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1. **CIT**

- **Context**

- Joseph P. Brothers, "From the Double Irish to the Bermuda Triangle", *Tax Analysts* 2014, 694:

On 14 October 2014, Irish Finance Minister Michael Noonan announced that the country **would be strengthening some of its domestic tax rules**, a decision undertaken partly in reaction to the negative attention wrought by the current EU investigation.

These measures include **eliminating** (though not necessarily with immediate effect) the **"management and control" exception to the tax residency rules**, so that any Irish-incorporated business entity would also and without exception be an Irish tax resident liable for tax on its worldwide income.

However, Noonan also defended other taxpayer-friendly aspects of Irish tax policy, particularly the country's 12.5% tax rate on trading income. **The EC letter does not criticize that 12.5% tax rate**.

- **Subject**

- Ireland, Country analysis 2015 (IBFD):

Any company incorporated in Ireland is generally deemed to be a **resident** for tax purposes.
This rule **does not apply to** companies carrying on, or related to companies carrying on, a trade in Ireland, provided that they are either under direct or indirect control of persons resident, or traded on a recognized stock exchange, in an EU Member State or in a tax treaty country. Companies are related if they are members of a 50% group. Previously, the common law test for corporate residence depended on **where the central management and control of the company took place**.

With effect of 23 October 2014, a company that is **incorporated in Ireland but is not tax resident there is nevertheless regarded as an Irish resident if**:
- the company is not regarded as a tax resident of any territory;
- the company is managed and controlled by an EU Member State or in a country with which Ireland has a tax treaty in force; and
- the country applies a "place of incorporation" test of residence, but not a central management and control test.

For companies incorporated before 23 October 2014, this rule is effective from **1 January 2015**.

Under the **Finance Act 2014**, **all companies incorporated in Ireland are treated as Irish resident for tax purposes with effect from 1 January 2015**. This is to remove the effectiveness of the "double-Irish" type tax avoidance schemes for companies established on or after that date. The rules will take effect for existing companies from **1 January 2021.**

- **General CIT**

- The **tax base** of a company is its **worldwide income**, after deduction of all expenses which are wholly and exclusively incurred for the purpose of the trade, subject to some specific provisions and exemptions, and after deduction of charges on income.

- **CIT rate** for **trading profits** will remain **12,5%** (resident and non-resident companies).
  Non-trading income and foreign income are also subject to the 25% rate.
  In the case of **foreign dividends**, the 12,5% rate applies if the dividends are paid by a company resident in an EU Member State or in a territory with which Ireland has a tax treaty, where certain conditions are met. In addition, the 12,5% rate applies to foreign dividends paid by a quoted company (or by its 75% subsidiary) that is not resident in either such state, if the shares of that company are regularly traded on a recognized stock exchange in an EU Member or in a tax treaty state. The rate also applies to foreign-source dividends paid out of the trading profits of private companies in territories with which Ireland does not have a tax treaty, if such a territory is party to the OECD Convention on Mutual Administrative Assistance in Tax Matters.

- **Capital gains** are subject to an effective tax rate of 33%. The disposal of a substantial interest in an offshore fund, however, attracts capital gains tax of 40%.

- **Dividend withholding tax** generally applies to payments of dividends at the 20% standard rate of income tax. However, such payments between resident companies are exempt. On interest and patent royalty payments, as well as on charges on income, tax is generally deducted at the 20% standard rate of income tax. An exemption applies in all cases for payments within 51% groups.

- **Exempt income** includes domestic dividends (with some exceptions) and income from commercially managed woodlands in Ireland.
  Special rules apply in respect of domestic dividends paid by a company that immigrates to Ireland after 3 April 2010. Domestic dividends are generally exempt, but if that company, while under the control of Irish residents, makes a distribution (i) to a connected resident company with the following 10 years, (ii) out of profits earned before it became resident in Ireland, that distribution is charged to corporation tax.
  There is an exemption from corporation tax for certain companies to trade in any of the tax years starting from 2009 until 2015. The exemption applies for 3 years from the commencement of the trade.

- **Expenses are deductible**, provided that they are incurred wholly and exclusively for the purposes of the company's trade. Interest is generally deductible, whether as trading expenses or as a charge on income. The same applies to royalty payments.
  Anti-avoidance legislation applies to limit relief for interest accrued but not paid on loans between connected companies, and for interest on loans to acquire an interest in another company where capital is recovered by a company connected to the investing company. Anti-avoidance rules also apply, in certain

circumstances, to deny relief for interest on intra-group loans taken out to finance the acquisition of fixed assets from a group company.

- **Trading losses** can be carried **forward** for an indefinite period of time; additional conditions apply depending on the type of trade carried out.
  A trading loss may be set off against other income and capital gains of the same or **preceding** accounting period (further rules apply depending on the type of trade carried on); 3 years for losses incurred in the final year of trading.

➢ **Tax incentives**

There are tax incentives (with accelerated depreciation):
- R&D tax credits (a 25% corporation tax credit applies in respect of qualifying R&D expenditure. Until 31 December 2014, the credit applied to the expenditure in excess of an amount of baseline expenditure, which was determined by reference to relevant R&D expenditure incurred in 2003. With effect from 1 January 2015, the restriction of the baseline expenditure is removed);
- tonnage tax;
- real estate investment trusts (REITs) regime (an Irish resident company incorporated in Ireland, which is listed on the main market of a recognized stock exchange in an EU Member State. REITs are exempt from corporation tax on the income and chargeable gains from property rental business. In April 2015, a new REIT guidance was released.

2. NEW GAAR

❖ David Fennell, "Finance Act 2014 – New General Anti-Avoidance and Mandatory Reporting Rules", *Irish Tax Review* 2014, 108-113 (part 1) and *Irish Tax Review* 2015, 53-60 (part 2).

❖ Brian Duffy, "Changes to Ireland's general anti-avoidance regime", *International Tax Review* (online) 2015:

The **Finance Act 2014** introduced **substantial changes to Ireland's GAAR**.

The measures **simplify the procedure** the Irish tax authority ("Revenue") must follow to withdraw any tax advantage which arose to a taxpayer as a result of a transaction the primary purpose of which was to achieve the tax advantage. A tax advantage is essentially a reduction in the tax payable.

The **New GAAR** will govern **transactions** entered into on or after 23 October 2014. Whilst the provisions contained in the New GAAR are broadly similar in principle, on further examination it is clear that in practice these changes could lead to an increase in successful challenges being made by Revenue under the current GAAR and in particular should curtail the possibility of a taxpayer successfully challenging a case on procedural grounds.

The main changes are:

- The requirement that a Revenue officer must form and issue an opinion that a transaction constitutes a tax avoidance transaction before being entitled to

withdraw a tax advantage has been removed. Under the New GAAR a Revenue officer may withdraw a tax advantage if it is reasonable to consider, based on certain considerations, that the transaction is a tax avoidance transaction. Consequently, the New GAAR removes the taxpayer's right to appeal the opinion formed by Revenue that the transaction fell within the general anti avoidance provisions on certain specified grounds.

- In line with the legislative changes made in the 2012 Finance Act there will be no time limit for raising a notice of assessment under the New GAAR.
- The surcharge which becomes payable on a Revenue finding that a transaction resulted in a tax advantage has been significantly increased from 20% to 30% of the amount of the tax advantage.
- The protective notification regime remains; if a taxpayer files a valid protective notification no surcharge will apply. If a valid protective notification is filed outside the prescribed time limits various reduced surcharges apply depending on the circumstances.
- A protective notification cannot be made where the transaction was one which should have been disclosed under the mandatory disclosure regime.
- Increased supporting documentation is now required for a valid protective notification. The taxpayer is now obliged to furnish all documentation pertaining to the transaction along with an opinion as to why the taxpayer believes the transaction is not tax avoidance and does not fall within the general anti avoidance provisions.

3. ATR

❖ Ireland, Corporate Taxation, Country Surveys **2015** (IBFD):

Revenue "opinions" are issued upon request where the circumstances are **complex** or a transaction is **unusual** and the existing **information services do nog provide the clarity required**. The opinions are **not legally binding**; it is open to Revenue officials to review the position when a transaction is completed and all of the facts are known."

There is no formal legislation nor procedure on ATRs. In fact, a system of "ATR" does not exist: in Ireland, Revenue "opinions" can be obtained.

❖ Fédération des Experts Comptables Européens, *Survey on advance tax rulings* (nineties):

"There is **not a formal system** of advance tax rulings in the Republic of Ireland.
However, practitioners do get **informal opinions** from the Revenues Commissioners – particularly, in relation to **inward investment** and the International Finance Services Centre (**IFSC**). Such opinions are **not binding** on the Revenue commissioners, but are not normally queried by them after the event."

❖ "Ireland", *International Survey on Advance Tax Rulings*, **2003** (IBFD).

Ireland has a well-developed **informal consultative system**, through which taxpayers may obtain **the opinion** of the Revenue **on the tax treatment of a proposed transaction or series of transactions** with **confidence that it will be adhered to**.

Although the **Irish Constitution and tax legislation** place constraints on the ability of tax officials to set limits on the application of tax legislation, the **Revenue have traditionally been willing to express opinions** in relation to the interpretation of tax legislation in particular cases. Over the past five decades, this willingness developed particularly in relation to **inward investment**, and has gradually been **extended to all taxpayers**. However, until recently, **formal guidelines** in relation to the format and content of ruling requests were practically non-existent. Only one document, Statement of Practice SP-CT/3/90, dealing with requests for entitlement to the 10% rate of tax for manufacturing activities, was issued by the Revenue.

In **July 2002**, a comprehensive set of **guidelines for taxpayers seeking a "Revenue Opinion" was released**. The emphasis on "opinions" rather than "rulings" reflects the Revenue's awareness of the constitutional and legislative constraints under which they operate. They interpret and apply tax legislation, but they do not amend or create it. The courts, also, have been scrupulous in avoiding making tax law. However, they have established that the **Revenue may be bound by opinions** given by them on a **full disclosure of all relevant facts**.

These **guidelines** specify the **type of information that should be provided** when seeking opinions, and identifies the **appropriate offices** to which they should be addressed. This **semi-formalization of the prevailing practice** falls short of the introduction of a rulings system. It is generally believed that a **more formalized ruling system cannot be introduced without a constitutional amendment**.

The amount of information available to taxpayers and practitioners on tax matters has increased significantly. During 1998, in anticipation of requests from taxpayers and their representatives, **the Revenue released, in a no-names form, an index and summaries of opinions expressed by them in response to requests from taxpayers**. The volume and user friendliness of the information available have been improved since then, with access being provided to a wealth of information via Revenue publications and their website. There is **no disclosure or publication of opinions** expressed by the revenue authorities to a taxpayer. However, opinions that are believed by the Revenue to be **of general interest** to taxpayers are usually made available on a **Revenue Precedents database**, or on a **"no-names" basis by request under the Freedom of Information Act**.

No fees are payable for an advance opinion.

- Arthur Cox, *Tax Rulings in Ireland*, Lex Mundi, **2011**:

a. Do taxpayers have the right to request a ruling from the tax authorities? If yes, please clarify if it is a constitutional right or if it is granted by tax law.

There are no "rulings" available in Ireland, however, the Irish tax authorities do on occasion give **advance opinions**. These are available either (in a small number of cases) as a matter of tax law or (more commonly) by practice. For example, in the case of certain reliefs, it is necessary to apply in advance to Revenue, whereas for other types of transaction, say large reorganisations, the Revenue will issue advance opinions on request.

b. Is the issuance of tax rulings limited to certain topics, or can they be obtained on every tax issue?

Under **tax law**, advance opinions may only be obtained on **certain topics**. As a matter of **practice**, advance opinions can be sought in respect of **any tax issue**. However, as the Irish Revenue would have limited resources, they would actively discourage issuing any form of clarification in respect of routine matters. Likewise they will not opine on a matter where anti-avoidance is concerned. There is another more generic system where a request for clarification on the interpretation of legislation can be submitted to Revenue, but the response time for that system can be a number of weeks, so it is rarely used by advisors.

[These advance rulings were generally provided on a company's qualification for Ireland's manufacturing relief. The key tax issue upon which taxpayers are requesting advance rulings from the Irish tax authorities is **whether income from a particular activity would be regarded as trading income (taxed at 12.5%) or passive income (taxed at 25%)**. In May 2003, the Irish tax authorities released a document titled Guidance on opinions on classification of activities as trading.]

[Opinions expressed by the Revenue are **specific to the taxpayer in question**. The confidentiality that surrounds all dealings between the Revenue and taxpayers ensures that details of any opinions remain confidential. The revenue state in the 2002 Guidelines: "An opinion given in relation to a specific case should not be relied on in other cases."

However, where the taxpayer or his adviser has a similar set of facts in another situation, the **constitutional requirement** under Art. 40 for **equality of treatment** of all citizens before the law provides a strong basis for insistence on application of the same tax treatment to all taxpayers.]

c. Are tax rulings definitive or can they be revoked by the tax authorities? Is a tax court authorization required to do so?

The nature of a Revenue opinion is that it is **not definitive, and can be revoked**. Revenue would however **rarely do so**, especially where they are aware that a taxpayer has implemented a transaction on foot of a Revenue opinion. Even if not revoked, the Revenue opinion should not be relied upon unless full disclosure has been made to the Revenue in the request.

[The **legal nature of advance opinions** obtained by taxpayers from the Revenue Commissioners has been considered in the Irish courts. Referring to the subordination of Inspectors of Taxes to the Revenue Commissioners in Sec. 161(1) of the ITA 1967, Blayney, J., stated: "An Inspector is not bound by a prior opinion expressed to the taxpayer by the Revenue Commissioners".

The Revenue state in the 2002 Guidelines: "Opinions given by Revenue are **not legally binding** and it is open to Revenue officials to review the position when a transaction is complete, and all the facts are known. In this regard, it is important to disclose the full facts and circumstances surrounding the transaction."

If the taxpayer does not act exactly in accordance with the proposals presented, or if these form only part of the overall picture, he may lose the benefit of the opinion.]

d. Do tax authorities have a deadline to start a tax ruling revocation process? If so, please describe the process and how long it takes.

There is no deadline for the Revenue opinion process. However, for large transactions, a response will usually be available within 2-4 weeks. For smaller transaction, it can take longer.

e. Does the taxpayer have any legal defense against a tax authority attempting to revoke a tax ruling? If so, please explain the defense.

A taxpayer could raise the defences of estoppel and **legitimate expectation**. The basis of both defenses being that the Revenue in issuing the opinion would have known or ought to have known that the taxpayer would be relying on the opinion, and had therefore a legitimate right to expect that the tax treatment would be as set out in the Revenue opinion. In response to such defenses, the Revenue might argue that as a matter of public policy it is necessary to revoke the opinion. Alternatively, they might suggest that full disclosure had not been made to Revenue.

f. What is the effect of a revocation of a tax ruling? (i.e. Is the revocation retroactive with resulting liability for the taxpayer- principle amount owing, interest, penalties, etc.- or does it take effect only from the date of the revocation?)

There is **no set formula for the effect of a revocation of a Revenue ruling**. Typically if Revenue wished to change their position on a matter, this would be done by making some form of public statement that all transactions done after a certain date would cease to benefit from a certain type of treatment, thus completed transactions would be grandfathered.

However, if they were (which would be very unusual) to withdraw an opinion after a **taxpayer had relied upon it to effect a transaction**, (and assuming the withdrawal was upheld) it would be most difficult for them to seek interest and penalties in addition to the tax, and indeed most likely they would not be successful in seeking to levy interest and penalties in those circumstances. The more usual course of action is **to prevent future transactions and not to alter the treatment of existing transactions in any event**.

4. APA

- **TP Legislation**

As part of the 2010 Finance Act, enacted in April 2010, Ireland has introduced broad-based transfer pricing legislation. Irish transfer pricing legislation formally endorses the OECD Transfer Pricing Guidelines and adopts the arm’s-length principle. Therefore the documentation requirements applied under the OECD Transfer Pricing Guidelines are approved.

The new transfer pricing rules apply to arrangements entered into between associated persons (companies) on or after 1 July 2010, involving the supply or acquisition of goods, services, money or intangible assets and relating to trading activities within the

charge to Irish tax at the trading rate of 12.5%. However, an exemption from the new rules is available for small- and medium-sized enterprises.

- **APA**

There are **no specific Irish legislative provisions dealing with APAs**. However, the Irish tax authorities have been willing to negotiate and conclude bilateral advance pricing agreements with treaty partners, and they are **generally willing** to consider entering such negotiations once a case has been successfully accepted into the APA programme of the other jurisdiction. Reference is made to the EU APA Guidelines.

The Irish Revenue Commissioners are the competent authority.

A Revenue opinion may be obtained but does not have the status of a unilateral APA.
Bi- and multilateral APAs may be obtained.

The Irish tax system does not provide any related procedure rules; the reference is made to the EU APA Guidelines for the case of APAs between an Irish and other EU associated company. There is no practical experience with pre-filing meetings.

No fee.