Irish tax update - Summer 2013

Base Erosion and Profit Shifting – the Irish position

The OECD published a report on base erosion and profits shifting (**BEPS**) in February 2013. The report identifies six key problem areas contributing to the growth of BEPS internationally. The issues of concern are transfer pricing rules, hybrid instruments, effective anti-avoidance, intra-group financial transactions, solutions to counter harmful tax regimes and digital goods and services. To address these areas the report proposes developing an action plan involving the OECD working with international stakeholders gathering further information on the harmful effects of BEPS and proposing solutions. The aim was to have the action plan presented to the OECD Committee on Fiscal Affairs in June. In mid June, at the G8 Summit in Northern Ireland, the G8 released a communique which alluded to the release of a BEPS action plan in July, although there are reports that the action plan will not be concrete.

The Irish government's response to the draft BEPS report has been positive. The Minister for Finance Michael Noonan is on record noting "Ireland welcomes the report of the OECD and also the coordinated effort at OECD level to deal with the challenges BEPS poses." The Minister noted that Ireland will work with its international partners on the action plan and the Irish government will be monitoring the progress of the discussions and envisaged solutions. Ireland already has many of the provisions being considered such as a general anti-avoidance rule, domestic provisions limiting tax relief on intra-group debt, transfer pricing provisions and provisions taxing dividends from non-trading foreign subsidiaries at a higher rate of corporation tax than the headline 12.5% rate.

Against the backdrop of BEPS there has been some loose reporting regarding Ireland's corporate tax regime particularly with respect to the 'double Irish' structure and unwarranted negative publicity regarding the use of such tax structuring by US multinationals such as Google and Apple. The response of the Irish government to recent US Senate hearings into the tax affairs of Apple, which referred to the company having negotiated a 2% tax rate with the Irish tax authorities, has been unequivocal. Minister Noonan noted that Ireland would not be the 'whipping' boy' for what he called a flawed US Senate report that said Irish loopholes helped US multi-nationals shrink their tax bills. He noted that the 2% tax rate being mentioned in Congress was misleading and calculated by dividing the tax charged by branches in Ireland by the entire profit of the companies concerned. The Department of Finance has been quick to make clear that Ireland does not do special tax rate deals with companies and Apple has been quick to confirm this.

As to the 'double Irish' structure the Department of Finance has said that international tax planning takes advantage of differences in national systems and rules and that the best way to combat such arrangements is for countries to work together at EU and OECD level to examine these structures and consider how international rules can be implemented to ensure fair levels of taxation.

Accusations by US Senators that Ireland acts as a tax haven for multinationals were also strongly rejected. Ireland does not have the characteristics of a tax haven which according to the OECD include a lack of transparency, no or low taxes, lack of effective exchange of information and no requirement of substantial activity. Ireland's tax system is statute based with a 12.5% corporate tax rate applying to trading profits arising in Ireland and 25% applying to passive income. Ireland has entered into double tax agreements with 69 countries to date, many of which contain information exchange provisions, together with a further 20 (approximately) information exchange agreements with non-double tax treaty countries and most recently entered into an Intergovernmental Agreement with the US for the better implementation of FATCA on 21 December 2012 (one of the first countries to do so). As regards substantial activity, looking at the cases of Google and Apple given their recent exposure in the media, Google employs more than 2,500 while Apple is reported as employing more than 4,000 in Ireland.

Draft Irish Regulations and Revenue guidance on FATCA published

The Irish tax authorities (the Revenue Commissioners) circulated draft guidance notes on the implementation of FATCA in Ireland and a draft of the Financial Accounts Reporting Regulations 2013 (the **Regulations**) in early May. These draft publications follow on from the FATCA enabling legislation contained in the Finance Act 2013 (see our Spring 2013 alert).

The draft Regulations provide that any person carrying on a business in Ireland as a custodial or depository institution, an investment entity or a specified insurance company shall be regarded, subject to certain exceptions, a reporting financial institution (**RFI**) for FATCA purposes. A RFI shall be required to register with the Internal Revenue Service, with the date of registration provisionally being set at 25 October 2013 (IRS) at the latest. The draft Regulations require RFIs to apply the due diligence rules and procedures detailed in Annex I to the Ireland – US Intergovernmental Agreement (**IGA**) to identify the account holders of those accounts reportable under FATCA. The draft Regulations further require RFIs to make and deliver a return of all reportable accounts maintained by a certain date (provisionally set as 30 June) in the tax year following the tax year to which the return relates. Details of the information to be reported are set out in the draft Regulations. Finally the draft Regulations provide, while a RFI can appoint a third party as its agent to carry out its obligations under the Regulations and IGA the financial institution itself remains responsible for any failure by its agent in carrying out those obligations

The draft guidance notes broadly follow those published previously by HM Revenue and Customs in the UK. In the context of funds the guidance considers among other matters (i) when a fund is exempt from FATCA reporting requirements under Annex II of the IGA or separately under the US Treasury Regulations, (ii) which 'investment entity' may have reporting obligations where a fund does not fall within the category of a non-reporting Irish Financial Institution and (ii) the documenting of new accounts on a merger of two funds.

The Revenue Commissioners indicated on publishing the draft Regulations and guidance that they would be accepting observations and comments on them up to the end of May. A number of trade associations including the Irish Funds Industry Association (the **IFIA**) and the Irish Debt Securities Association (the **IDSA**) have taken the opportunity to make submissions to the Revenue Commissioners. Revised draft guidance notes are expected to be issued by the Revenue Commissioners in July.

IRS revises timeline for the implementation of FATCA

On 12 July 2013 the IRS issued Notice 2013-43 (the Notice) extending certain timelines regarding the implementation of FATCA by 6 months.

The start date for the implementation of FATCA withholding has been pushed from 1 January to 1 July 2014. The IRS online registration portal to register financial institutions which was to have been accessible by no later than 15 July 2013 will now be accessible by 19 August 2013. Financial institutions will be able to use the period between 19 August and year end to access and modify their registration information. It will only be on or after 1 January 2014 that financial institutions will be expected to finalise their registration information.

The IRS electronically posted first list of foreign financial institutions will no longer be published by 2 December 2013 but rather by 2 June 2014 with financial institutions needing to finalise their registration by 25 April 2014 to appear on the first list.

Additional changes provided for in the Notice include partner jurisdictions no longer being required to obtain and exchange account information with respect to calendar year 2013. In addition the IRS intend on providing a list of jurisdictions that will be treated as having in effect an IGA notwithstanding that an IGA may not have entered into force as of 1 July 2014. Modifications made to the US Treasury Regulations on foot of the Notice to deal with all these changes should feed into Ireland's IGA through the operation of its most favoured nation provision.

New annual return requirement in respect of certain funds

The Finance Act 2012 gave the Revenue Commissioners the power to make regulations requiring a fund to file a return of information relating to the value of units held in the fund. Draft regulations have been published which are due to be approved shortly. These regulations will require the value of an Irish tax resident investor's holding in an Irish fund to be reported electronically to the Revenue Commissioners annually. As things stand it is understood that the first return will need to be filed by 30 September 2013 in respect of the value of units held by a unit holder in a fund as at 31 December 2012 and thereafter by 31 March in respect of the previous calendar year.

Revised draft guidance notes were published by the Revenue Commissioners last month to address issues raised during consultations with interested parties. The value of the investment to be reported is computed on the basis of the redemption or repurchase price calculated under certain provisions of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 but where the unit is not priced as at 31 December the latest available price nearest to that date may be used. Funds will not be required to make returns in respect of certain exempt Irish tax resident investors e.g. pension schemes, other funds, section 110 special purposes companies, etc.

The IFIA met with the Revenue Commissioners in April and in advance of that meeting made a number of submissions seeking clarification on a range of issues with respect to filing the new annual report. The IFIA wrote to industry on 20 May 2013 informing firms of the outcome of discussions with the Revenue Commissioners and requesting firms to review the draft guidance notes and file specifications with a view to providing feed back to the IFIA Transfer Agency or Tax Committees by the end of May.

VAT recovery entitlement concerning unsuccessful share acquisition bid

On 2 May 2013 the High Court determined that Ryanair was not entitled to recover VAT incurred on expenditure relating to its unsuccessful bid to acquire a 100% shareholding in Aer Lingus in October 2006. The Court found in relation to the bid that Ryanair was not a taxable person carrying out an economic activity despite Ryanair's stated intention to provide management services to Aer Lingus in the event of a successful bid. It is not clear at this stage whether Ryanair will appeal to the Supreme Court.

While the decision was very much based on the specific circumstances, it highlights the need to consider VAT recovery entitlement when making share acquisitions. The potential to recover VAT can depend on a number of factors including whether a pure holding company is the acquisition vehicle, whether management services will be provided and whether VAT grouping is put in place. Early planning could reap rewards.

Treaty update

Ireland has signed comprehensive double taxation agreements with 69 countries of which 64 are in effect.

A new agreement with the Ukraine was signed on 19 April 2013 and legal procedures to bring the agreement into force are now being followed.

An agreement with Uzbekistan came into force on 17 April 2013 and will be effective from 1 January 2014.

Negotiations for new agreements with Azerbaijan, Jordan and Tunisia are at various stages while negotiations are on-going for the revision of existing agreements with Pakistan and the Netherlands.

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