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Recent Developments in International Taxation

Ireland

Philip Tully

Matheson

philip.tully@matheson.com

Major Irish developments in 2019

The principal Irish legislative changes during 2019 were announced in the Budget 2020 and enacted in the Finance Act 2019 (the 'Finance Act'). Many of the significant measures introduced in 2019 resulted from the implementation by Ireland of European tax and information exchange measures in accordance with European Union directives. These include the extension of the scope and application of the Irish transfer pricing rules, the introduction of anti-hybrid rules required by the EU's anti-tax avoidance directives and the implementation in Ireland of the Directive 2018/822 ('DAC 6') mandatory information exchange regime. These measures continue to show Ireland's commitment to ensuring that its corporation tax regime is in line with international best practice, and represent further milestones in Ireland's Corporation Tax Roadmap published in 2018.

Significant measures have also been implemented recently in Ireland to address the impact of the Covid-19 pandemic. Irish Revenue is operating two schemes for workers impacted by the crisis. The Temporary Wage Subsidy Scheme (the 'Scheme') and the Covid-19 Pandemic Unemployment Scheme. In addition, Irish Revenue has issued some helpful guidance regarding the implications for tax residence of companies and the creation of permanent establishments as a result of employees being located outside Ireland due to travel restrictions. Ireland has also relaxed certain reporting and filing obligations to assist taxpayers experiencing difficulties arising from the impact of Covid-19.

Updates to Irish transfer pricing rules

The Finance Act introduced a number of changes to the Irish transfer pricing rules that were expected following a process of consultation with taxpayers. The primary measures introduced by the Finance Act were:

- the extension of Irish transfer pricing rules to non-trading transactions, subject to certain exceptions for domestic transactions between parties that are both Irish residents;

- expanding the scope of the transfer pricing rules to include capital transactions over a *de minimis* threshold;

- aligning Ireland's transfer pricing legislation with the 2017 Organisation for Economic Co-operation and Development (OECD) Guidelines, including the introduction of documentation requirements that involve the preparation of master and local files;

- the removal of historic grandfathering for transactions entered into before July 2010; and

- the extension of transfer pricing rules to transactions involving small and medium-sized enterprises (SMEs).

The new provisions will apply to companies for chargeable periods beginning on or after 1 January 2020. Therefore, Irish companies engaging in intra-group transactions, whether on a trading account or otherwise, should carefully consider whether such arrangements come within the scope of these updated transfer pricing rules. If so, appropriate transfer pricing analysis and documentation should be prepared to support the pricing of any such arrangements.

New Irish anti-hybrid rules

The Finance Act also introduced new Irish anti-hybrid rules in accordance with the EU Anti-Tax Avoidance Directives (ATAD and ATAD2). These anti-hybrid rules apply to payments made, or arising, on or after 1 January 2020.

The anti-hybrid rules are aimed at preventing companies from benefiting from mismatches in the tax treatment of payments on hybrid financial instruments and on payments by or to hybrid entities that result in either double deduction mismatch outcomes (where an expense is deductible for tax purposes twice) or deduction and non-inclusion mismatch outcomes (where a payment is tax deductible but not subject to tax for the recipient).

The rules generally apply to transactions entered into between ‘associated entities’, which broadly include entities under common 25 per cent ownership, entities included in consolidated financial statements or entities in which one has significant influence over the other.

The Irish anti-hybrid rules are less restrictive than equivalent rules in some other EU jurisdictions. For example, income will be regarded as ‘included’ for tax purposes under the Irish anti-hybrid rules where a payment is made to a recipient in a jurisdiction that does not impose tax, which operates a territorial regime, or where the payment is subject to a controlled foreign company charge.

These new anti-hybrid rules are detailed and complex, and companies availing of tax deductions in respect of intra-group transactions should carefully consider both the Irish and foreign tax treatment of such arrangements to ensure that no issues arise.

EU mandatory disclosure regime

Ireland also implemented the provisions of DAC 6 in the Finance Act. These new mandatory exchange of information rules require ‘intermediaries’, which includes a broad range of advisers, to report certain details of cross-border transactions entered into from 25 June 2018 onwards with particular characteristics to the Irish Revenue Commissioners. Information reported under the regime will be exchanged with the tax authorities of all other EU Member States, and some of the information will also be shared with the European Commission.

The objective of DAC 6 is to create a reporting obligation in respect of transactions that could potentially involve aggressive tax planning at the time such transactions are implemented (rather than waiting until the time when tax returns are filed). However, the scope of transactions captured by this regime is very broad and includes many intra-group transactions in respect of which there is no tax motivation.

Initially it was intended that the first DAC 6 reporting obligations would arise in Ireland on 31 July 2020. However, as a result of the Covid-19 pandemic, EU countries have been given the option of electing to defer these reporting dates by six months. Ireland has elected to defer reporting in Ireland and, as a result, the first DAC 6 reporting dates in Ireland will now be:

- for cross-border arrangements implemented between 1 July and 31 December 2020, the first reports will be due from 1 January 2021; and

- for reporting 'historical' cross-border arrangements (ie, arrangements during the 'look-back' period from 25 June 2018 to 30 June 2020), reports are due by 28 February 2021.

Given the broad scope of transactions that potentially come within the remit of the DAC 6 regime, taxpayers should review transactions entered into since 25 June 2018 (in particular, those involving intra-group cross-border transfers of intellectual property (IP) or businesses) to consider whether any reporting obligation arises. As the primary reporting obligation rests with the intermediaries involved in such transactions, it will be important for taxpayers to liaise with their external advisers to determine whether a reporting obligation arises in any EU jurisdiction; when such a report is due, who will report the relevant transactions; and, if multiple reports are required, that they are consistent.

Irish response measures to Covid-19

Ireland introduced the Scheme to provide financial support to employers that have been significantly impacted by the Covid-19 pandemic to ensure that they can retain employees on their payroll. The Scheme enables employees, whose employers are affected by the pandemic, to receive significant support (up to certain specified caps) directly from their employer through the payroll system. The Scheme is in addition to an increased rate of unemployment benefit for those who have been let go by their employers due to the Covid-19 crisis.

In order to qualify for the Scheme, employers must have experienced a decline of at least 25 per cent in turnover or customer orders. The scheme was initially expected to last 12 weeks and involved a fixed weekly subsidy payment. However, the Scheme was extended, most recently until 31 August 2020, and the latest subsidy payment was based on the previous net weekly pay.

In addition to the Scheme, the Irish Government also introduced some further measures to assist companies during the pandemic:

- Irish Revenue implemented a 'tax debt warehousing' arrangement for VAT and payroll-related tax liabilities, whereby they suspended debt collection and the charging of interest on late payments for VAT and Pay As You Earn (PAYE) liabilities for SMEs (automatically) and also for larger businesses (on request). Irish Revenue also indicated that it will continue to engage with any viable business that experiences temporary cashflow difficulties.

- In order to alleviate concerns regarding the creation of permanent establishments, Irish Revenue will disregard an individual's presence in Ireland for corporation tax purposes for a company (of which the individual is an employee, director, service provider or agent) where that presence is shown to result from travel restrictions related to Covid-19.

- Further, where an employee or director of a company is present in another jurisdiction as a result of Covid-related travel restrictions, and would otherwise have been present in Ireland, Irish Revenue is prepared to disregard such presence outside Ireland for corporation tax purposes for that company.

Other developments

Some other recent Irish tax developments of note include the following:

- Dividend withholding tax: Ireland increased its rate of dividend withholding tax from 20 per cent to 25 per cent from 1 January 2020. A broad range of existing exemptions continue to apply and, as a result, this change should only impact a limited number of recipients of dividends from Irish companies.

- Stamp duty: Ireland increased the rate of stamp duty on transfers of non-residential property from six per cent to 7.5 per cent and introduced a new stamp duty charge on company takeovers effected by way of court approved schemes of arrangement.

- Double tax treaties: The Finance Act includes provisions to ratify the newly negotiated double tax treaty between Ireland and the Netherlands, and the protocol to the double tax treaty with Switzerland.