Ireland

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Overview of corporate tax work over last year

Ireland's 12.5% corporation tax rate continues to be the foundation of Ireland's tax regime, demonstrated by Irish Revenue reporting that net corporation tax receipts for 2018 totalled €10.4 billion, representing an increase of 26.7% compared to 2017. The main focus of Irish tax lawyer's work over the last 12 months has included advising on mergers and acquisitions ("**M&A**"), investment into property structures and the on-shoring of intellectual property ("**IP**"). The continuing effects of pre-Brexit have also resulted in a steady volume of banking, treasury and insurance activities as companies seek to establish a base in Ireland. M&A activity strengthened throughout 2018, reflecting the continued confidence in the Irish economy despite the global economic and political volatility experienced throughout the year.

Mergers & acquisitions

2018 represented another impressive year for M&A activity in Ireland. Deal volume is reported to be at its highest level in recent years, indicating that Ireland's international reputation is going from strength to strength with €92 billion worth of M&A activity taking place last year. Irish company acquisitions have historically been driven by US multinationals; however, technology and medtech/life science industries are now gaining traction from foreign multinationals in Canada, France and China.

Banking, treasury and insurance

The international banking sector has developed into a crucial element of the Irish economy with approximately half of the world's top 50 banks now located in Ireland. Ireland has also attracted a large number of multinational corporations who have set up corporate treasury operations in Ireland and remains a key player in the global insurance market. The surge in the number of leading insurance companies establishing an Irish base for their EU operations in this sector is largely due to Brexit, coupled with Ireland's attractive corporate tax rate and generous double taxation relief regime.

Corporate restructuring

Following a strong 2017, corporate restructuring activity particularly in the indigenous sector remained at a high level for 2018. The majority of the focus of transactions which these companies engaged in related to pre-sale restructurings and group tidy-ups. Changes to domestic and international law continue to be the drivers behind much of the corporate restructuring taking place as many multi-national level groups seek to take advantage of cross-border tax regimes. It remains to be seen what effect any amendment to the current transfer pricing rules (discussed in the "Transfer pricing" section below) will have on corporate restructuring transactions in Ireland going forward. Brexit also continues to accelerate activity in the corporate restructuring sphere as companies seek to establish an Irish base for their pan-European activity. The high rate of M&A activity taking place in Ireland has also increased the focus on corporate restructuring as corporations seek to cement their post-acquisition integration.

Intellectual property

The Knowledge Development Box was introduced for accounting periods commencing on or after 1 January 2016 and has had little traction since its introduction; however, Revenue anticipates that more companies will make use of the 24-month time frame in which a company has to submit its claim in respect of the relief. Therefore, more claims in respect of the year ended 31 December 2017 are expected to be made by corporate taxpayers in 2019 in comparison to the current 10 claims which were made in the 2018 tax year. The Department of Finance is expected to carry out a review of the current research and development ("**R&D**") tax credit during the course of 2019. At present it is not anticipated that the R&D tax credit will be radically affected. The recent US tax changes were predicted to have potentially impacted Ireland as an attractive location for carrying out R&D activities. To date, however, there is no evidence to suggest that the US tax rate of 13.125% on Foreign Derived Intangible Income has negatively affected Ireland's rate of foreign direct investment ("**FDI**") from US entities. A European Attractiveness Survey carried out by Ernst & Young as part of their annual review concluded that Ireland won 205 new FDI commitments in 2018, which was an increase of 52% from 2017.

Tax disputes

Tax disputes is an area in which activity picked up substantially in 2018 due to the increasing levels of cases being heard by the Tax Appeals Commission ("**TAC**"). Since it replaced the Office of the Appeals Commissioners in 2016, the TAC has received 4,341 tax appeals arising over various tax heads. Over a quarter of these cases appeared before the TAC in 2018, representing significant work for tax experts. A substantial increase for 2019 of nearly double the existing budget for the TAC is expected to lead to an approximate doubling of staff for the TAC. With the remaining backlog of over 2,500 tax appeals still currently in the TAC's system, this represents an area which should continue to grow; in particular, there is a number of high-profile cases expected to be heard, including *Cintra* and *Perrigo*. Given the nature of the cases that have been heard this year, this reflects Revenue's change of approach challenging more high-profile cases. This is highlighted further by the submission of five appeals in the final week of December 2018 which related to an aggregate quantum in dispute of approximately €2.1 billion.

Key developments affecting corporate tax law and practice

In September 2018, the Irish Department of Finance published "Ireland's Corporation Tax Roadmap" (the "**Roadmap**") outlining how Ireland will address some of the international tax developments. This document laid out the pathway for Irish compliance with:

- The EU Anti-Tax Avoidance Directives ("**ATAD**").
- The OECD Base Erosion and Profit Shifting project ("**BEPS**").
- The EU Directive on Administrative Cooperation.

The Roadmap details when certain elements of the above frameworks will exist on a statutory footing in Ireland. It also details when Irish policy on other elements of the above frameworks is to be formulated.

Transfer pricing

The Department of Finance is also currently reviewing whether Ireland's current transfer pricing rules are BEPS compliant. The OECD states that the updated transfer pricing ("**TP**") rules are designed to deal with weaknesses in the current system. They argue that these have arisen due to a perceived emphasis on contractual allocations of functions, assets and risks in the current system. The OECD intends to broaden the scope of TP rules to deal with certain transactions which are more difficult to assess under the current framework.

It is expected that the new TP rules which may be adopted include:

i. Irish TP rules should be amended to incorporate the 2017 OECD transfer pricing guidelines.
ii. The application of the TP Rules should be expanded to apply to transactions agreed before 1 July 2010 (the TP Rules do not currently apply to transactions the terms of which were agreed prior to 1 July 2010).
iii. The removal of the current exemption for small and medium businesses ("**SMEs**") should be considered (SMEs are currently exempt from the TP Rules).
iv. The expansion of the application of the TP rules to non-trading transactions and capital transactions should be considered (currently the TP Rules only apply to trading transactions).

Common Consolidated Corporate Tax Base

The Common Consolidated Corporate Tax Base ("**CCCTB**") is an EU proposal which would involve a degree of standardisation of tax regimes across the EU, which could affect Ireland's 12.5% corporate tax rate. It has not been previously adopted as EU tax decisions require unanimous support. The European Commission raised the proposal again in 2019, expressing the view that the time has come to move away from unanimity on tax issues. Ireland has continued to express the view that it is not in favour of the CCCTB.

Tax climate in Ireland

Digital economy

One issue which tax policy makers are facing is whether proceeds derived from the sale of digital goods and services can be taxed using traditional methods of taxation or whether an entirely new approach is required. The OECD's BEPS project identified the need to evaluate and assess digital business models continuing its work on digital issues via the Task Force on the Digital Economy, which was established in 2013 as a subsidiary of the OECD's Committee on Fiscal Affairs.

The OECD's BEPS Action 1 Report released in October 2015 identified a number of challenges associated with digitalisation, specifically relating to tax nexus, data and income characterisation. This report discussed some potential solutions on the basis that existing treaty provisions were followed. It is likely that any proposals will be approved at an OECD level before being adopted across the European Union.

Multilateral Convention to Implement Tax Treaty

On 29 January 2019, Ireland deposited with the OECD its Instrument of Ratification for the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (the "**MLI**"), which came into force on 1 May 2019. The MLI is an instrument which amends the terms of pre-existing international tax treaties to make them BEPS compliant. The MLI only affects a treaty where both parties to the treaty have ratified the MLI.

Developments affecting attractiveness of Ireland for holding companies

Irish holding companies still remain an attractive prospect on the global market. This outlook continues due to the Irish low-tax regime. The participation exemption which provides for a capital gains tax exemption on the sale of certain shareholdings is utilised by many holding companies, and exemptions for certain foreign dividend policies have allowed in certain circumstances for a net effect of no charge to Irish tax on foreign dividends. However, there were two major policy developments in the past year which may affect the continuing attractiveness of Ireland as a location for holding companies. The two new measures introduced are a new exit tax and a regime in relation to Controlled Foreign Companies ("**CFCs**").

Exit tax

Prior to the Finance Act 2018, Ireland had a limited exit tax regime that was designed as an anti-avoidance measure to restrict companies from moving their tax residency out of Ireland to avoid Irish capital gains tax. However, the EU Anti-Tax Avoidance Directive 2016/1164 (the "**ATAD**") required Member States to introduce further, more comprehensive measures in relation to exit tax by 1 January 2020. The new exit tax rules are therefore not entirely unexpected, but their introduction is earlier than anticipated.

With effect for transactions on or after 10 October 2018, the new rules impose a tax of 12.5% on unrealised capital gains where companies migrate their tax residency or transfer assets offshore, putting them outside the scope of Irish tax law. In such a scenario, the company is deemed to have disposed of the assets and immediately reacquired them at market value. The gain arising from this disposal will be subject to the exit tax of 12.5%. However, any deemed gain which is made as part of a transaction to dispose of an asset, the purpose of which is to ensure the gain is taxed at the 12.5% rate as opposed to the general capital gains rate (i.e. in cases of tax avoidance), will be charged at the current capital gains tax rate of 33%.

It is now clear that the general exit rate to be applied is 12.5% rather than the 33% rate that currently generally applies to taxable gains and, as such, reaffirms Ireland's commitment to the 12.5% corporation tax brand and to being viewed as a competitive country with an attractive tax regime for international business. It has additionally been speculated that the new rules may discourage US multinational companies from undertaking group restructurings involving the transfer of intellectual property from Ireland back to the US in order to avail of the new lower US tax rate on foreign-derived intangible income which, if true, would also be positive for the Irish economy.

Controlled Foreign Companies

With effect for accounting periods beginning on or after 1 January 2019, a new regime in relation to CFCs has been introduced for the first time which represents a significant change to the Irish tax landscape. The new CFC rules are designed to prevent companies from moving profits to low or no tax jurisdictions, thus eroding the Irish tax base. Under these rules a company will be considered to be a CFC where it is a non-Irish resident company which is controlled by an Irish company, branch or agency. While Ireland was required to establish a CFC regime by the ATAD, significant comfort may be taken from the policy approach adopted by Ireland in implementing the regime. The ATAD allowed Member States to determine whether the income of a CFC should be attributed to its parent using one of two options – the first option considers the nature of the income in the CFC and whether it is passive (as opposed to trading), whereas the second is primarily focused on whether the CFC is engaged in artificial/non-genuine activities. Ireland selected the second option, which has the benefit of avoiding the potential pitfall of option one, which could have seen broad swathes of income being treated as CFC income regardless of whether or not that income has any Irish nexus.

Industry sector focus

Corporate real estate

A range of recent measures, both international and domestic, have been introduced which impact the Irish real estate industry. Increased international investment in the Irish real estate market has resulted in a degree of negative media attention due to tax policies that allowed income and gains on Irish real estate arising in certain Irish investment entities to accumulate effectively tax-free. As a result, there have been changes to the legislation applying to commonly used special-purpose vehicles, most notably the introduction of Irish real estate funds (“**IREF**”) withholding tax on certain regulated funds.

The concept of an IREF withholding tax significantly affected investment in Irish real estate through a qualifying investment fund, which has become a popular investment vehicle in previous years. Despite the 20% withholding tax on distributions made to foreign investors, the Qualifying Investor Alternative Investment Fund (“**QIAIF**”) is still a prevalent vehicle for large-scale projects in excess of approximately €50 million, as it remains exempt from tax at fund level.

The main action contained in ATAD that should impact investors operating in the Irish real estate market is the interest limitation/borrowing costs deductibility rules (discussed in the “The year ahead” section below). The interest limitation/borrowing costs limitation provisions seek to discourage multinational enterprises from reducing their tax base through inflated debt financing.

Policy changes have also been introduced to effect domestic corporate investors. The key recent changes for domestic real estate investors are those to the taxation of landlords, the shortening of the seven-year capital gains tax exemption. 2018 represented the first full year since the increase in stamp duty on non-residential property from 2% to 6%, which came into force on 11 October 2017. The vacant site levy was increased from a maximum 3% to a maximum 7% on 19 July 2018.

Ireland maintains a favourable tax regime when compared to other states who are also subjected to similar international changes. Combined with a high demand and continuing high yields, Irish real estate remains a very attractive investment for international private equity.

Aviation finance

Ireland’s position as a global leader in aviation leasing is firmly based on the highly advantageous tax regime strategically targeted towards supporting this sector. The long-term reliability of this regime is underpinned by Ireland’s extensive network tax treaty partners. The majority of the double tax treaties that Ireland is party to provide for 0% withholding tax on inbound lease rentals, and this is coupled with the fact there are no withholding taxes on outbound lease rentals.

Historically Revenue granted, on a concessionary basis, an extension of the exemption from stamp duty whereby the transfers of aircraft are exempt from stamp duty, to apply to the transfer of shares in “aircraft owning entities” where certain conditions were met. During the course of 2018, Revenue indicated that this concessionary treatment would no longer be permitted (following the general withdrawal of Revenue opinions and confirmations over five years old).

Asset management

Ireland has become a domicile of choice for investment funds. Ireland was among the first countries to adapt its legislation for the tax-efficient implementation of the UCITS IV regime. Ireland's tax rules also permit redomiciliations, mergers and reconstructions of investment funds without giving rise to adverse Irish tax consequences for investors in funds.

Ireland is the largest centre for administration of hedge fund assets (over 40% of global hedge fund assets are administered in Ireland). As of September 2018, there were €4.5 trillion total assets under administration in Ireland, €2.5 trillion of which were funds domiciled in Ireland and €2 trillion outside of Ireland.

The year ahead

The Minister for Finance has indicated in 2018 Tax Strategy Papers that this year's Irish Budget will be prudent to prepare for the consequences of Brexit. With the international spotlight continuing to focus on Ireland in respect of its tax regime, it remains to be seen what measures the Irish government will make in respect of a number of tax regimes. The mandatory disclosure scheme is one area which may come under scrutiny, designed to counteract aggressive tax-planning strategies employed by certain taxpayers. Under the scheme, where tax advisors or similar professionals give advice to clients on tax planning, which falls outside the scope of ordinary tax advice, they must disclose the nature of this advice to Revenue. However, there are many exemptions under this rule which are designed to relieve the vast majority of tax advisors of reporting duties. This has resulted in low levels of participation in the scheme in the past, and so Ireland may come under pressure to widen the scope of application of the scheme.

ATAD also requires EU Member States to introduce ratio-based interest limitation rules, designed to limit the ability to deduct borrowing costs when calculating taxable profits. The rules are intended to prevent the use of excessive interest payments as a means by which BEPS by multinational companies can occur. The interest limitation rules in ATAD operate by limiting the allowable tax deduction for net interest costs in a tax period to 30% of Earnings Before Interest, Tax, Depreciation and Amortisation.

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