credit. The change for the home carer credit represents a formalisation of an administrative practice already operated by Revenue.

Exemption of certain profits arising from production, maintenance and repair of certain musical instruments

The exemption is available to individuals who are subject to tax on profits generated from the production, maintenance and repair of early Irish harps, Irish lever harps and uilleann pipes. Profits of up to €20,000 per annum can be exempted under these measures, and they came into effect from 1 January 2023.

Help to Buy scheme

The scheme had been due to end in 2022 but was extended in its current form to the end of 2024. In addition, the definition of "qualifying residence" has been extended to include certain dwellings that are purchased by a first-time purchaser in accordance with an "affordable dwelling purchase arrangement" and a "direct sales agreement" as defined in the Affordable Housing Act 2021.

Finance Act 2023: May 2023

CGT relief for farm restructurings

Capital gains tax (CGT) relief for farm restructuring allows farmers to claim tax relief on gains arising from the sale of farmland when the proceeds of the sale are reinvested in acquiring new farmland within 24 months. Full CGT relief is available where the purchase price of the new land exceeds the sales price of the old land, and partial relief is available where the sales proceeds exceed the purchase price. The relief has been extended to 31 December 2025.

Enhanced stock relief

Under existing legislation young trained farmers and registered farm partnerships are eligible for enhanced relief at rates of 100% and 50%, respectively, for increases in the value of stock. These enhanced reliefs have been extended to 31 December 2024.

Accelerated capital allowances for the construction of slurry storage facilities

To assist the agri-business sector in adopting environmentally positive farming practices, the Minister introduced an accelerated capital allowance scheme for the construction of new slurry storage facilities. The scheme allows farmers to write off the capital cost incurred in constructing these facilities over two years rather than the usual seven years. The new scheme commenced on 1 January 2023, and it now includes qualifying expenditure incurred on the construction of slurry storage facilities between 1 January 2023 and 31 December 2025 (previously, this was 30 June 2023).

The maximum value that can be claimed under this scheme is €500,000.

Revenue eBriefs

During 2023 and to date in 2024 Revenue has published a significant number of eBriefs that are relevant to completing 2023 Forms 11 and 12 and calculating 2024 preliminary tax if it is being paid on an estimated basis.

Revenue eBrief No. 001/23: Universal Social Charge

Tax and Duty Manual Part 18D-00-01, “Universal Social Charge”, has been updated to reflect the following changes resulting from the passing of Finance Act 2022:

- Paragraph 4 has been updated to account for the increase in the USC rate thresholds in line with increases to the national minimum wage.
- Paragraphs 6.1 and 11.3 have been updated to confirm that employer contributions to a PEPP are not considered relevant emoluments for the purposes of USC.
- Paragraph 11.2 has been updated to reflect that from 1 January 2023 employer contributions to a PRSA are not considered a taxable benefit-in-kind after an amendment to s118 TCA 1997.
- The following USC-exempt payments have been added to the list of exemptions in paragraph 12.2:
  - Section 192J: Electricity costs emergency benefit payment,
  - Section 192JA: Payments under Electricity Costs Emergency Benefit Scheme II,
  - Section 192K: Pandemic Special Recognition Payment,
  - Section 192L: Ex Gratia Payment in Respect of an Incorrect Birth Registration,
  - Section 192M: Payments under Covid-19 Death in Service Ex-Gratia Scheme for Health Care Workers and
  - Section 192N: Payments in relation to Ex-Gratia Scheme for Community Employment Scheme Supervisors and Assistant Supervisors.
- Paragraph 13 has been updated to confirm that the reduced rate of USC for medical card holders has been extended for one further year, to the 2023 year of assessment.

Revenue eBrief No. 003/23: Deduction for Income Earned in Certain Foreign States (Foreign Earnings Deduction)

Tax and Duty Manual Part 34-00-09, “Deduction for Income Earned in Certain Foreign States (Foreign Earnings Deduction)” has been updated to reflect the extension of the relief, by Finance Act 2022, to the 2025 year of assessment. The qualifying conditions of the FED and the maximum amount of income tax relief that may be claimed remain unchanged.

Revenue eBrief No. 005/23: Changes to Standard Rate Tax Band and Personal Tax Credits

These changes apply with effect from 1 January 2023 and include the following:

- the value of the standard rate tax band has increased by €3,200 per person,
- the value of the basic personal tax credit, the employee (PAYE) tax credit and the earned income tax credit have all increased to €1,775 per person and
- the value of the home carer tax credit has increased to €1,700 per person.

Revenue eBrief No. 019/23: Special Assignee Relief Programme (SARP)

Tax and Duty Manual Part 34-00-10, “Special Assignee Relief Programme (SARP),” has been updated to reflect the extension of the relief, by Finance Act 2022, to the 2025 year of assessment. In addition, the TDM has been amended as follows:

- A new Paragraph 5 has been inserted to reflect the new qualifying requirements applying to assignees who arrive in the State on after 1 January 2023 (changes broadly relate to new PPS number requirements and the fact that the €75,000 income threshold has been increased to €100,000).

- Example 1 in Appendix I has been amended to refer to the new minimum relevant income threshold applying to assignees who arrive in the State on or after 1 January 2023.
- A new Appendix III has been included to provide a copy of the new Form SARP 1A employer certification, which is required to be completed in respect of new arrivals to the State from 1 January 2023.

Revenue eBrief No. 028/23: Tax Treatment of Ukrainian Citizens Who Work Remotely in the State for Ukrainian Employers

On 14 April 2022 Revenue issued eBrief No. 090/22. This eBrief outlined Revenue's concessional treatments with regard to Ukrainians who:

- came to the State as a result of the war in their country and
- continued to be employed by their Ukrainian employer while performing the duties of their employment remotely from Ireland.

The concession provided that in relation to Ukrainian employment income:

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

This concession applied solely to employment income paid to the Irish-based employees by their Ukrainian employer.

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

Given the continuation of the war in Ukraine and the ongoing humanitarian crisis, Revenue confirms that the concessional treatments as set out above will continue to apply for the tax year 2023, subject to the qualifying conditions outlined in eBrief No. 090/22.

Any individual or relevant entity that avails of these concessional treatments should continue to retain evidence to support compliance with the qualifying conditions.

Revenue eBrief No. 033/23: Claiming Tax Relief for Health Expenses

Tax and Duty Manual Part 15-01-12, "Health Expenses – Qualifying Expenses" has been updated in respect of the flat-rate expense amount allowable regarding certain kidney patients (at section 10.6) and children with life-threatening illnesses (at section 12).

Revenue eBrief No. 050/23: ROS – Return Preparation Facility (RPF) Updated

The Tax and Duty Manual Part 38-06-01B has been updated as follows:

- Paragraph 4, "Availability of RPF", and Appendix 1 have been updated to include the release date for Corporation Tax Form 2022 and 2023.
- Paragraph 6, "Working on the Form – reference to the 'validation button'" (previously, 6.1), has been removed as it is no longer required.
- Instructions on "Save As" and "Save" are outlined in paragraphs 6 and 6.1.

The Return Preparation Facility (RPF) can be accessed through a link on the ROS login screen. Forms prepared and saved using the RPF must be uploaded using ROS Online to sign and submit the return (and thereby meet the filing obligation).

As newer versions of forms are made available in the RPF, they will not be available in the ROS

Offline application. Over time the RPF will be replacing the ROS Offline application for the majority of forms; however, ROS Offline will still be used for some forms.

Appendix 1 contains information on the specified form types available in the RPF. Work is ongoing to develop additional forms in RPF, in line with the regular annual or periodic update of such forms.

Revenue eBrief No. 065/23: Representative Church Body – Cost of Living Accommodation Allowance

Tax and Duty Manual Part 36-00-15, "Representative Church Body – Cost of Living Accommodation Allowance", has been updated to include the allowance for 2023. The examples have also been updated.

Revenue eBrief No. 068/23: Annual Average Exchange Rates and Lloyds Sterling Conversion Rates

Tax and Duty Manual Part 04-06-12, "Annual Average Exchange Rates and Lloyds Sterling Conversion Rates", has been updated to include the average market mid-closing rate v Euro, and the Lloyds sterling conversion rate, for the calendar year 2022 (see eBrief 026/24 regarding 2023).

Revenue eBrief No. 081/23: Offshore Funds: Taxation of Income and Gains from EU, EEA and OECD Member States & from Certain Offshore States

The TDMs concerning the taxation of offshore funds have been updated as follows:

- TDM Part 27-04-01 has been updated at paragraph 2.1.1 to provide for a non-exhaustive list of general legal and regulatory criteria that should be considered to assist in establishing whether the threshold of "similar in all material respects" is met when determining the equivalent nature of an offshore fund to its Irish counterpart.
- TDM Part 27-02-01 has been updated for the following amendments introduced by recent Finance Acts:
  - Finance Act 2022: clarifies the tax treatment of an authorised unit trust, where particular conditions are satisfied.
  - Finance Act 2020: clarifies the interaction of the offshore funds legislation with respect to the migration of Irish securities from the CREST system to Euroclear Bank in March 2021 after Brexit.

See below for further discussion on portfolio income generally.

Revenue eBrief No. 083/23: Dependent Relative Tax Credit

Tax and Duty Manual Part 15-01-27, "Dependent Relative Tax Credit", has been updated. In paragraphs 5 and 6 the "specified amount" has been updated for the 2023 year of assessment to €16,780.

Revenue eBrief No. 108/23: Credit in Respect of Tax Deducted from Emoluments of Certain Directors and Employees

Tax and Duty Manual Part 42-04-59, "Credit in Respect of Tax Deducted from Emoluments of Certain Directors and Employees", has been updated in section 6. The update explains:

- that debt warehousing of Schedule E liabilities for a self-assessed director or employee was available for income tax payments that fell due on 31 October 2020 and 31 October 2021 and
- that it was not possible to warehouse Schedule E liabilities that were due to be paid by 31 October 2022 (16 November 2022 where the ROS extension applied).

Revenue eBrief No. 122/23: Remote Working Relief

TDM 05-02-13, "Remote Working Relief", has been updated in section 5, "Treatment of Employer Reimbursed Remote Working Expenses", to clarify conditions relating to the €3.20 per diem payment. The €3.20 cannot be claimed if the employer reimburses the expense, and Revenue is prepared to accept reasonable apportionments where broadband is supplied as part of a "bundle".

Revenue eBrief No. 137/23: Non-resident Landlord Withholding Tax

Revenue has published a new Tax and Duty Manual providing guidance on the new online Non-resident Landlord Withholding Tax system, which is set to commence operation from 1 July 2023 (further discussion below).

Revenue eBrief No. 140/23: Expressions of Doubt (41a-03-00)

Tax and Duty Manual 41a-03-00, "Expression of Doubt (Full Self-Assessment) IT/CT/CGT", has been amended at paragraph 3. This is to clarify that even where an expression of doubt has been accepted as genuine, interest will apply where a liability is due and has not been paid within 30 days of an assessment's being raised.

Revenue eBrief No. 157/23: Rent-a-Room Relief

Tax and Duty Manual Part 07-01-32 (Rent-a-Room Relief) has been amended as follows:

- A new paragraph 7.2 has been inserted to include material on the rent tax credit (which potentially can be claimed in Rent-a-Room situations).
- Obsolete material on owner-occupier relief under certain property-based tax incentive schemes and relief from stamp duty for first-time buyers and certain owner-occupiers has been deleted.

Revenue eBrief No. 160/23: Universal Social Charge

Tax and Duty Manual Part 18D-00-01, "Universal Social Charge", has been updated as follows:

- Paragraph 11.2 – Personal Retirement Savings Account: to clarify that employer PRSA contributions are not subject to PAYE and are, therefore, not chargeable to PRSI under the PAYE system (both employer's share of PRSI and employee's share of PRSI).
- Paragraph 11.3 – Pan-European Personal Pension Product: to clarify that employer PEPP contributions are not subject to PAYE and are, therefore, not chargeable to PRSI under the PAYE system (both employer's share of PRSI and employee's share of PRSI).

Revenue eBrief No. 180/23: A Guide to Self-Assessment

Tax and Duty Manual Part 41-00-28, "A Guide to Self-Assessment", is updated at paragraph 4 to reflect the available online payment options.

Revenue eBrief No. 190/23: Domicile Levy

Tax and Duty Manual Part 18C-00-01, "Domicile Levy", has been updated and refreshed throughout and contains clearer and/or more detailed guidance on various aspects of the levy, including the following:

- 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 the Revenue Commissioners to make and amend assessments to the levy and the right of an individual to make an appeal; and
- information on applicable penalty and interest provisions.

Worked examples are also provided in the manual.

See below for further discussion.

Revenue eBrief No. 230/23: Taxation Issues for Registered Farm Partnerships

Tax and Duty Manual Part 23-02-09, which deals with 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; and

- 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.

Revenue eBrief No. 234/23: ROS Pay and File Useful Tips

The ROS filing Tax and Duty Manuals "Revenue Online Service" (Part 38-06-01), "ROS Pay and File Useful Tips" (Part 38-06-01a) and "Return Preparation Facility" (Part 38-06-01b) have been updated regarding:

- inputting/updating bank account details (38-06-01a: paragraphs 4 and 7; and 38-06-01: paragraph 10);
- use of commercial credit cards is no longer accepted for payments (38-06-01a: paragraph 7.1.2);
- use of the Iris chatbot (38-06-01a: paragraph 6; and 38-06-01: paragraph 7);
- refunds in ROS (38-06-01a: paragraph 7; and 38-06-01: paragraph 10);
- the development of the Return Preparation Facility (RPF) to replace ROS Offline (38-06-01a: paragraph 8; and 38-06-01 paragraph 9.5);
- phased payment arrangement notices are noted as priority messages in ROS inboxes (38-06-01: paragraph 14); and
- warning about using commas, dots or other symbols when naming and saving files in the RPF (38-06-01b: paragraph 6).

Revenue eBrief No. 256/23: Exemption of Certain Profits of Microgeneration of Electricity

A new Tax and Duty Manual Part 07-01-44 provides guidance on the income tax exemption of certain profits from the microgeneration of electricity by an individual at his or her sole or main residence. Section 216D of the Taxes Consolidation Act 1997 provides for an exemption from Case IV income tax, USC and PRSI for certain profits arising to a qualifying individual from the microgeneration of electricity. For tax years 2022, 2023 and 2024 the exempt amount is €200; a qualifying individual is not required to declare such profits in an income tax return, but any amount in excess of the exempt limit is required to be declared as income.

Revenue eBrief No. 015/24: Income Tax Return 2023 – ROS Form 11

The 2023 ROS Form 11 has been available since 1 January 2024. The form was updated in early February 2024 to enable claims for the mortgage interest tax credit and is updated on an ongoing basis to include additional prefilled information from third parties.
The changes flagged in Tax and Duty Manual Part 38-01-04H include:

- information on rental income paid to non-resident landlords (paragraph 4.1) and the removal of references to s97(2)K TCA 1997 (paragraph 4.2);
- updates to the non-refundable foreign tax panel (paragraph 5.4);
- updates to the "employments not subject to PAYE" panel (paragraph 6.1);
- a reminder about the amount of expenses (30%) that can be claimed as "allowable deductions incurred in employment" (paragraph 6.2);
- updates regarding social welfare payments (paragraph 6.3) to advise that the annual amount will be shown in the summary table – filers are reminded to fill in the fields in the return in order for the income to be declared and included in the summary calculation of tax due, and social welfare payments information is prefilled from late January so returns submitted before then should include welfare payments even if the table is not populated with information at that time;
- an advisory message about new questions to be added to the "Lump sums from relevant (foreign) pension arrangements" panel to reflect the new s200A TCA 1997 (paragraph 6.4);

- updates to the "transborder relief" panel regarding the drop-down country field (paragraph 7.1); and
- updates to the tax credits panel (paragraph 8) to reflect increased values.

Revenue eBrief No. 021/24: Loss Relief for Self-employed Individuals Adversely Impacted by Covid-19 Restrictions

Tax and Duty Manual Part 12-01-03, "Loss Relief for Self-employed Individuals Adversely Impacted by Covid-19 Restrictions", has been updated:

- to confirm that a claim for relevant loss relief under s395A or relevant allowances under s304(3A) TCA 1997 can no longer be made owing to the time limits provided for in the legislation – the last possible date by which a final claim could be made under s395A or s304(3A) was the due date for the Form 11 tax return for 2021, which was 31 October 2022; and
- to include references to s1077FTCA 1997 and the Code of Practice for Revenue Compliance Interventions.

Revenue eBrief No. 030/24: Tax and Duty Manual 04-06-04 – Leasing of Machinery or Plant – General Principles of Taxation

Tax and Duty Manual Part 04-06-04, "Leasing of Machinery or Plant – General Principles of Taxation", has been updated. This is to reflect the general legislative framework applicable when calculating taxable profits and gains related to leases of machinery or plant after the commencement of Finance (No. 2) Act 2023 on 1 January 2024. The manual sets out current Revenue guidance on general matters relating to the taxation of leases of machinery or plant, superseding previous guidance on the topic.

Revenue eBrief No. 048/24: Part 41A-05-04 Full Self-assessment – Time Limits for Making Enquiries and Making or Amending Assessments

Tax and Duty Manual 41A-05-04, "Full Self-assessment – Time Limits for Making Enquiries and Making or Amending Assessments", has been updated at paragraph 4 to refer to an amendment in Finance Act 2022 to s959AA(2A) TCA 1997, which explicitly provides that assessments may be amended outside of the normal four-year time limit as a result of a mutual agreement procedure (MAP) determination. The TDM also outlines that tax returns may be amended outside of the four-year time limit to account for the knock-on effects of a MAP or correlative adjustment, even if the company whose return is amended was not directly a party to the MAP or correlative adjustment.

In addition, paragraph 3, which outlines exceptions to the four-year limit for making enquiries, and paragraph 4, which outlines the time periods for making or amending assessments, have been amended for ease of understanding.

Revenue eBrief No. 049/24: Certain Benefits Payable under Social Welfare Acts – Increase for Qualified Adult

Tax and Duty Manual Part 05-05-33 , "Certain Benefits Payable under Social Welfare Acts – Increase for Qualified Adult", has been updated to clarify the tax treatment of the increase in the State Pension in respect of a qualified adult:

- for the tax year 2014 and subsequent years and
- for tax years up to and including 2013.

(A second PAYE credit could be claimed up to and including 2013 but not thereafter.)

Revenue eBrief No. 116/24: ROS – Extension of Pay & File Deadline for ROS Customers for 2024

Revenue announced an extension to the ROS return filing and payment date for certain self-assessment income tax customers and for customers liable to capital acquisitions tax (CAT). For customers who file their 2023 Form 11 return **and** make the appropriate payment through ROS for:

- preliminary tax for 2024 and
- income tax balance due for 2023

the due date is extended to **Thursday, 14 November 2024**.

For beneficiaries who received gifts or inheritances with valuation dates in the year ended 31 August 2024 and who make a CAT return and the appropriate payment through ROS, the due date is also extended to **Thursday, 14 November 2024.**

To qualify for the extension, customers must **both pay and file through ROS.** Where only one of these actions is completed through ROS, the extension does not apply and the required date to submit both returns and payments is no later than 31 October 2024.

The Complexities

Domicile levy

For 2023 the domicile levy of €200,000 and the filing of a Form DL1 apply where an individual:

- is Irish domiciled – the requirement to be an Irish citizen does not apply for 2012 and subsequent years,
- has worldwide income for 2023 in excess of €1m,
- holds Irish property valued at in excess of €5m on 31 December 2023 and
- has an Irish tax liability for 2023 of less than €200,000.

The scope of the domicile levy is wider than anticipated when it was introduced by Finance Act 2010. Initially, it was thought to apply only to non-Irish-tax-resident individuals, but although it was introduced to target such taxpayers, the underlying legislation does not limit the charge in this way. Accordingly, it can apply to all taxpayers who otherwise satisfy the criteria. Tax practitioners should also be mindful that Revenue does not consider that universal social charge (USC) comprises part of a taxpayer's Irish tax liability for the purpose of determining whether the €200,000 threshold above has been exceeded. This view has been upheld by the Tax Appeals Commission. Where the €200,000 levy is payable for 2023, it may be offset by income tax (not USC) paid for 2023.

High-income earner restriction

Since 2007 a high-income earner restriction has applied to those claiming "specified reliefs". There is a limit on the use of specified reliefs by taxpayers with "adjusted income" in excess of €125,000. The specified reliefs are restricted to €80,000 or 20% of the relief due before the restriction, whichever is greater. Tapering relief applies to taxpayers with income of between €125,000 and €400,000. In the case of married taxpayers, each spouse has a €125,000 threshold. In addition to filing a Form 11, those taxpayers subject to the high-income earner restriction are obliged to file a Form RR1.

Property relief

Finance Act 2012 introduced a 5% property relief surcharge in the form of an increased USC charge where annual gross income is at least €100,000 (as calculated in accordance with USC computational rules). The surcharge applies to income sheltered by property reliefs, i.e. "specified" reliefs. The increased USC charge is calculated before taking the high-income earner restriction into consideration.

Passive investors should not claim any unused accelerated capital allowances carried forward beyond 2014 (or the tax life of the building or structure, if later).

Non-resident landlords

Until July 2023 where rents were paid directly to a person whose usual place of abode was outside Ireland, s1041 TCA 1997 obliged the tenant to deduct income tax at the standard rate from the payment.

Rent paid direct by tenant to non-resident landlord: up to 30 June 2023

The tenant was obliged to deduct tax from the rent at the standard rate and account for this tax to Revenue. The tax should have been remitted to Revenue with the tenant's annual return of income (Form 11 or Form 12, as appropriate). It should be noted that the obligation to deduct tax did not make the tenant a chargeable person. For PAYE workers the recovery of the tax deducted could be achieved by adjustment of tax credits. The tenant should have given the landlord a certificate of the tax deducted on Form R185 (Certificate of Income Tax Deducted).

Tenants may not always be aware of their obligation to deduct tax from rents paid to foreign landlords. In such circumstances Revenue may request the tenant to provide the following information in respect of the landlord:

- name and address;
- details of the bank account into which rent is paid (name and address of the bank and the account number into which the payments are made); and
- details of the rents paid to the non-resident landlord for all years for which the landlord was resident abroad.

Rent paid to Irish agent of non-resident landlord: up to 30 June 2023

In this case the tenant is not obliged to deduct income tax from the rent. The landlord is assessable and chargeable to income tax in the name of the Irish agent, in accordance with s1034TCA 1997. The agent should be set up with a separate tax registration.

2023 changes

The non-resident landlord regime as outlined above changed with effect from 1 July 2023. Finance Act 2022 provided that collection agents who act for a non-resident landlord must deduct withholding tax at the standard rate of 20% from rental payments to non-resident landlords and must remit the tax withheld to Revenue.

Tenants paying directly to a non-resident landlord most also withhold and remit 20% of the rent paid by them to Revenue.

Investment portfolios

The area that possibly presents the greatest difficulty for a tax adviser when preparing a tax return is determining the status of different assets held in an investment portfolio. The popularity of collective investment vehicles has soared in recent years, and where such vehicles are domiciled outside Ireland they are typically considered to be "offshore funds", as defined under Irish law. As most practitioners know, such a classification is not necessarily favourable for a taxpayer. **Revenue's Tax and Duty Manual Part 27-02-01** includes very useful decision trees to assist in determining the nature of foreign investments that have the appearance of possibly being offshore funds. Key points to remember when reviewing portfolios are:

- An eight-year charge applies to EU/EEA/OECD-regulated funds, i.e. a disposal is deemed to occur based on the uplift in value of the fund in the eight-year period. The onus is on the taxpayer, not the fund manager, to calculate the tax due and return details of the deemed disposal in their tax return.
- The death of the holder of an EU/EEA/OECD-regulated fund triggers an exit charge. The units of the fund are deemed to have been disposed of and immediately reacquired by the deceased for market-value consideration (this is often overlooked and is particularly detrimental where the fund is bequeathed to a spouse and it was assumed that no tax would arise).
- Loss relief is not available in respect of losses arising from an EU/EEA/OECD-regulated fund.
- The remittance basis does not apply to gains arising from regulated funds within the EU/EEA/OECD.
- Certain ETFs which that previously were not thought to fall into the regime outlined above may now do so following updated Revenue guidance which was published in September 2022 (see TDM Part 27-01A-03 which was reviewed in July 2023).

Guidance on the appropriate tax treatment of investments is ever evolving, and tax advisers should review the guidance regularly.

Foreign bank accounts

Opening a foreign bank account (including those operating via online platforms) deems a taxpayer to be a "chargeable person" for self-assessment purposes in the year in which the bank account is opened. Full details of the bank account, including the amount of money deposited, must be reported.

Foreign authority reporting

As tax advisers will be well aware, clients with foreign assets are coming to Revenue's attention as a consequence of the sharing of information by foreign authorities under exchange-of-information provisions, including the US Foreign Account Tax Compliance Act and the Common Reporting Standard.

Capital gains tax

Capital gains tax (CGT) is an integral part of a Form 11 tax return. Taxpayers who are not required to file a Form 11 are still obliged to return to Revenue details of any chargeable disposals made by filing a Form CG1, even where no tax is due because of the availability of reliefs, losses etc. A typical example of this would be the disposal of a residential property in the UK. Such a disposal before April 2015 would not have been subject to UK CGT if the property was owned by a non-UK tax resident. However, UK CGT now applies, and Irish CGT on such a disposal may be mitigated by claiming a credit for the UK tax paid.

CGT on disposals made between 1 January 2023 and 30 November 2023 should have been paid by 15 December 2023, and that on disposals made in December 2023 paid by 31 January 2024.

Capital acquisitions tax

Capital acquisitions tax (CAT) is not an integral part of a Form 11 tax return, but it is mandatory to disclose receipt of a gift or inheritance on a personal tax return. Delivery to Revenue of a return and discharge of any CAT liability in respect of gifts or inheritances with a valuation date arising between 1 January 2024 and 31 August 2024 must be undertaken by 31 October 2024. The applicable date for gifts/inheritances with a valuation date arising between 1 September 2023 and 31 December 2023 is also 31 October 2024 (this deadline may be extended to 14 November 2024 where the IT38 is filed and the CAT paid through ROS).

Conclusion

Although the Form 11 for 2023 appears similar to previous versions, on closer consideration there are a number of issues that require more thought than might previously have been the case. This, together with a ramp-up of compliance intervention after the introduction of the revised Code of Practice for Revenue Compliance Interventions in May 2022, may mean that many CTAs are now of the mindset that they are navigating their way through traps rather than performing tricks!

Justine Murphy
Tax Director, PwC Ireland

Employee Share Incentive Schemes: An Alternative Option for Employers

Introduction

IBEC reported that Irish employers were facing elevated pay expectations from staff for 2024.[1] To remain competitive, employers are increasingly looking for innovative ways to attract new talent and retain their existing talent pool with meaningful rewards. Because of this, employee share incentive schemes have become hugely popular in recent times. Although tax benefits are not usually the sole driver for their introduction, employee share incentive schemes offer tax savings to both employers and employees while having flexibility to be designed to meet the individual circumstances of employers. Each type of employee share incentive scheme has its own rules, terms and conditions, and reporting obligations, which this article will discuss.

Employee Share Incentive Schemes

There are many Irish trading companies, both domestic and multinational, that have employee share incentive schemes in operation.

1 IBEC, *HR Update 2023: Workplace Trends & Insights* (October 2023), https://cdn.ibec.ie/-/media/documents/media-press-release/ibec_hr_report_2023_fa.pdf?rev=e4169cbf35e34a37b77d2ea0bb270b85&hash=5D41FB59BE797698F702F53CB683FD36.

International research[2] has shown that involving employees in the ownership of the business not only creates growth for the company and increased taxes for the Government but also retains key staff. Holding equity in a business encourages employees to be motivated to help grow the company's bottom line, as any growth impacts the value of their investment.

Regardless of the stage of the company – whether it be in its start-up phase, an established, growing business or a business undergoing a merger, acquisition or sale – the objectives of the company to retain and reward key employees are often the same. For start-up businesses, in particular, employee share incentive schemes can be a very useful tool to attract employees, as employers in this space are facing huge challenges competing against attractive salary packages offered by other, well-established employers in Ireland.

Tax Treatment

As mentioned above, although the tax benefits are not usually the sole driver of introducing a share incentive scheme, they should not be underestimated. For employees who participate in a share scheme it is possible to avail of capital gains tax (CGT) treatment on an eventual sale of the shares. Depending on the circumstances, it may also be possible for employees to avail of revised entrepreneur relief, as provided for in s597AA Taxes Consolidation Act 1997 (TCA 1997), to reduce the tax costs on a share disposal further. There may, however, be some difficulties in availing of this relief as the employee would need to retain at least 5% of the ordinary share capital of the company over a qualifying period. This minimum shareholding requirement may be compromised by any new employees' entering the equity pool of the company.

In addition to the commercial benefits, employers can avail of a PRSI saving where the conditions for the employer PRSI exemption on share-based remuneration are met. The employer PRSI exemption applies where the employee receives shares in a company in which they are employed or shares in a company that has control of the company in which they are employed.

As a result of the above, an equity incentive to employees is financially more attractive than a cash bonus, which attracts PAYE, USC and employee PRSI at a marginal rate of up to 52%, plus an employer PRSI charge of up to 11.05%.

Types of Share Schemes

There are two categories of employee share incentive schemes in Ireland for employers to choose from.

Table 1: Types of share schemes.

Revenue-approved schemes	Revenue-unapproved schemes
• Approved profit-sharing schemes (APSS) • Save As You Earn (SAYE)	• Share options • Key Employee Engagement Programme (KEEP) share option schemes • Free or discounted share schemes • Restricted/clog shares • Forfeitable shares • Growth/flowering shares • Restricted stock units (RSU)

2 Inter-University Centre, for European Commission's DG Market, *The Promotion of Employee Ownership and Participation: Final Report* (October 2014), https://eprints.staffs.ac.uk/2616/1/Final%20Study%20%27The%20Promotion%20of%20Emp%20ownership%20and%20Particip%27%20for%20DG%20MARKT_feb%202015.pdf.

In practice, Revenue-approved schemes are not very commonly used by employers. The traditional Revenue-approved scheme provides little flexibility with regard to scheme structure and design and requires that participation in the scheme be open to all employees (full, part-time and temporary) and company directors who are subject to Schedule E on their income, provided they satisfy the minimum period set by the employer. Because of these conditions, growing SMEs often find it difficult to participate. Some growing and well-established businesses feel that these conditions are prohibitive as they hinder flexibility to hand-pick key employees to reward. The terms can also act as a disincentive to key employees who prefer a selective scheme to be operated.

Approved profit-sharing scheme

The terms of an approved profit-sharing scheme permit an employer to allocate shares to employees up to an annual limit of €12,700 free from income tax, provided the employee meets certain criteria. A notable key advantage of this scheme is that employees can convert their otherwise taxable discretionary bonus into shares in their employer's company, which gives employees an alternative to a cash bonus. Where the business does well within the specified period of the scheme, the employee gains on a sale. This means that the objectives of the employer and the employee are aligned from the outset, the common aim being for the employee to remain and work toward reaching the financial goals and targets of the business.

Taxation rules for the approved profit-sharing scheme are dealt with in s509 to s518 TCA 1997. The key features of the scheme are:

- Shares that are allocated under an approved profit-sharing scheme must be held in trust for a specified period. The trust is set up by the employer.
- The costs of establishing an approved profit-sharing scheme and any amounts paid by the company to the trustees are generally deductible in computing the company's taxable profits.
- If the shares are held for at least three years, the employee will be exempt from income tax once the shares are transferred to the employee.
- Employee PRSI (not employer PRSI) and USC are payable on the value of the shares at appropriation, and the employer operates these taxes through the payroll system.
- On a future sale of the shares the employee is liable to CGT on the difference between the disposal proceeds and the market value of the shares at appropriation.
- Employers are also afforded the flexibility to decide year on year whether to allocate new shares to the employees, which gives the employer an element of control over the scheme and its process.

Trustees are obliged to file an annual return, Form ESS1, with the Revenue Commissioners regarding an approved profit-sharing scheme by 31 March in the year after the year of assessment.

Save As You Earn

Employees in a Save As You Earn scheme must enter a contract to make regular monthly savings of between €12 and €500 from their net salary over a predetermined period of three, five or seven years. At this time the employee enters a contract with the employer to acquire shares in the future at a predetermined option price (often, the option price includes a discount of up to 25%, which is attractive for employees). The employee's savings are placed in a deposit account with an approved bank or savings institution.

This scheme provides flexibility to both employer and employee. From an employer's perspective, they can set a minimum service requirement for participants, a maximum of three years, which can be used to incentivise employees to remain in employment with the company. From an employee's perspective, the scheme affords the opportunity to save in a flexible yet risk-free manner. Employees also can receive their total savings at the end of the period tax-free if they do not wish to exercise the option to acquire shares in the employer company.

This scheme is most suited to start-up and smaller businesses whose objective is to drive growth, given the amount of each employee's monthly savings. This scheme would not be common in larger and more well-established companies.

Taxation rules for the Save As You Earn scheme are dealt with in s519A–s519C and Schedules 12A and 12B TCA 1997. The key features of this scheme are:

- No income tax is payable on the grant or exercise of the option except where the option is exercised within three years of being obtained.
- USC and employee PRSI (no employer PRSI) are payable at the date of exercise on the difference between the market value of the shares and the option price. The employer operates these taxes through the payroll system.
- On a future sale the employee is liable to CGT on the difference between the disposal proceeds and the option price at acquisition.

Employers must deliver details of options granted or exercised on the Form SRSO1 to the Revenue Commissioners by 31 March in the year after the year of grant or exercise or within 30 days of receiving a request from Revenue.

Table 2: Summary of Revenue-approved schemes.

Type of Revenue-approved scheme	Upfront cost	Tax on grant/ exercise	Tax costs on disposal	Reporting obligations (employer/trustee/ employee)
Approved profit-sharing scheme	None	No income tax where the shares are held for at least three years Employee PRSI and USC are payable on the value of the shares at appropriation	CGT is payable on the difference between the disposal proceeds and the market value of the shares at appropriation	Trustees are obliged to file Form ESS1 by 31 March in the year after the year of assessment Employees report any disposal of shares in their income tax return
Save As You Earn (SAYE)	Regular monthly savings of between €12 and €500 over a defined period	No income tax on grant or exercise except where the option is exercised within three years of being obtained USC and employee PRSI are due at date of exercise on the difference between the market value of the shares and the option price	CGT is payable on the difference between the disposal proceeds and the option price at acquisition	Since 1 January 2024, employees no longer have a reporting obligation in relation to SAYE. Employers must file a Form SRSO1 by 31 March in the year after grant or exercise Employees report any disposal of shares in their income tax return

Unapproved schemes

Unapproved share incentive schemes are more common in Ireland as they allow employers more flexibility in terms of rewarding key employees with equity in the business. Designing the unapproved share scheme is critical to ensure that the scheme meets the objectives that it is designed to achieve, from both a commercial and a practical point of view. If the schemes incorporate realistic and achievable targets or hurdles, they are very effective in aligning employers' and employees' goals and objectives. Where share schemes are introduced as a bonus or salary increase substitute, it is important to show that where the business is successful in the future, the employee will participate financially in that success.

The schemes do not require prior Revenue approval and do not require equality of treatment among all employees of the business.

For the most part, employees are liable to income tax at marginal rates on either the date of grant of a share award or the date of exercise of a share option. On a future sale of shares the employee may also be subject to CGT on any gain.

Share options

A share option is a right that an employer grants to their employee to subscribe for shares in the company at a predetermined price in the future. Under a share option scheme employers can decide:

- the number of shares to be acquired,
- the option price and
- the exercise period,

which gives an employer control over the scheme. This ensures that employees are required to complete a certain period of service in the company before being able to exercise their options and that an employee does not have any rights relating to the shares until the option is exercised.

The tax treatment of share options is dealt with in s128 TCA 1997. The rules in relation to the operation of tax on a gain arising on a share option have changed with effect from 1 January 2024. Where a gain arises on the exercise, assignment or release of a share option after 1 January 2024, an employer operates the tax via the payroll system. This contrasts with the treatment of a gain on a share option realised before 1 January 2024, whereby the gain rendered the employee a "chargeable person" and the tax was payable under the self-assessment system.

The key features of this scheme are:

- There are two types of options: short option (an option not capable of being exercised more than seven years after the date of grant) and long option (capable of being exercised more than seven years after the date of grant).
- The most common form of share option scheme operating in Ireland is the short option, given its favourable tax treatment. There is no upfront tax charge on the grant of a short option, and income tax, employee PRSI and USC are payable on the exercise of the share option on the difference between the market value at exercise and the option price payable.
- A charge to employer PRSI does not arise where the shares are in the company in which the office/employment is held or in a company that has control over that entity.
- No liability arises where the share option is not exercised.
- CGT will arise on the ultimate disposal of shares on the difference between the disposal proceeds and the market value of the shares at the exercise date.

A common issue can arise where an employee disposes of their share award to cover the tax payable on exercise of the option, which reduces the benefit of the share award for employees. The option for employees to sell their share options in what is known as a "cashless exercise" or "same-day sale" to cover the tax payable may be difficult to achieve in the case of private companies, where there is no readily available market for the shares. Where such "cashless exercise" or "same-day sale" arises, the employee will not be able to avail of the reduced rate of CGT provided for under revised entrepreneur relief because the holding-period requirement for the relief has not been satisfied.

Details of share options granted, exercised or released must be reported by the employer to the Revenue Commissioners on the Form RSS1 by 31 March following year of assessment. If a gain is realised on or before 31 December 2023, the employee must complete Form RTSO1 within 30 days of exercise and file an income tax return.

Key Employee Engagement Programme

For several years Irish SMEs were asking the Irish Government to introduce a scheme or mechanism to allow them to operate a simple yet tax-efficient scheme to grant shares to their key employees. The Key Employee Engagement Programme (KEEP) was introduced in Finance Act 2017, and its sole objective was to support SMEs in attracting and retaining key employees.

Although it is a Revenue-unapproved scheme, there are several conditions, from both a company and an employee perspective, for the KEEP to operate. Where all conditions are satisfied, it allows employers to grant options at market value to either key or all employees and permits the employees to defer any tax costs until the ultimate disposal of the shares. The tax treatment of this scheme is a big selling point for employers, given that income tax is generally chargeable on any gain realised by an individual on the exercise of a share option, whereas under the KEEP, employees pay CGT on a future disposal of the shares, creating a tax benefit of up to 19% in the rate of tax/USC/PRSI payable by the employee. Finance Act 2022 saw an increase in the lifetime company limit for KEEP shares from €3m to €6m, which was welcomed by employers in the SME space.

Taxation of options granted under the KEEP is dealt with in s128F TCA 1997. The key features of the scheme are:

- The scheme is available for qualifying share options granted on or after 1 January 2018 and before 1 January 2026.
- The options cannot be exercisable within 12 months or more than 10 years after grant.
- The price cannot be less than market value of the same class of shares at grant.
- Before Finance Act 2022 the shares acquired by the exercise of the share option had to be new ordinary fully paid-up shares in a qualifying company. However, Finance Act 2022 amended this to allow for existing shares to be part of the scheme.
- To qualify:
  - the employee or director must work more than 20 hours a week or devote not less than 75% of their working time to the company/group,
  - their employment must be capable of lasting at least 12 months from the grant date of the options under the scheme,
  - the individual cannot hold a material interest (15% or more) in the company or group and
  - the individual must hold the options for at least 12 months before exercising.
- To qualify:
  - the company/group must be incorporated in Ireland, the UK or an EEA State and resident in Ireland, the UK or an EEA State and carrying on business in Ireland through a branch or agency,
  - the activities of the company/group must exist wholly or mainly for the purpose of a "qualifying trade" on a commercial basis with a view to the realisation of profit and
  - the company/group must meet the requirements of SMEs (within the meaning of the Annex to Commission Recommendation 2003/361/EC).

- On a disposal of shares the employee will be subject to CGT, currently at 33% (rather than income tax, USC and employee PRSI, currently at rates of up to 52%, which apply to unapproved share options).

There is no pre-approval process for the scheme or for the share valuation, but the employer has a requirement to report details of options granted to, exercised by, transferred to and released by the employee in a KEEP1 form to Revenue no later than 31 March following the year of assessment.

Free or discounted shares

The issue of free or discounted shares to an employee results in a charge to tax under s112 TCA 1997 for the employee. The key features are:

- The market value of the shares awarded, less any price paid by the employee, is treated as notional pay when the shares are awarded.
- Income tax, employee PRSI and USC are payable on the notional pay amount.
- An employer's charge to PRSI does not arise where the shares are in the company in which the office/employment is held or in a company that has control of that company.
- The employer must withhold these taxes via the payroll system.
- CGT may arise on the ultimate disposal of the shares by the employee, and the employee is obliged to report details of the disposal in their income tax return.

Employers must submit "real-time reporting" of notional pay on either the day the taxable benefit arises or the earlier of:

- the next pay day and
- 31 December in that year.

Employers must also report details of the award of free or discounted shares in a Form ESA by 31 March in the year after the award.

If the liability on the free or discounted shares is greater than the employee's net pay, an employer is obliged to account for and remit the total tax, PRSI and USC due on the actual and notional pay in the payroll return. The tax must be recouped from the employee; otherwise, the employee will be deemed to have received another benefit – a notional loan arising on the acquisition of shares. Section 122A TCA 1997 provides that a benefit-in-kind charge arises for an employee who has not fully paid for the shares on acquisition. The benefit-in-kind is charged at 13.5% of the value of the deemed loan, which equates to the market value of fully paid-up shares in the same class. The charge continues to arise until the share is fully paid up, disposed of or surrendered or the employee dies.

Restricted/clog shares

Where an employer is mindful of the financial cost for employees of acquiring shares, restricted/clog share schemes can be attractive. Restricted/clog shares are common in companies that are not able to have multiple classes of shares and do not have the ability to issue growth/flowering shares.

Under a restricted/clog share scheme the cost for an employee is reduced where a "clog", or a time restriction, that is absolute and for genuine commercial reasons, placed on the shares. The clog/restriction typically acts to "lock in" the employee for a set period to help drive growth in the business and thus maximise the share value. Even though there is a reduction in taxable value there is an upfront tax cost for employees. This can prove to be unattractive for employees, particularly where there is no opportunity for the employee to dispose of shares to fund the tax cost for the duration of the clog period.

The tax treatment of restricted/clog shares is dealt with in s128D TCA 1997. The key features of the scheme are:

- The restriction period placed on the shares reduces the taxable value of the shares for the employee. The maximum reduction is 60%, where the restriction on the shares is for greater than five years. The reduction decreases to 10% where the period of restriction is one year.

- Income tax, employee PRSI and USC are payable on the market value of the shares at the date of acquisition, with the market value to be reduced by the relevant discount percentage, depending on the period of restriction placed on the shares.
- A charge to employer PRSI should not arise where the shares are in the company in which the office/employment is held or in a company that has control of that company.
- The employer has the responsibility of operating the taxes through the payroll system.
- Employees should be mindful that if the original restriction is removed or varied during the clog period, additional taxes may become due.
- CGT may also arise on the disposal of the shares, which were newly issued shares, by the employee on the difference between the disposal proceeds and the price paid for the shares and the amount charged to income tax on acquisition may be taken into account in calculating the gain.

Employers must report the award of restricted shares, as well as any disposal of such shares, before the end of the restricted period in a Form ESA by 31 March in the year after the award of the shares or their disposal.

Forfeitable shares

Forfeitable shares are awarded by an employer who wishes to award equity to their key employees depending on certain performance targets or criteria or the employee's remaining with the company. To qualify as forfeitable shares, there must be a bona fide written agreement between the employer and employee setting out the terms under which there will be a forfeiture of shares if certain circumstances either arise or do not arise and the employee will no longer be the holder of the beneficial interest in the shares. Forfeitable shares provide employers with an opportunity to award equity to key employees subject to certain criteria, which allows employers flexibility and control in terms of designing the share scheme.

The tax treatment of forfeitable shares is dealt with in s128E TCA 1997. The key features of the scheme are:

- Where an employee acquires the shares for less than market value, a charge to income tax, USC and employee PRSI arises on the market value of the shares at the date of acquisition. The market value of the shares disregards the risk of forfeiture.
- The employer has responsibility for paying these taxes to the Revenue Commissioners through the payroll system.
- A charge to employer PRSI does not arise where the shares are in the company in which the office/employment is held or in a company that has control over that company.
- Where shares are not forfeited, an employee keeps the shares and benefits from any growth in value of the shares from the acquisition date at the favourable CGT rate on a future disposal.
- Where shares are forfeited, an employee can seek a refund from Revenue of the tax paid on acquisition of the shares, subject to Revenue's four-year time limit.

Employers must report the award of forfeitable shares and the forfeiture of forfeitable shares in a Form ESA by 31 March in the year after the award or forfeiture. Employees should also report any disposal of shares in their income tax return.

Growth/flowering shares

Growth/flowering shares are becoming hugely popular where employers wish for key employees to participate in the future success and growth of the company above the current value of the company. Growth/flowering shares involve the issue of a new class of shares to employees participating in the scheme. The new class of shares have limited rights, but the expectation is that the shares would grow in value on certain events' happening. It is good practice from the outset for the company's articles to be updated for the issue of growth shares, which distinguishes the shares from the existing shares in issue. From an employee's perspective, they have shares upfront in the company, which can act as an incentive to help grow the business and remain loyal and committed to the company.

The key feature of the scheme are:

- No upfront tax cost arises for the employee where the employee pays for the shares at market value. A valuation exercise should be undertaken to value the growth shares being issued.
- The fair market value of these shares can be lower at the outset because no existing value is being passed to the employee and due to the hurdles set. A robust valuation should be carried out to determine the fair market value of the shares being offered to the employees.
- An exemption for employer PRSI may be available.
- CGT may arise on the ultimate disposal of the shares by the employee and is reportable by the employee in their income tax return.

Employers must report the award of growth/flowering shares in a Form ESA by 31 March in the year after the award.

Restricted stock units

A restricted stock unit (RSU) is a promise to an employee that, on completion of a vesting period, the employee will receive several shares or cash to the value of such shares. Completion of the vesting period is important to retain key staff, as no shares or cash will pass to an employee until the vesting period has passed. Vesting periods can be satisfied by time or by the performance of the individual or the company. Where an employee's performance is a key factor in determining whether they receive shares, the scheme can be used to incentivise employees not only to meet expectations but to exceed them and perform to the highest standards.

The tax treatment of RSUs is dealt with in s112, s897B and s975 TCA 1997. The key features of the scheme are:

- Income tax and USC are payable on the market value of the shares provided to the employee on vesting.
- Employee PRSI is payable on the receipt of the shares or cash.
- Employer PRSI does not apply where the shares are in the company in which the office/employment is held or in a company that has control of that company.
- Employer PRSI is payable where cash is provided to the employee. The employer has the responsibility to deduct all taxes and pay them over to Revenue through the payroll system.
- To fund the tax charge on vesting, an employee can:
    - opt to sell some of their shares to cover the cost. Revenue will defer collection of the tax up to the date the shares are settled provided such date is within 60 days of the vesting date. However, there is an overarching deadline of 23 January as the final date by which all tax liabilities are paid in respect of the previous tax year; or
    - avail of a cash-flow mechanism provided by Revenue that allows an employer to pay the tax on behalf of an employee and to plan for the cost to be recouped from the employee on or before 28 February of the following year. If the deadline of 28 February is not met, the employer is required to treat any outstanding tax as a benefit for the employee, which brings with it further tax costs for the employee.
- CGT may arise on the ultimate disposal of the shares by the employee on the difference between disposal proceeds and the market value of the shares at the date of acquisition.

Employers are required to file a Form ESA with Revenue by 31 March in the year after vesting. There is no requirement at present to report the grant of RSUs.

Table 3: Summary of Revenue-unapproved schemes.

Option	Upfront costs	Tax costs on grant/exercise	Tax costs on disposal	Employer reporting obligations	Employee reporting obligations
Share options	Option price	Income tax, employee PRSI and USC payable on the exercise of the option on the difference between the market value at exercise and the option price Employer PRSI does not arise where conditions are satisfied	CGT on the difference between the disposal proceeds and the market value of the shares at exercise	Details of share options granted, exercised or released to be reported on Form RSS1 by 31 March in the after year of assessment	If a gain is realised before 1 January 2024, employees must complete Form RTSO1 within 30 days of exercise (this is not required for a gain after 1 January 2024) Employees report any disposal of shares in their income tax return
KEEP	Market value of share options	None	CGT on ultimate disposal of shares on the difference between sales proceeds and acquisition cost	Details of options granted, exercised, transferred or released to be reported in KEEP1 form no later than 31 March after the year of assessment	Employees report any disposal of shares in their income tax return
Free or discounted shares	Nil (if free share) or discounted price (where discounted share)	If less than market value is paid for the shares, a notional tax charge arises on the amount of the undervalue, which is subject to income tax, USC and employee PRSI No employer PRSI charge arises where conditions are satisfied Potential benefit-in-kind charge on notional loans	CGT on the disposal of shares on the difference between sales proceeds and price paid for shares, if any.	Employers are required to submit “real-time reporting”, as well as a Form ESA by 31 March in the year after the award	Employees report any disposal of shares in their income tax return

Option	Upfront costs	Tax costs on grant/exercise	Tax costs on disposal	Employer reporting obligations	Employee reporting obligations
Restricted/ clog shares	Market value of the shares factoring in clog (and minority discount if relevant)	If less than market value is paid for the shares, income tax, USC and employee PRSI arise No employer PRSI charge arises where conditions are satisfied Potential benefit-in-kind charge on notional loans	CGT arises on the disposal of shares on the difference between sales proceeds and price paid together with the amount charged to Income Tax on acquisition of the shares	Employers are required to file Form ESA by 31 March of the year after the award of shares or disposal	Employees report any disposal of shares in their income tax return
Forfeitable shares	Market value, ignoring risk of forfeiture	If the employee acquires shares for less than market value, income tax, USC and employee PRSI arise No employer PRSI arises where conditions are satisfied	CGT arises on the disposal of shares on the difference between sales proceeds and price paid	Employers must report the award or forfeiture of forfeitable shares in a Form ESA by 31 March in the year after the award or forfeiture	Employees report any disposal of shares in their income tax return
Growth/ flowering shares	Market value of the share	If the employee acquires shares for less than market value, income tax, USC and employee PRSI arise No employer PRSI arises where conditions are satisfied	CGT may arise on the disposal of shares on the difference between sales proceeds and price paid	Employers must report the award of growth/flowering shares in a Form ESA by 31 March in the year after the award	Employees report any disposal of shares in their income tax return
Restricted stock units	Nil	If an employee receives shares, income tax, employee PRSI and USC arise on vesting. No employer PRSI arises. If an employee receives cash to the value of shares, income tax, employee and employer PRSI, and USC arise	CGT may arise on the disposal of shares on the difference between disposal proceeds and the market value of the shares at the date of acquisition	Employers are required to file a Form ESA with Revenue by 31 March in the year after vesting	Employees report any disposal of shares in their income tax return

Share Valuation

To ensure that the intended tax treatment of the schemes applies, it is important to make sure that employees acquire the shares at fair market value and are not seen to have received a benefit: free or discounted shares. Where shares are acquired for less than market value, a charge to PAYE, USC and PRSI arises on the difference between the price paid for the shares by the employee and the fair market value of the shares on acquisition under the provisions of s112 TCA 1997.

Revenue guidance on valuing shares for the purpose of share schemes is limited. However, there are several provisions in the tax legislation dealing with valuations, such as s548 TCA 1997, which provides a definition of market value that is referenced in s122A (notional loans on shares), s128C (convertible shares) and s128D (restricted shares) TCA 1997. Therefore, valuing shares should be specific to the type of scheme envisioned, given that some of the schemes – forfeitable shares and restricted shares, for example – require the valuation to be obtained without factoring in such restrictions.

The responsibility for determining the market value of shares for the purpose of a share scheme lies with the employer, given the PAYE risk that exists should free or discounted shares be given to employees. Section 985A(3) TCA 1997 provides that employers should operate PAYE based on the best estimate of fair market value, and to satisfy this requirement obtaining independent third-party valuations is deemed best practice. Where a company is in its infant stage, valuing its shares can be difficult. This, coupled with the cost of obtaining the valuation, can prove to be a challenge for some companies.

For share award schemes it is also important to highlight the application of minority discounts, which can be up to 70%, to conclude on the fair market value of the shares. Such discounts aim to reflect the small shareholding in the business and the lack of control over the affairs of the company. It is important, however, to note that the use of minority discounts should be consistent for similar transactions in the business, and prior thought should be given to their use in an employee share award scheme scenario.

Revenue Intervention

Although there is always a risk that Revenue may question or raise an intervention in relation to an employee share incentive scheme – particularly, the company valuation used – it has not been common in practice to date. It is worth noting, however, that tax practitioners have seen an increased amount of interventions from Revenue in recent months, which means that interventions in relation to employee share incentive schemes may become more frequent. This is coupled with the fact that Revenue has in the past undertaken an exercise in relation to ensuring that the correct taxation rules were applied to options, which yielded massive revenues for it, so an intervention in this area cannot be ruled out.

It is also important to highlight that employee share award schemes that are in operation will also be examined vigorously by independent tax practitioners should the company be examined under due diligence. It is important to ensure that all aspects of the schemes are undertaken properly and with due care, including producing a reasonable company valuation. This will help the company to experience a smooth due diligence process (and avoid buyers' asking for certain indemnities) in relation to employee share schemes in what can sometimes be a stressful process for companies and their shareholders.

Conclusion

Tax practitioners are seeing a big appetite among employers for employee share incentive schemes as a means of attracting new and retaining existing talent. Employers have a desire for bespoke schemes whereby they have an involvement in designing the structure of the scheme to best suit the company's needs. Employers prefer Revenue-unapproved schemes, given the flexibility and control that those schemes offer to them. Employers must, however, be mindful of the terms, conditions and reporting obligations of each scheme and must ensure that they fully understand the PAYE risks involved should incorrect values and discounts be used. Overall, the commercial and tax considerations for the company and employee will influence the choice of scheme. The hope is that whatever scheme is deemed most suited is the scheme that will succeed in aligning the employee and the company with similar goals and objectives for the greater good of the company's business.

Martin Phelan
Head of Tax, Ireland, Simmons & Simmons LLP

TAC VAT Determination: Right to Defence and Knowledge of Fraud

Introduction

In December 2022 the Tax Appeals Commission (TAC) published a significant decision (31TACD2023) regarding the right to a defence under EU law. The case concerned a VAT notice of assessment ("the assessment") disallowing VAT inputs of €6.5m claimed by a taxpayer over a number of years. The assessment was issued after a lengthy investigation by Revenue into VAT fraud, which formed the basis of Revenue's contention that the taxpayer knew or should have known that the transactions to which the VAT inputs related were connected to VAT fraud.

The taxpayer appealed the assessment on two grounds:

- that its right to a defence under EU law was violated; and
- that Revenue had made an incorrect finding that the taxpayer knew or should have

known that the taxpayer was involved in transactions connected with the fraudulent evasion of VAT.

Right to a Defence

The taxpayer argued that Revenue had acted in breach of its right to a defence under the EU Charter of Fundamental Rights (the "Charter"). This was based on the fact that although Revenue had made its determination after a lengthy and extensive investigation into the affairs of the taxpayer, it had nevertheless failed to provide the taxpayer with access to the information and documentation on which its conclusions were based before the issuance of the assessment. This was in spite of the taxpayer's request for a right of reply to the allegations before the raising of the assessment. Thus the taxpayer was not afforded the opportunity to address the allegations against it before the assessment was raised, contrary to precedent in the Court of Justice of the European Union (CJEU) case of *Glencore Agriculture Hungary Kft. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* C189/18.

Although the facts underpinning the taxpayer's appeal were not in dispute, Revenue sought to make several arguments, as follows.

Jurisdiction

Revenue argued that the taxpayer did not take an appeal to the courts to declare the assessment a nullity and had, instead (with the benefit of legal advice at all relevant times), opted to use the mechanisms of the TAC, which are premised on the existence of a valid assessment. Here Revenue, in effect, called into question the jurisdiction of the TAC to deal with questions of administrative law, even though in an earlier meeting with the taxpayer it had informed the taxpayer that it would be a matter for the TAC. It is worth noting that in Ireland the general position is that only the High Court (subject to appeal to the Court of Appeal and/or the Supreme Court) has power of judicial review of administrative acts. However, the Appeal Commissioner relied on the fact that the Finance (Tax Appeals) Act 2015 empowers the TAC to both hear and determine appeals under Irish VAT law, which, in turn, is governed by EU law. The Appeal Commissioner also pointed to the following cases, which established a duty on all bodies dealing with disputes to apply EU law and the TAC's jurisdiction to apply it:

- CJEU case *Commissioner of An Garda Síochána v Workplace Relations Commission* C-378/17,
- CJEU case *Banco de Santander SA* C-274/14 and
- Supreme Court case *An Taisce v An Bord Pleanála* [2020] IESC 39.

In the *Workplace Relations Commission* case the CJEU found that all organs of the State have an obligation to enforce EU law. The *Santander* judgment further clarified that this obligation applies to all competent national authorities when making decisions, not only judicial authorities. The judgment in the *Workplace Relations Commission* case was considered by the Supreme Court in the *An Bord Pleanála* case, which commented that:

> "It would therefore seem to be the case in accordance with this judgment that a body such as An Bord Pleanála would be required to disapply national measures of whatever type, if inconsistent with EU principles...If applied literally, that judgment is capable of having widespread ramifications for the jurisdiction of national non-court bodies, or administrative entities, which are called upon to apply national legislation where an EU measure is relevant. Such bodies, under whose remit EU rights may arise, include the Environmental Protection Agency, the Tax Appeals Commission, the Valuation Tribunal, the Refugee Appeals Commission, the Information Commissioner as well as the District and Circuit Courts."

Finally, in an *obiter dictum* to *Lee v the Revenue Commissioners* [2021] IECA 18 Murray J stated that:

> "If a taxpayer wishes to contend that the application of a particular provision of the TCA breaches EU law, then the Appeal Commissioners must address that contention if it is relevant to the matter with which they are seised and, if it is appropriate and necessary to do so to decide that case, to disapply the provision or otherwise exercise their powers so as to ensure that EU law is not violated. The same principle dictates that the Appeal Commissioners may entertain claims based upon the doctrine of abuse of rights in European law. These principles derive from the mandates of European law. Neither expand the jurisdiction of the body as a matter of national law."

While acknowledging that those remarks were *obiter* and concerned the predecessor to the TAC, the Appeal Commissioner concluded that the TAC has jurisdiction to apply the doctrine of "abuse of rights" based on the precedent set in the *Glencore* case. Here, the Appeal Commissioner was satisfied that the taxpayer's claim was grounded on such a doctrine.

Taxpayer's rights were not breached

Revenue argued that the taxpayer's rights under EU law were not breached, because the assessment was not a "final decision" that adversely affected the rights of the taxpayer but was, rather, a step in a wider process that the taxpayer "was invited to engage with". In support of this argument Revenue referred to the email enclosing the assessment, which invited the taxpayer to reply to the findings made against it. This argument was rejected by the Appeal Commissioner, who found that the "raising of the assessment against the Appellant was not a neutral step in a process of engagement between the parties, but was the culmination of [Revenue's] investigation into the Appellant". Therefore any right to information and to present a defence arose before the issuance of the assessment.

The Appeal Commissioner considered that the CJEU's jurisprudence on the right to defence in VAT cases such as this one was clear, citing the decision in *WebMindLicenses Kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* C-419/14, where it was held that the taxpayer must have the opportunity "in the context of the administrative procedure, of gaining access to that evidence and of being heard concerning it". Such an opportunity was not presented to the taxpayer here, and therefore its right to defence was breached. Furthermore, the Appeal Commissioner noted that Revenue is required to respect the rights protected by the Charter when implementing EU law (such as in this instance) and is also obliged to interpret national measures in conformity with the Charter whenever they come within the scope of EU law.

Disclosure not necessary

Revenue also sought to argue that it should not be required to provide the taxpayer with a file containing the evidence against it because all of the information relevant to the matter was contained in the taxpayer's own records. Although the Appeal Commissioner accepted that the vast majority of the information relevant to the assessment originated from the taxpayer, he found that this did not disapply Revenue's obligations toward the taxpayer under the judgment in the *Glencore* case.

Placing the burden on the taxpayer to guess what information Revenue intended to rely on, from the entirety of its documents, would be contrary to the CJEU decision in the *Glencore* case that:

> "the requirement...for a person to be able to make his views known as regards the evidence on which the authorities intend to base their decision means that the addressees of that decision must be in a position to be aware of that evidence".

Therefore, Revenue had an obligation to provide the file of evidence on which it sought to rely. The CJEU held that a tax authority can restrict access to information and documents if "objectives of public interest" warrant it; however, the Appeal Commissioner was satisfied that no such objectives were invoked by Revenue in this instance.

The Appeal Commissioner therefore found in favour of the taxpayer that the assessment was invalid based on the "abuse-of-rights" principle.

Revenue Finding Was Incorrect Based on the Facts

Despite allowing the appeal based on the abuse-of-rights principle, the Appeal Commissioner set out what his finding would have been had he **not** made that decision. Having reviewed the extensive evidence offered by both parties, he reached the conclusion that Revenue had failed to demonstrate that the taxpayer "knew or should have known" that the transactions that it had entered were likely fraudulent in nature, in line with the test in the CJEU decision in *Axel Kittel v État belge* C-439/04.

In *Mobilx Limited (in administration) v Revenue and Customs Commissioners* [2010] STC 1476 the English and Wales Court of Appeal stated, *inter alia*, that:

> "The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who 'should have known'. Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel*."

Revenue did not allege actual knowledge of the fraud on the part of the taxpayer; rather, it argued that it "ought to have known", based on a cumulative consideration of the totality of the relevant facts. Revenue submitted that objective evidence of what occurred included "traders newly registered for VAT accumulating huge sales, on atypical credit terms, failing to pay VAT, and disappearing, following significant disruption to the market". It was argued that this provided more than enough warning to a person prepared to look at the evidence. Furthermore, it was submitted by Revenue that the taxpayer had not taken sufficient due diligence steps before commencing business with the fraudulent traders.

The taxpayer argued that there was no objective evidence before the Appeal Commissioner to demonstrate non-payment of VAT by anyone, or the connection between that non-payment and the commission of a fraud. The taxpayer had no way of establishing whether or not the suppliers accounted for VAT and no way of establishing whether their failure to do so was as a result of fraud.

The Appeal Commissioner made a number of findings of material fact and determined that the taxpayer had carried out a degree of due diligence on the traders, including sourcing IDs, proof of address, and certificates of registration and incorporation, where applicable. However, the Appeal Commissioner was not satisfied that the taxpayer demonstrated the expected care in its due diligence on the missing traders, especially given the heightened risk of fraud arising from the frequently transitory nature of their trading.

Notwithstanding the insufficient due diligence carried out, the Appeal Commissioner determined that there was no clear evidence that the taxpayer knew or ought to have known that its transactions were connected with VAT fraud or that there was VAT fraud present in the particular industry. External industry factors made it reasonable for the taxpayer to deal with the missing traders rather than established traders in the market in an attempt to make a more substantial profit. The Appeal Commissioner had regard to the *dictum* of Arden LJ in *Davis & Dann Limited v HMRC* [2016] EWCA Civ. 142, where it was noted that the level of knowledge required for "ought to have known" was "the no other reasonable explanation standard". The Appeal Commissioner was satisfied that Revenue had not shown that the taxpayer met this hurdle in this instance.

Conclusion

The most significant aspect of this decision is the Appeal Commissioner's willingness to accept arguments based on EU law. As Irish VAT law is based on an EU Directive, the TAC is obliged by judgments of the CJEU to implement EU law, including the "abuse-of-rights" doctrine. It is no surprise therefore that Revenue has appealed the decision to the High Court by way of case stated on a point of law. To date, the appeal has not been listed for hearing.

From the taxpayer's point of view, this was clearly a good outcome. Although Revenue has appealed the decision to the High Court, the Appeal Commissioner has set the bar very high to overturning the decision in full. Given that the appeal was allowed on both procedural and factual grounds, it is unlikely that the High Court's ruling will adversely impact the taxpayer.

It is worth considering how EU law might impact appeals over direct tax assessments. At present, the majority of Irish direct tax legislation is domestic in its origination. However, the EU's influence on Irish direct tax has steadily increased over time, including through the Mutual Assistance and Anti-Tax Avoidance Directives. Of particular note, the Pillar Two Model Rules, arguably the most radical change to the Irish corporation tax system since the 1990s, have been implemented through an EU Directive. Unless the courts rule otherwise, it is likely that taxpayer rights under EU law will feature in direct tax cases in years to come.


Dara Higgins
Partner, Matheson LLP
Freda Mc Geough
Associate, Matheson LLP

VAT and Holding Companies: Review of the *Covidien* Case

Introduction

The judgment in the case of *The Revenue Commissioners v Covidien Limited* [2024] IEHC 192 was delivered on 11 April 2024 and upholds the earlier determination of the Tax Appeals Commission (TAC), 81TACD2022, in favour of the taxpayer. There is a large body of case law from the Court of Justice of the European Union (CJEU) endorsing the broad scope of the VAT recovery entitlement for "active" holding companies, but this case is important owing to its particular facts and given the focus on VAT deductibility in respect of the costs associated with corporate transactions. The High Court's decision will be welcomed by taxpayers and practitioners seeking to determine whether a holding company is entitled to VAT recovery in certain circumstances but also serves as a useful reminder of the importance of ensuring appropriately documented intra-group arrangements to support a claim for VAT recovery for relevant holding companies.

The taxpayer's ability to adduce clear oral and documentary evidence in support of its claim at TAC level was essential to its appeal.

Recap on VAT Recovery for Holding Companies

Before delving into the details of the *Covidien* case, it is helpful to summarise the established rules in respect of VAT recovery for holding companies.

The question of whether a holding company can deduct the VAT incurred on its costs has been the subject of much litigation at CJEU level over the last 30 years or so. The overarching principle that emerges from such case law is that a holding company can reclaim the VAT that it incurs on relevant costs, provided it is engaged in the supply of services to its subsidiaries for consideration and the costs incurred have a direct link to this activity, or to the business of the company as a whole.

Holding companies broadly fall within one of three categories for VAT recovery purposes:

- **Active holding companies** – Holding companies that are engaged in the supply of services to subsidiaries for consideration, and are therefore entitled to VAT recovery, are typically referred to as "active holding companies", and the services supplied are normally given the umbrella term "management services".
- **Passive holding companies** – By contrast, those companies that simply hold shares in subsidiaries in a passive manner, without supplying any services for consideration, are referred to as "passive holding companies" and are generally not entitled to recover the VAT incurred on their costs. Note that the receipt of dividends does not constitute consideration for these purposes. The holding of shares in a passive manner is considered a "non-economic activity" for VAT purposes.
- **Mixed holding companies** – The final category of holding company is one that is engaged in the supply of services to some subsidiaries for consideration but holds other subsidiaries in a passive manner. These holding companies are referred to as "mixed holding companies" and are required to apportion their VAT recovery entitlement to ensure that deduction is made only for the portion of VAT incurred that is attributable to their taxable economic activity. Any VAT incurred on costs directly attributable to the non-economic, passive holding of subsidiaries is irrecoverable.

These categories of holding companies are also identified in Revenue's guidance in its Tax and Duty Manual "VAT Deductibility for Holding Companies". Although the law in this area is now relatively settled in many respects, some ambiguity remains when determining whether to restrict the deductibility of VAT for holding companies in certain circumstances – for example, in determining precisely when costs should be attributed to a non-economic activity for mixed holding companies. The deductibility of costs associated with corporate mergers and acquisitions involving the holding company can also be contentious. Tax authorities may take the view that the costs of certain transactions are not directly attributable to the taxable activity of the holding company (even an active holding company) but to the ultimate shareholders' investment in the corporate group, such that VAT recovery should be restricted. This is among the arguments that Revenue sought to advance in the *Covidien* case, albeit unsuccessfully. A summary of the background to this case is set out below.

Background

The taxpayer, Covidien Limited, is an Irish-incorporated and Irish-tax-resident entity that acted as the ultimate holding company for the Covidien Group during the relevant period of 1 July 2011–31 December 2014 ("the Appeal Period"). The Covidien Group is a multinational healthcare business that focused on three particular market segments during the period: medical devices, medical supplies and pharmaceuticals.

During the Appeal Period, the taxpayer held four subsidiaries directly and approximately 300 subsidiaries indirectly, 84 of which were described as "active" subsidiaries.

Covidien Limited entered into two agreements relevant to the supply of management services to subsidiaries:

- The first service agreement was entered into on 26 June 2009 with a group company, Tyco Healthcare Group LP ("Tyco"), for the purchase of services required to provide management services to subsidiaries. The agreement provided that these services consisted of corporate executive, business development, human resources, internal audit, finance, tax, legal, treasury and risk, management and operations services.
- The second service agreement was for the supply of management services by

the taxpayer and was entered into on 26 September 2009 with four of the company's indirect subsidiaries, being Nellcor Puritan Bennett Ireland, Mallinckrodt Medical Imaging Ireland, Mallinckrodt Medical BV and Covidien AG (referred to as "the Service Recipients" throughout the case).

For the purposes of the appeal, the costs incurred by the taxpayer that related to the ongoing holding and management of subsidiaries were referred to as the "ongoing costs" and, we understand, essentially related to the VAT recovery in respect of the ongoing fees charged by Tyco.

Separately, the Covidien Group went through a restructuring process during the Appeal Period, which involved the spin-off of its nuclear medicine and pharmaceutical business into a newly formed company, Mallinckrodt Plc, as part of a project known as "Project Jameson". The VAT incurred on costs associated with Project Jameson was the second category of costs that were the subject of the appeal.

The final category of costs in this case arose from the well-publicised "inversion transaction" involving the acquisition of the Covidien Group by Medtronic ("the Medtronic Transaction"). The acquisition was effected by way of a cancellation scheme of arrangement approved by the High Court and resulted in the cancellation of existing shares in the taxpayer and the issuance of fully paid new shares in the taxpayer to two Medtronic companies.

The taxpayer had claimed full VAT recovery for the period in respect of all "ongoing costs" that it determined to be related to its management activity and in respect of all costs related to Project Jameson and the Medtronic Transaction. After an audit, Revenue concluded that only partial VAT recovery would be permitted in respect of the ongoing costs and that no VAT recovery entitlement arose for the taxpayer in respect of the costs associated with Project Jameson or the Medtronic Transaction.

Accordingly, Revenue raised a number of assessments for VAT for the Appeal Period, which together totalled €45,936,882.

TAC Determination

The TAC proceedings lasted for nine days and involved multiple days of oral testimony and the submission of a large quantity of documentary evidence. This is reflected in a 172-page TAC determination, which examines the evidence provided, together with both parties' legal submissions, in detail. The Appeal Commissioner made a series of material findings of fact on foot of the evidence provided, most of which were highly supportive of the taxpayer's case. These findings of fact are summarised below:

- The taxpayer's board made decisions related to all aspects of the Covidien Group's business, which were then actioned by executive officers and appropriate personnel in relevant subsidiaries.
- There was detailed ongoing involvement by the taxpayer's board in the management of the Covidien Group as a whole and in relation to specific group projects and initiatives.
- Through the first service agreement and the second service agreement, the taxpayer was providing management services not only to the four Service Recipients but also to the 84 subsidiaries connected to them.
- The evidence provided did not support a finding that the taxpayer was engaged in a non-economic activity. The taxpayer was not a passive holding company but at all material times was actively engaged and directly and indirectly involved in the management of its subsidiaries and sub-subsidiaries. Such involvement was "for the purposes of the exploitation of its holdings in those companies for the purposes of obtaining income therefrom on a continuing basis".
- The taxpayer received a single composite supply of services from Tyco. Furthermore, there was a direct and immediate link

between (a) the input costs, being on the single supply received from Tyco, and (b) the supply of management services by Covidien to the four Service Recipients and their 84 subsidiaries. The services purchased from Tyco were used in their entirety for the purposes of the supply of services to subsidiaries.

- The decision to undertake the Project Jameson spin-off of Covidien's pharmaceutical business, structured as a "three-cornered demerger", and the subsequent implementation of such decision were an integral part of the active management by the taxpayer's board of the group's business as a whole. The structure of the group among global business units meant that the transaction affected not only the Service Recipients but also their respective subsidiaries throughout the group. Consequently, the services supplied to the taxpayer as part of Project Jameson had a direct and immediate link to the taxpayer's taxable output supplies to both its direct and its indirect subsidiaries.
- The role of the taxpayer's board in the initiation, oversight and execution of the Medtronic Transaction was an integral part of the active management by the taxpayer of the Covidien Group business as a whole.

Points of Law Referred to the High Court

After the taxpayer's successful appeal at TAC level, Revenue appealed the determination by way of case stated to the High Court, and the main points of law referred for determination were whether the Appeal Commissioner was correct in law in:

- his approach to issues of fact, on the one hand, and issues of law, on the other, and in particular, the identification of material findings of fact in his determination;
- concluding that the taxpayer was at all material times wholly engaged in an economic activity for VAT purposes;
- considering that the receipt of a single composite service from Tyco and the supply of a single composite service by the taxpayer were relevant for the purposes of ascertaining the level of input VAT deductible by the taxpayer;
- concluding that there was a direct and immediate link between the entirety of input costs suffered by the taxpayer on the supply of services that it received from Tyco under the first service agreement and the supply of taxable management services by the taxpayer under the second service agreement to the Service Recipients and, through them, to the other 84 legal entities connected to the Service Recipients;
- concluding that the taxpayer was entitled to deduct the VAT inputs that it incurred in respect of services that it received in relation to Project Jameson; and
- concluding that the taxpayer was entitled to deduct the VAT inputs that it incurred in respect of services that it received in relation to the Medtronic Transaction.

Ultimately, Nolan J found in favour of the taxpayer in respect of all questions raised for determination.

High Court Decision

Legal framework

The judge began by examining the legal framework in respect of the entitlement to deduct VAT and noted that the key legislative provisions were Articles 9 and 168 of Council Directive 2006/112/EEC ("the VAT Directive"). Article 9 deals with "economic activity" and provides that "the exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity". Article 168 provides that VAT is deductible on the purchase of goods and services "insofar as the goods and services are used for the purposes of the taxed transactions of a taxable person". This is referred to in the judgment as the "used for" test.

The judge also cited with approval a passage from the UK Supreme Court case of *Revenue and Customs Commissioners v Frank A Smart & Son* [2018] STC 806, which helpfully summarises the principles from relevant CJEU case law in respect of the "used for" test and the entitlement to deduct VAT.

Service agreements and the "economic reality" principle

The disregarding of the written agreements in favour of the "economic reality" was fundamental to the taxpayer's success in this case. The second service agreement provided for the supply of services by the taxpayer to the four Service Recipients only. However, there is a principle in VAT law that requires the terms of written agreements to be disregarded where they do not conform to the legal and economic reality.

In this regard, it was determined at TAC level that, in reality, the taxpayer provided services to 84 active subsidiaries, although the consideration for all of these supplies was provided by the four Service Recipients. The TAC found that the operating structure and inter-company transfer pricing policy meant that there was a logic and a benefit to the four Service Recipients' paying for the management services received by their 84 subsidiaries. On the basis of this finding, the TAC determined that the taxpayer was not a "mixed holding company" and was not engaged in a "non-economic activity". This was essential to the taxpayer's case, as the corollary must be that the taxpayer was engaged only in economic activity, such that any VAT incurred in the course of its activities would be deductible.

Although there was no appeal on the finding of fact, Revenue argued in the High Court that the TAC made a mistake in law in concluding that the written agreements should disregarded in this manner and contended that the taxpayer was bound by its own agreements. Nolan J noted that it seemed that the manner in which the service agreements were actually carried out varied from the precise wording of the agreements, and he upheld the principle that consideration of economic realities is a fundamental criterion for the application of VAT, citing two recent Irish cases in which the principle was applied (*Vieira Limited v Dermot O'Donagain (Inspector of Taxes)* [2021] IECA 334 and *Revenue Commissioners v Novartis* [2022] IEHC 642). The judge held that the Appeal Commissioner was entitled to come to his view that the taxpayer was engaged in a supply to all 84 subsidiaries for consideration based on the evidence that he heard.

Revenue also argued that, under the contract, the services were to be charged to the Service Recipients at cost plus 10% but in practice were charged at 40% of the cost of purchasing the services from Tyco. Revenue argued that this demonstrated that not all of the costs were consumed in the context of the management services supply and that a portion of the costs must have been attributable to a separate, non-economic activity and therefore should be irrecoverable. However, the taxpayer argued that it did not have to make a profit on the transaction in order to claim VAT recovery and that the TAC had found as a fact that the services acquired were used in their entirety for the supply of management services to subsidiaries. Nolan J noted that the disparity in price was due to transfer pricing reasons and agreed with the taxpayer's submission that there was no requirement to make a profit for VAT deductibility purposes. Accordingly, it was determined that the Appeal Commissioner could not be criticised in his approach to this issue. Although one can appreciate the logic of Revenue's argument, the CJEU has in the past rejected any attempts to confine VAT deductibility by reference to a strict equation of costs versus revenues.

It is interesting that the taxpayer was deemed not to be a "mixed holding company" in circumstances where it was found to be engaged in a supply of management services to 84 indirect subsidiaries, out of a total of approximately 300 subsidiaries in the wider group. The fact that only 84 of these companies were "active" was likely determinative, as it was perhaps possible to conclude that none of the activities of the taxpayer (or the costs incurred) related to the inactive subsidiaries. However, this was not addressed in the judgment. Questions, arguably, remain regarding when a holding company should be classified as a "mixed holding company" engaged in partial non-economic activity in the context of larger, multi-layered corporate groups where services are supplied to some but not other subsidiaries.

Single composite supply

The TAC determined that the supply of services from Tyco was a single composite supply, which could not be broken down into its constituent parts. Revenue argued that the TAC had erred in law in this finding. The taxpayer argued that Tyco's service covered a full range of management and professional services in the form of a single supply, a concept well known in VAT law, and that the TAC was correct in coming to its conclusion. Nolan J sided with the taxpayer, noting that the service must be viewed from the perspective of the consumer, and he agreed with the TAC's approach to the issue in considering the UK case of *HMRC v the Honourable Society of Middle Temple* [2013] UKUT 250.

It seems that the finding that there was a single composite supply greatly simplified the case for the taxpayer because, instead of the court's having to examine separately the merits of each element of the service supplied by Tyco, it was possible to focus on a single input for deductibility purposes.

Approach to issues of fact and law

Nolan J determined that the TAC was correct in its approach to issues of law, on one hand, and issues of fact, on the other. The judge cited the case of *Glynn v Revenue Commissioners* [2021] IEHC 780, in which Stack J noted that alleged errors of law by an Appeal Commissioner should be pleaded with particularity. Nolan J noted that this did not happen in this case, likely because it was hard to be particular. He also held that the Commissioner did not ignore the evidence or the submissions of either party, as these were laid out in detail in his determination. This is a case in which issues of law and fact were particularly intertwined.

Deductibility of VAT on "ongoing costs"

In addition to the arguments set out above, Revenue contended that the TAC had failed to address the issue of the deductibility of ongoing costs through the prism of EU law and had failed to engage with and correctly apply the "used for" test. However, the taxpayer argued that the TAC knew and applied the law correctly and had found that the taxpayer was not engaged in a non-economic activity but used the single composite supply of services received from Tyco wholly for the benefit of the 84 active subsidiaries. Ultimately, Nolan J determined that the TAC was correct in law in determining that the VAT on the ongoing services received from Tyco was deductible. The judge noted that the TAC had not failed to apply the "used for" test and had correctly considered EU law (Article 9 of the VAT Directive) when determining that the taxpayer was exploiting its property (namely, its shareholdings in its subsidiaries) for the purposes of obtaining income therefrom on a continuing basis.

The leading case of *Cibo Participations SA v Directeur régional des impôts du Nord-Pas-de-Calais* C16/00 was cited, in which it was determined that "direct or indirect involvement in the management of subsidiaries must be regarded as an economic activity where it entails the carrying out of transactions which are subject to VAT". In agreeing with the finding of the TAC, Nolan J held that the services provided by Tyco were utilised in their entirety for Covidien's economic activity, which was based on credible evidence. It was therefore unnecessary to consider whether the costs formed part of the general costs linked to the taxpayer's activities as a whole.

Project Jameson costs

In respect of Project Jameson, Revenue argued that the TAC had erred in its characterisation of the planning and execution of the transaction as constituting an economic activity. Revenue submitted that the TAC should have considered whether the costs were used for the "taxed transactions" of the taxpayer and asserted that they clearly were not used for the provision of management services, nor did the taxpayer receive any consideration for its activities in this regard. Revenue also argued that the transaction involved a "share-for-share" exchange at the shareholder level, the implication being that the transaction was undertaken by the company's shareholders and not the company itself, such that the costs should not be deductible.

By contrast, the taxpayer argued that the decision to enter into the Project Jameson transaction was an integral part of the active management of the Covidien Group's business as a whole and so the costs had a direct and immediate link to taxable output supplies.

Nolan J upheld the TAC's determination on this point and ruled that the VAT incurred on the Project Jameson costs was deductible in full. With regard to the argument that there was a transaction at the shareholder level only, Nolan J pointed out that the transaction was, in fact, a three-cornered demerger that involved the spin-off of the business by way of a distribution of a dividend *in specie* by the taxpayer.

The judge noted that the TAC's determination on the point was concise but determined that the TAC had correctly applied EU law and considered the range of evidence provided in respect of Project Jameson. He noted that the oral evidence and board packs provided demonstrated the role of the taxpayer's board in the group as a whole, particularly with respect to specific projects and initiatives within the group. The judge held that the taxpayer was at all material times wholly engaged in economic activity, including in the context of Project Jameson. He noted that it would be illogical to be wholly engaged in economic activities at all material times yet not be wholly engaged in economic activities during a crucial reconstruction of the business of the taxpayer, i.e. Project Jameson.

The judge further held that the Project Jameson costs were comparable to those analysed in the CJEU decision in the joined cases of *Larentia + Minerva v Finanzamt Nordenham* C-108/14 and *Finanzamt Hamburg-Mitte v Marenave Schiffahrts AG* C109/14. In this respect the judge referred to the principle that a taxable person has the right to deduct VAT in respect of costs even where there is no direct and immediate link between the particular costs incurred and the output transactions of the business, provided those costs are part of the general costs of the business and are, as such, components of the price of the goods or services that the business supplies. The judge held that:

> "[s]uch costs do have a direct and immediate link with a taxable person's economic activity as a whole. Restructuring of the company had as its goal the benefit to the group as a whole and thus to the price of the goods and services which the taxpayer supplied."

Medtronic Transaction costs

Finally, with respect to the Medtronic Transaction, Revenue argued that the TAC had erred in law in equating the transaction to the share issuance activity analysed in the *Kretztechnik AG v Finanzamt Linz* C-465/03 decision, as there was no capital-raising purpose in effecting the transaction. Revenue also argued that it was a mistake in law to hold that the board's initiation, oversight and execution of the transaction was an integral part of the active management by the board of the taxpayer as a whole. There was also no finding that the transaction affected group companies, which Revenue argued was fatal.

The taxpayer's arguments for deductibility were essentially in line with its arguments in respect of Project Jameson, i.e. that the costs formed part of its general costs and the VAT thereon was therefore deductible, as it was not engaged in an exempt or non-economic activity.

In his deliberations Nolan J noted that the TAC's finding that the board's involvement in the transaction was an integral part of the active management of the Covidien Group's business as a whole was logical and consistent on the basis that it found that Covidien had been wholly engaged in an economic activity. In response to Revenue's argument that there was no finding that the transaction affected group companies, he stated:

> "The Medtronic transaction was clearly a transaction for the benefit of the group as a whole which in my view clearly arises from [the Commissioner's] finding that the taxpayer was wholly engaged in economic activity. Therefore, it seems to me that this is a finding that I cannot set aside since I do not believe that no reasonable commissioner would have come to the same conclusion."

Accordingly, the judge ruled that the TAC was correct in law in concluding that Covidien was entitled to an input VAT deduction in respect of costs related to the Medtronic Transaction.

Considerations for Practitioners

This case provides another helpful precedent in support of the entitlement of active holding companies to reclaim VAT on costs – in particular, in respect of the costs of corporate transactions. Given the helpful findings of fact at TAC level, it is perhaps not surprising that the taxpayer was determined to be entitled to full VAT deducibility. The earlier case of *Ryanair v The Revenue Commissioners* C249/17 had, arguably, already given full expression to the principle that active holding companies are entitled to reclaim the VAT incurred on transaction costs in both the Irish and EU courts (at least in the context of acquiring companies to which management services are intended to be supplied). However, Revenue may have considered that it had a stronger case in this context, given the particular nature of Project Jameson and the Medtronic Transaction and in light of the fact that the taxpayer had entered into agreements with only four indirect subsidiaries. Our understanding is that the case has not been appealed.

In the context of corporate transactions, Revenue's "VAT Deductibility for Holding Companies" currently notes that some costs will not be deductible even if incurred by active holding companies. The guidance specifically cites as an example the "costs of restructurings that seek to create shareholder value but do not relate to the taxable economic activity of the holding company". The *Covidien* case demonstrates that a strict differentiation of costs in this manner may be misguided and that costs that create shareholder value are capable of deduction provided they form part of the general costs of a company that is engaged in fully taxable activities.

Finally, a key takeaway for practitioners is to ensure that there is appropriate documentation of intra-group arrangements where the intention is to have an active holding company. The fact that the taxpayer had put in place management services agreements with subsidiaries was, arguably, essential to its appeal. Although the written agreement unhelpfully provided for a supply of services to just four subsidiaries, the taxpayer's ability to provide strong witness testimony and documentary evidence, such as board packs, to show that, in reality, the company was engaged in a supply of services to a larger number of subsidiaries was very important. Where applicable, holding companies should ensure that they take steps to document clearly the active management role played in the business of its subsidiaries in order to support their VAT deductibility position in the event of a Revenue challenge.

Adrian Godwin
Managing Director, Oaktree Financial Services Limited

Navigating Pension Contributions: Considerations for Employees, the Self-Employed and Dual-Income Earners

Introduction

Income from employment or self-employment provides individuals with the means to support themselves and their dependants over the course of their working life. Earned income will cease on retirement, at which stage the majority of individuals will experience a reduction in income levels. Setting up a pension and contributing to it throughout one's lifetime are crucial for securing one's financial future and replacing lost income in retirement. This provides a structured way to save for retirement while offering tax benefits and the potential for compound growth over time.

Pensions can often be viewed as complicated, so first I will go back to basics and outline the types of pension structure, who can contribute to them, how much you can contribute based on your type of income, and the tax relief available. I will then cover some scenarios to

Table 1: Available pension structures based on earnings source.

Relevant earnings	Pension structures available
Self-employed individuals – earnings from a self-employed trade or profession taxed under TCA 1997, Schedule D, Case I or II	Personal retirement savings account (PRSA) Personal pension/retirement annuity contract (RAC)
Employees in non-pensionable employment[1] – TCA 1997, Schedule E, income	PRSA Personal pension/RAC
Employees/proprietary directors Schedule E, income	Executive/occupational pension scheme[2] (defined benefit or defined contribution) PRSA (employer contributions are no longer liable to tax as a benefit-in-kind since 1 January 2023) Additional voluntary contribution (AVC) schemes (including AVC PRSAs) Buy-out bond[3]/retirement bond Pan-European Personal Pension Products (PEPPs)

[1] A “non-pensionable employment” is one where the individual is not included for retirement benefits in an approved occupational pension scheme relating to the employment or where the sole benefit arising is a lump sum payable on death (Revenue Pensions Manual, Chapter 21, “Retirement Annuity Contracts”, section 21.2). Pensionable employment includes PRSAs where an employer contributes after 1 January 2023.

[2] Most clients call their executive/occupational pension scheme their “company pension”.

[3] A buy-out bond (BOB) can only take a transfer from an occupational pension. The original employer pension scheme rules continue to apply to a BOB, and you can choose retirement options based on your original employer scheme. This means that you have an additional retirement option: take a lump sum based on salary and service and purchase an annuity with the balance. This can be helpful where the lump sum is greater than 25% and a large part of the scheme value. It is expected that BOBs will become obsolete in time as transfers to PRSAs are used more frequently. It is important to note that the BOB can be more suitable than a PRSA for individuals in certain circumstances. A BOB cannot transfer to a PRSA at present, but it can transfer to an executive/occupational scheme.

watch out for, particularly for those who have dual incomes.

Back to Basics

The following table illustrates the types of pension available based on earnings source.

Income Tax Relief

Personal contributions (and AVCs, if a member of an occupational pension) receive income tax relief at your marginal rate. There is no relief for PRSI or USC.

Relief is available on pension contributions up to an annual limit based on your age and net relevant earnings. Net relevant earnings are capped at €115,000 for this calculation.

The following table outlines the relevant percentages.

Table 2: Age-related limits on tax-relieved pension contributions.

Age	Net relevant earnings
Under 30	15%
30–39	20%
40–49	25%
50–54	30%
55–59	35%
60+	40%

Net relevant earnings are relevant earnings less deductions such as:

- any losses or capital allowances relating to an individual's relevant earnings, e.g. plant and machinery used in the trade, and
- charges on income such as tax-deductible maintenance payments or covenants that are deductible for income tax.

An individual has until 31 October 2024 (14 November 2024, if doing their return online) to make a pension contribution for 2023 and elect to backdate the tax relief.

If an individual pays more than the limit (outlined above), then they can carry forward any unused relief to future tax years and offset it against relevant earnings for those years.

Professional sportspeople can claim income tax relief at 30% of the earnings cap (€115,000) irrespective of their age.

Tax relief is generally provided at source for employee contributions and regular AVCs to occupational pensions.

Tax relief will need to be claimed from Revenue via myAccount or ROS for any ad hoc contributions to an occupational pension, AVC PRSA or AVC-only scheme. This will also apply to those in non-pensionable employment who make a contribution to a PRSA or personal pension.

Self-employed individuals or their agents can claim tax relief on any pension contributions in their tax return.

Potential Pitfalls

A recent Tax Appeals Commission determination (94TACD2024) dealt with the issue of claiming tax relief for an AVC and the importance of ensuring that the request for tax relief is dealt with in time. In this case the extended filing deadline for the tax year 2022 was 15 November 2023; however, the request to claim tax relief was made by the appellant on 29 November 2023, the day that she received proof of the payment from the financial institution. The date on which the actual contribution was made has been redacted, so we can only assume that this was on or before 15 November. This case does not seem to question the timing of the contribution but highlights the importance of the timing of requesting the tax relief, which should be in line with s787(7) TCA 1997 and should have been done on or before 15 November 2023. This individual's AVC of €15,400 was put against her earnings from 2023, which naturally reduced any further AVCs that she could make up to 14 November 2024 for the tax year 2023. This case highlights the importance of ensuring that pension contributions are made promptly and that any proof required has been received well before the filing deadline.

Dual Incomes

When a person has dual income, there are specific rules around the income that needs to be "pensioned" first. This is most common when you have a person who is member of a contributory occupational pension scheme and has self-employed income or non-pensionable employment income. In some cases the pensionable salary uses up the earnings limit first, and this can reduce scope, or mean that there is no scope, for individuals to receive tax relief on pension contributions for their self-employed earnings.

This is best illustrated by example.

Mary (aged 45) is an IT specialist who earns €120,000 from her employment and is a member of her employer's occupational pension scheme, to which she pays 5% of her salary (€6,000 p.a.). She also has self-employed income from her yoga studio of €50,000 p.a.

Based on Mary's age, she can get tax relief on up to 25% of her net relevant earnings, capped at €115,000. As her earnings from her employment are greater than €115,000, we use the cap of €115,000 and multiply it by 25% to get a maximum tax-relievable contribution of €28,750. As Mary has already contributed

€6,000 to her scheme, she can make an AVC of €22,750 to her employer's scheme or to a separate AVC PRSA, if she prefers. Mary's pensionable income uses up the earnings limit first, and she therefore cannot make a pension contribution in relation to her self-employed earnings. This would apply even if she did not maximise her AVC to her employer's scheme or AVC PRSA.

Timing of Contributions and Leaving Employment

It is important to bear in mind that contributions to an employer pension scheme or an associated AVC PRSA may be made only while one remains in the relevant employment. Failing to realise and take account of this could result in a lost opportunity to make, and claim tax relief on, a contribution in the year in which one leaves or ceases employment. Again, this is best illustrated by example.

In July 2024 Mary (aged 45) decided to leave her IT job and focus 100% on her yoga studio. In October 2025 she is doing her tax return and wishes to make the maximum tax-relievable pension contribution. She earned €60,000 in her IT job and earned €75,000 from her yoga studio in 2024. Mary was a contributory member of an occupational pension and therefore has to "pension" her Schedule E income first; however, as she is no longer in service, she cannot contribute further to her employer occupational scheme or to an AVC PRSA in relation to that employer service. €60,000 of her earnings limit has been utilised, and therefore she can get tax relief only on a pension contribution of 25% of €55,000 of her self-employed earnings (i.e. €13,750). Mary then makes a contribution of €13,750 to a PRSA or personal pension in relation to her self-employed income. If she had considered her pension options before leaving her employment, she could have been able to receive personal tax relief on a total pension contribution of €28,750, rather than €16,750 (i.e. 50% of €6,000, plus €13,750).

Conclusion

As outlined above, there is much for advisors and their clients to consider in relation to pensions, particularly in advance of the income tax filing deadline.

Madeleine Delaney
Chief Executive, The Charities Regulator

Key Considerations When Engaging With Charities

Introduction

Ireland has more than 11,500 charities, from small, volunteer-only community groups to multi-million-euro organisations employing thousands of people. The diversity of the sector is reflected in the Register of Charities, which includes more than 3,600 schools, as well as libraries, museums, youth clubs, daycare centres and much more.

Aside from the societal impact that charities have, the sector is of significant importance to the Irish economy. Our report published last year on the social and economic impact of registered charities in Ireland, which we compiled with Amárach, estimated that 281,250 people were employed in the charity sector in 2021, the equivalent of almost one in eight workers.

Furthermore, total direct expenditure by Irish charities was estimated as being worth €18.6bn in 2022, an increase of 28% compared to 2018, when the impact of the sector was previously assessed. When the indirect and induced effects of activity are also included, the overall financial impact of the charity sector was estimated at €32.1bn in 2022.

All charities have one thing in common, whether they are a large organisation or one of Ireland's smaller charities (some 45% of charities, excluding schools, have an annual income of less than €100,000): public trust and confidence are the bedrock of their existence.

Robust, fair and proportionate regulation is a critical element for ensuring that trust and confidence grow and are maintained. Whereas charity laws in Ireland date back as far as the 1600s, the establishment of an independent regulator is a more recent development. The Charities Regulator, the independent statutory body that registers and regulates charities in Ireland, was established just 10 years ago, in 2014. Our remit is grounded in legislation – in particular, the Charities Act 2009 – and includes maintaining a public register of charities and ensuring compliance with charity law. We also deal with concerns raised with us about charities and, when necessary, can appoint inspectors to investigate the affairs of any charity.

Additionally, we provide services to certain charities through our Charity Services unit. It manages requests for the consent or direction of the Charities Regulator regarding practical matters that affect how certain charities deal with their assets, property and internal governance or continue to provide services to their beneficiaries. These include authorising the appointment of new charity trustees, approving cy-près schemes and authorising the disposition of charity property where a charity does not have a power of sale to deal with the property.

Regulation, although important, is only one element in ensuring that Ireland's charity sector thrives. Those who support and advise charities, whether on a voluntary or a professional basis, play a critical role, too, in making sure that charities are well run and that they comply with their obligations under charity law.

Tax advisers, accountants and lawyers are among the professional advisers that charities engage with. They are also among the volunteers who take on additional responsibilities as charity trustees. These are the volunteers who sit on the boards of Ireland's charities (or committees, in the case of associations) and are the people, under charity law, who ultimately exercise control over and are legally responsible for a charity.

In this article we look at some of the more common areas where support and advice can be provided and highlight guidance on our website.

Charity Trustees

More than 76,000 volunteers in Ireland take on additional responsibilities as charity trustees, carrying out important work in the governance and leadership of Ireland's charities, often alongside busy personal and work commitments. If you are a new trustee, one of long standing or perhaps someone who is thinking of becoming one, you should familiarise yourself with the responsibilities of being a charity trustee. You will find a range of guidance on our website to explain and to help you and your fellow trustees in your role.

The Charities Amendment Act 2024, which was enacted in July, contains a formal statement of the existing duties of a charity trustee applicable under common law. This provides clarity to charity trustees – and to those advising them – on their fundamental responsibilities.

Briefly, charity trustees are responsible for the control and management of the charity. This means that, even if the charity has employees, ultimate responsibility lies with the charity trustees. They must make sure that they have adequate systems, procedures and controls in place to ensure that they can fulfil their duties as charity trustees, act in the best interests of the charity and exercise due skill and care in its management. The Charities Governance Code contains material that assists charity trustees in this regard.

Whether you are a trustee of a charity or providing professional services to a charity, also make sure that you are familiar with the charity's key obligations under the Charities Act 2009. For example, it is essential to know when the charity's annual report is due to be filed with the Charities Regulator, and what your obligations are if you receive a statutory direction to provide information under the Charities Act 2009.

It is also the responsibility of charity trustees to ensure that the organisation engages in activities that advance its selected charitable purpose(s) only. The law protects donor intention, meaning that charitable property must be used for the charitable purpose for which it was donated. The Charities Act 2009 sets out the purposes that are recognised as charitable in Ireland and also stipulates that the purpose must be of public benefit. It is this public benefit requirement that distinguishes charities from other not-for-profit organisations. A charity must meet these requirements at all times.

Section 40 Charities

When the Charities Regulator was established, in 2014, some 8,000 organisations that already held a CHY number granted to them by the Revenue Commissioners were automatically deemed registered, in line with section 40 of the Charities Act 2009. A deemed registered charity remains on the Register of Charities only for so long as it continues to hold an entitlement to a charitable tax exemption. These are called section 40 charities.

Advisers should note that if a section 40 charity loses its CHY number, it is automatically removed from the Register of Charities and is no longer deemed to be a registered charity. There is no discretion in the Charities Act 2009 in relation to this.

If a section 40 charity involuntarily loses its CHY but continues to operate as a charity, it must make an application for registration under section 39 of the Charities Act 2009 or transfer any assets to another charity with similar purposes. At all times, charitable assets must be applied for exclusively charitable purposes.

Selling or Buying Charity Property

Matters related to the buying and selling of charity property are among the most common that are handled by our Charities Services unit. Often, applications for authorisation of a proposed sale are received late in the process – for example, after a contract for sale has been signed – which ultimately delays the closing of the transaction. Applications for authorisation involve a robust legal process and take time. A charity is authorised to act only in accordance with the provisions of its governing document. Most charities have the power to buy property, but not all charities have the power to sell property. The main reasons for this are:

- They had no written civil law governing document at the time when the property was acquired (as is the case with most older properties owned by religious charities).
- If they had a governing document, the powers given to the charity were very limited and did not provide the trustees with a power of sale without seeking regulatory authorisation or consent.
- The property title deed under which they acquired their property did not give them any power of sale or qualified the power of sale.
- Donor intention – the terms of the charitable bequest/gift of that property mean that they are required to hold it and use it for exclusively charitable purposes indefinitely, or to seek regulatory authorisation for any changes to those terms.

If trustees of any description are not given a power to do something, they must either seek permission for that action or seek to amend the trust under which they hold their property. This comes from the long-established trust law principle that roughly translates as “you cannot give yourself what you never had”.

The provisions of the Charities Act 1961 imply that there are additional restrictions for charity trustees, in that they may need to seek authorisation from the High Court, or the Charities Regulator, as an alternative, for transfers/sales of charity property. A charity has a power to sell/transfer its property if it was given the power or already had it at the time when it acquired the property. It cannot retrospectively give itself a power of sale.

Sales of charity property must be agreed on terms that are advantageous to the charity in all the circumstances, under section 34(1) of the Charities Act 1961. This means that the charity must get market value when selling its property. Market value means the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's-length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.

Off-market sales of charity property may be authorised in certain circumstances. For example, a special purchaser may be willing to pay above the estimated market value for a property. In all cases we encourage charity trustees to seek independent advice at an early stage and procure detailed valuation reports before agreeing to sell charity property. As they are acting in a trustee capacity, they cannot deal with the property as freely as if it were their own.

If regulatory authorisation is required for charity property sales, charities must speak to their advisers early, ensure that they have title to the property before marketing it and make an application through the Charities Regulator's online portal. The regulatory authorisation process is an alternative to a High Court application. It is a legal process that is necessarily robust in the public interest. Therefore, the authorisation process can take several months to complete, so contracts and all parties' expectations should be managed accordingly.

Whether or not regulatory authorisation is required, charity trustees and their advisers should follow the guidance in relation to charity property, to protect donors' interests and the public interest.

Winding up/Transferring a Property from One Charity to Another

Charities cannot transfer charity property at below market value to any other organisation or anyone other than a charity. This is in order to protect the equity in charity property, so that it is applied only for its beneficiaries or the beneficiaries of another charity. If the Charities Regulator's authorisation is required for the transfer, the charity must make an application under section 34(2) of the Charities Act 1961. This sets out the background to the application, confirms the market value of the property and demonstrates why it is of benefit to both the transferor and the recipient charity to make the transfer at below market value.

There is a detailed review process, in the interests of protecting donor intention and ensuring that charity trustees are acting in accordance with the law. Although it is not the Charities Regulator's role to advise charity trustees, it will not exercise its discretionary statutory power if a charity has not shown that its proposal is within the law and how it is of benefit to the charity to transfer its property as proposed, in all the circumstances.

Charities are also restricted as regards where they can transfer charity assets on winding up. As charity property was donated for exclusively charitable purposes, it must continue to be applied for those specific charitable purposes.

Charitable assets must only be transferred to another charity, in accordance with the winding-up provisions. If there are no provisions in the charity's governing document, the charity may need to apply to the High Court for a cy-près scheme or, as an alternative, to the Charities Regulator to authorise the transfer.

This process takes several months at least, and advisers should engage early with the process and advise their charity clients accordingly.

All charities that intend to seek regulatory authorisation must check that their details on the Register of Charities are up to date and that they are compliant with their obligation to submit an annual report to the Charities Regulator. Guidance is available on our website.

Click, Check and Give

Finally, Irish people and organisations give generously to charities – a strong measure of the trust and confidence that exist and are so vital to safeguarding the charity sector. If you or your company or organisation intend to give time, money or goods to a charity, you can check that you are giving to a registered charity and find basic information about its finances and activities on the public Register of Charities at checkacharity.ie.

Anyone interested in becoming a charity trustee should check out the variety of opportunities available through organisations such as Boardmatch and Volunteer Ireland. Alternatively, you could approach charities directly to express your interest in becoming involved, perhaps on a sub-committee initially, while you learn more about the organisation.

News & Moves

Seven New Tax Partners at EY Ireland

EY Ireland has announced the appointment of seven new Tax Partners, enhancing the firm's ability to meet rising client demand with expert solutions for the increasingly complex challenges faced by businesses across the island of Ireland and beyond. Graham Reid, Head of Tax & Law at EY Ireland said: "Our practice is going from strength to strength here at EY Ireland and I'm very proud to welcome our new partners who are building a better working world in partnership with our brilliant clients."

Sandra Brennan is a Tax Partner in EY's tax risk and controversy practice, specialising in the firm's Revenue interventions and tax risk offering. She has more than 15 years of experience and focuses on assisting clients through Revenue interventions and supporting clients proactively manage their tax risk. She holds a Bachelor of Commerce and is Chartered Tax Adviser (CTA).

Shannon Cunningham is a Partner in EY Northern Ireland's Tax and Law practice, leading a team of 100 providing tax services for corporate groups. With over a decade of experience in tax diligence, corporate, refinancings, international tax matters, and tax compliance, Shannon is well-versed in a range of tax issues. She holds a degree in Accounting and Finance from Dublin City University and is both a Chartered Accountant and a Chartered Tax Adviser (CTA).

Sandra Dawson is a Partner with EY's Financial Services Tax practice where she leads the Insurance Tax Practice. She provides advice on complex tax matters, including establishing operations, restructuring, mergers, and navigating Pillar Two regulations. Sandra earned her Bachelor of Commerce degree from University College Dublin, is a Fellow of Chartered Accountants Ireland Chartered Tax Adviser (CTA).

Aideen Farrell is a Partner in EY's Tax and Law practice, specialising in Indirect Tax, and helps clients manage and optimise their VAT obligations across various sectors. With 20 years of experience, Aideen helps clients to navigate the rapidly changing indirect tax landscape, ensuring they meet their compliance and reporting requirements. She is a graduate of University College Dublin, a Fellow of Chartered Accountants Ireland and a Chartered Tax Adviser (CTA).

Enda Kelly is a Partner in EY's Tax and Law practice, specialising in R&D and Innovation Incentives. He oversees a team of Engineers and Scientists dedicated to securing R&D funding for clients through grants and tax incentives. Enda holds a BEng in Mechanical Engineering from the University of Limerick, an MSc in Computer Aided Engineering from Dublin City University, and an MBA from the University of Galway.

John Kennelly is a Partner in EY's Tax and Law practice, offering expert advice on domestic and international tax, with a focus on M&A, reorganisations, and wealth management for high-net-worth individuals. John holds a degree in business and accounting from MTU Cork, is Chartered Tax Adviser (CTA) and a Fellow of Chartered Accountants Ireland.

Deirdre Rogers is a Partner in EY's Financial Services Tax and Law practice, serving financial services clients with a focus on the International Banking sector, leveraging her 20 years of experience in taxation. Deirdre graduated from the University of Limerick with a Bachelor of Business Studies Honours Degree and is both a Fellow of Chartered Accountants Ireland and a Chartered Tax Adviser (CTA).

Fenergo and Deloitte Join Forces to Deliver Greater Efficiency Through Client Lifecycle Management Automation

Fenergo, a leading provider of digital solutions for Know Your Customer (KYC), Transaction Monitoring (TM) and Client Lifecycle Management (CLM), and Deloitte Ireland, announced, on 8th August, an agreement to deliver Fenergo's AI-powered CLM solutions to financial institutions across EMEA.

HLB Ireland Merge with Lowry Chartered Accountants

Today, HLB Ireland, Accounting & Advisory, has announced a merger with Lowry Chartered Accountants. Effective immediately, the combined entity will operate as HLB Ireland. The merger reflects the firm's dedication to growth, innovation, and delivering unparalleled client value. The combined entity aims to solidify its position as a leading accounting and advisory firm in Ireland.

(L – R) Mark Butler, Managing Partner at HLB Ireland, and David Bolger, Partner at HLB Ireland.

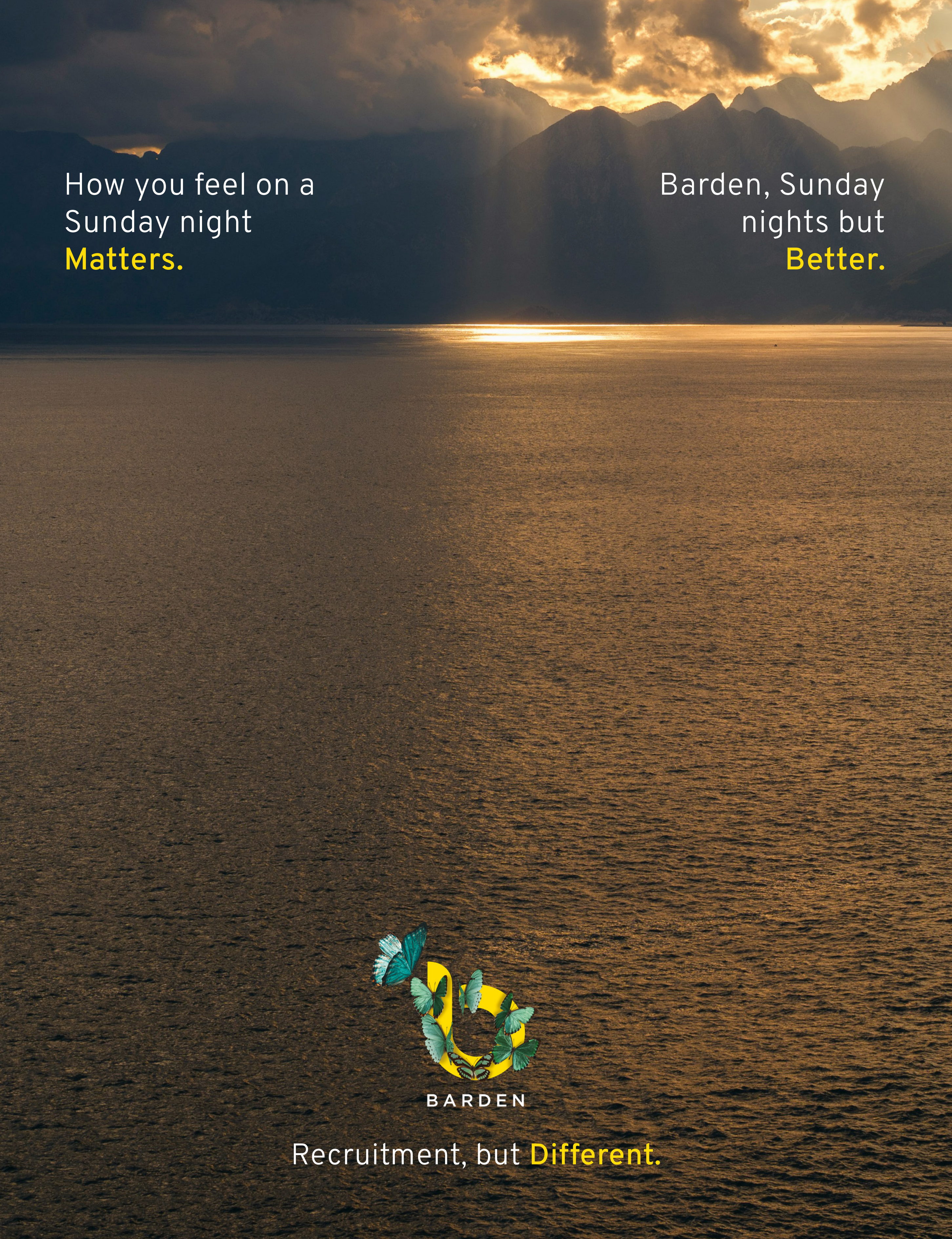
KTA Tax Appointments

KTA Tax, private client tax advisers, is delighted to announce the appointments of Niall Connolly and Brian Broderick as Directors, and Susan Donnelly as Associate Director. Niall, Brian, and Susan, all Chartered Tax Advisers (CTA), possess strong technical expertise and extensive experience in advising private clients and their families on all taxation matters.

(l-r) Jane Florides - Director, Brian Broderick - Director, Lisa Cantillon – CEO and Director, Niall Connolly - Director, Susan Donnelly - Associate Director, Patrick Kinnane - Director.

Charities Regulator Appoints New Chief Executive, Madeleine Delaney

Minister of State Joe O'Brien TD, with responsibility for Community Development and Charities, has approved the appointment of Madeleine Delaney as Chief Executive of the Charities Regulator. The appointment was made by the Board following a public recruitment process.


How you feel on a
Sunday night
Matters.
Barden, Sunday
nights but
Better.
BARDEN
Recruitment, but Different.