McCANN FITZGERALD

Exploiting Intellectual Property Rights:

Key Attractions of Locating Operations in Ireland

BRIEFING

Many of the leading global corporates in the technology, pharma, medical devices, biotech and other sectors involved in the commercialisation of intellectual property have chosen Ireland as their preferred location for doing business within Europe and internationally. This has contributed to Ireland becoming a global digital hub and centre for innovation. In this briefing, we will outline the key legal, tax and business attractions of locating operations in Ireland to exploit intellectual property rights.

Ireland is a common law jurisdiction with a reputation as a safe, politically stable and efficient place to hold and exploit IP rights, not least become of its robust laws and court system which recognise and protect the rights of owners of intellectual property rights, including, patents, copyright, trademarks, designs and plant varieties and which consistently rank highly in international indexes regarding IP regimes.

Ireland's expertise in the field of IP development and exploitation is powered by a highly skilled and educated workforce providing the requisite human skills and technical resources. Ireland also has the requisite commercial infra-structure, pro-business environment and dedicated State agencies which support enterprise.

Establishing operations in Ireland is very straightforward; a company can be incorporated and operational within a matter of weeks in Ireland and, is subject to a comprehensive and up to date company law regime. Ireland, being a long-standing Member of the EU, (and the OECD) provides a gateway to doing business in the EU and access to important protections under EU law. In addition, Irish based operations can access certain EU R&D and Innovation Funding Programmes.

Intellectual Property Exploitation and Enforcement

In terms of the legal environment for intellectual property exploitation, a guiding principle in dealing with intellectual property rights is freedom to contract; parties may tailor intellectual property exploitation agreements to their needs. However, EU competition law applies to agreements that have an impact on inter-State trade within the EU; Irish competition law (the substantive rules of which mirror those of the EU) applies in the national sphere.

As regards enforcement of intellectual property, the Irish High Court is experienced in dealing with commercial disputes and is a suitable forum for resolving intellectual property disputes. The commercial division of the High Court (known as the Commercial Court) specialises in the hearing of complex commercial disputes including intellectual property matters. The Revenue Commissioners are designated as the competent customs authority for receiving and processing actions in connection with counterfeit and pirated goods. Ireland signed the International Agreement on a Unified Patent Court on 19 February 2013, however, the ratification of this agreement will require a constitutional referendum. Ireland has indicated that it will establish a local division of the Unified Patent Court.

Irish tax regime

Ireland has a very favourable tax regime for companies tax resident in Ireland carrying on a trade of exploiting and/or developing intellectual property in Ireland. Such companies are subject to the standard rate of corporation tax of 12.5%. Generally speaking, companies incorporated in Ireland and /or centrally managed and controlled in Ireland are regarded as tax resident here. The 12.5% rate applies to all trading income, such as royalty and other licensing income and to profits made on the sale of trading assets. Trading in this context requires that the Irish operations are active and carried on by staff in Ireland with the relevant skills, expertise and authority to conduct and manage the exploitation of the rights located in Ireland.

Specific tax depreciation allowances and research and development tax credits are available in respect of expenditure incurred on certain R&D carried on in Ireland which effectively reduces the rate of tax for companies engaged in R&D below 12.5%.

Knowledge Development Box

Ireland has introduced a Knowledge Development Box regime which taxes profits arising in connection with qualifying assets generated by qualifying R&D carried out by an Irish company at a rate of 6.25%. It adopts the modified nexus approach and is the first OECD compliant patent/knowledge development box regime in the world.

Qualifying assets for these purposes are defined as patents (including supplementary protection certificates), copyrighted software and, in certain circumstances, inventions that are certified by the Controller of Patents, Designs and Trade Marks as being novel, non obvious and useful. Qualifying expenditure includes own account expenditure and R&D activities carried on within the EU. Expenditure on outsourced R&D also qualifies, where the outsourced work is performed by unrelated third parties. Expenditure performed by a related party (known as "uplift expenditure") does not qualify for the relief but is taken into account in calculating the tax relief available. Qualifying profits for these purposes are calculated by reference to the total income derived from the qualifying assets expressed as a proportion of the company's qualifying R&D, plus any uplift expenditure over its total R&D costs incurred in developing the qualifying assets. For more details of this regime see our Knowledge Management Box Regime briefing.

Research and development expenditure

Companies carrying on research and development activities in Ireland are entitled to claim a tax credit of 25% in respect of R&D incurred within Ireland and/or the EEA, subject to specific conditions and limitations. This tax credit may be claimed in addition to any tax deduction available in respect of expenditure on patents, trademarks, scientific research etc. Qualifying R&D expenditure includes expenditure on plant and equipment and on buildings, where certain conditions are met.

Qualifying R&D activities involve systematic, investigative or experimental activities in the field of science or technology and involve basic research, applied research and/or experimental development. In addition, the activities must seek to achieve scientific or technological advancement and involve the resolution of scientific or technological uncertainty.

The R&D tax credit can be off set against a company's current year corporation tax liability or it can be paid to certain key employees as tax free remuneration. Unutilised R&D tax credits can be carried forward to future periods or can be carried back against previous corporation tax paid. Excess credit can be repaid to the company by the Revenue, in certain circumstances and subject to certain limits.

The R&D tax credit can be claimed in respect of group expenditure on R&D and, on amounts paid to Irish universities to carry on the R&D, up to a limit of €100,000 or if lower, 5% of own account R&D expenditure. In addition, corporates can claim the tax credit in respect of amounts paid to unconnected person to carry out R&D activities on its behalf up to a limit of €100,000 or, if lower, 15% of own account R&D expenditure.

Tax deduction for scientific expenditure

Non-capital expenditure on scientific research is deductible for trading companies. Scientific research for these purposes is defined as "any activities in the fields of natural or applied science for the extension of knowledge". Expenditure for these purposes includes payments made to the Irish universities undertaking such research or other approved bodies.

Participation exemption for certain shareholdings

Generally speaking, the 12.5% rate of corporation tax applies to trading profits only and gains made on the disposal of the capital assets of the business are subject to tax at a rate of 33%. However, Ireland has a participation exemption which exempts from tax gains made on the sale of shares or/and certain rights related to shares, in a trading company or part of a trading group resident in the EU or, a country with which Ireland has a double tax treaty (DTT country), provided certain minimum shareholding requirements (5% plus for 12 months or more) are met.

Taxation of dividends / foreign tax credits

Ireland also has an extensive (currently 72) double tax treaty network and operates a generous and flexible foreign tax credit pooling arrangement in relation to the taxation of income from investments such as, dividend income received from trading companies resident in the EU or DTT country. Such dividends are subject to the 12.5% rate. In practice, this means that such dividends are not subject to further tax in Ireland. Ireland also provides for a unilateral tax credit in respect of foreign withholding tax suffered.

Tax depreciation allowances on intangible assets

Companies can claim tax depreciation allowances in respect of the capital cost of acquiring a broad range of intangible assets where they are used in a course of a trading operation carried on in Ireland. Qualifying assets for these purposes are broadly defined and include most intellectual property rights, patents, trademarks, copyright, computer software, know-how including secret processes and formula related to industrial, commercial or scientific experiments/techniques, research rights related to medical effects or medicines and other intangible rights.

The tax depreciation allowances can be written off in line with the amortisement charge in the company's accounts or, over 15 years, at an annual rate of 7% and 2% in the final year, and (subject to certain restrictions) can be off set against trading income derived from the exploitation of intangible assets and the sale of goods and/ or services which derive the greater part of their value from those assets.

Transfer Pricing

In line with OECD transfer pricing rules, Irish trading companies are obliged to conduct transactions with connected or related parties on an arm's length basis. Small and medium size enterprises (companies with fewer than 250 employees and a turnover of less than €50m or assets of less than €43m) are exempt from the specific Irish transfer pricing rules and related reporting requirements. In addition, Ireland has introduced 'Country by Country' reporting measures for large multi- national groups (groups with consolidated revenues of more than €750m) from 1 January 2016, in line with BEPS Action 13.

Withholding Tax Royalty Payments

Royalty payments in respect of most intellectual property rights can be made by an Irish resident corporate, to non-residents free from Irish withholding tax, irrespective of where the recipients are located. Patent royalties payments can give rise to withholding tax but, generally speaking, withholding tax can be avoided where the recipient is not resident in Ireland and is resident in another EU member state or in a DTT country. In addition, where certain conditions are met, it is possible to avoid withholding tax on payments in respect of non-Irish registered patents to non-resident persons, subject to obtaining advance clearance from the Revenue Commissioners.

Profit Participation

Profits can be repatriated by way of dividends to non-resident shareholders free from withholding tax in line with a number of exemptions from withholding tax, including where the recipient is resident in an EU or DTT country, or is ultimately controlled by residents of the EU or a DTT country, or is a listed company.

Stamp Duty

Transfers of intellectual property rights are specifically exempt from stamp duty Ireland, thus the acquisition or transfer of intellectual property rights by Irish corporates can be done tax efficiently.

State Supports

Ireland has dedicated State agencies which provide companies with specific financial support/programmes and hands on, know-how and assistance. These supports are available to specific projects and in certain circumstances may be availed of by Companies exploiting intellectual property rights in Ireland as part of a broader business. The Industrial Development Authority (IDA) idaireland.com, is mandated to assist international companies to invest and establish operations in Ireland, and Enterprise Ireland enterprise-ireland.com, is mandated to assist Irish businesses to invest in research, development and innovation with a view to assisting export sales growth.

Conclusion

Ireland has a well established infra-structure and favourable tax regime for companies exploiting IPRs, together with, a robust and developed legal and court system for the protection and enforcement of IP. These regimes combined with Ireland's membership of the EU make it a very attractive EU location in which to exploit intellectual property rights globally.

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