Annual International Bar Association Conference 2019

Seoul, Korea

Recent Developments in International Taxation

Ireland

Philip Tully

Matheson

philip.tully@matheson.com

46713518.12

1 Major developments in 2018

During 2018 Ireland implemented a number of recommendations from the Organisation for Economic Co-operation and Development's ("**OECD**") Base Erosion and Profit Shifting ("**BEPS**") initiative. Ireland implemented many of these recommendations in accordance with the European Anti-Tax Avoidance Directive ("**ATAD**") as well as implementing the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the "**MLI**").

The principal Irish legislative changes were announced in Budget 2019 and enacted in Finance Act 2018. Many of these measures were set out in Ireland's 'Corporation Tax Roadmap' published by the Department of Finance in September 2018, with one key exception being the early implementation of an ATAD-compliant exit tax that took effect from 10 October 2018.

2 New Exit Tax

In Finance Act 2018, Ireland introduced a new broad-based exit tax that applies from 10 October 2018, in line with the requirements to introduce an exit tax pursuant to ATAD. Under the new provisions an exit charge will arise if:

- a company migrates its place of residence from Ireland to any other jurisdiction;
- assets of an Irish permanent establishment ("**PE**") are allocated from the PE to the company's head office or to a PE in another jurisdiction (this provision only applies in respect of companies that are resident in an EU Member State other than Ireland); or
- the business of an Irish PE is allocated from the PE to the company's head office or to a PE in another jurisdiction (again, this provision only applies in respect of companies that are resident in an EU Member State other than Ireland).

The exit tax is charged at 12.5% and applies to the latent gain inherent in the assets. The exit tax does not apply to assets that remain within the Irish tax charge (for example, Irish real estate or assets that continue to be used in the business of an Irish branch).

The exit tax may be deferred and paid over five years. If the exit tax is unpaid, Revenue may pursue any other Irish resident group company or an Irish resident director who has a controlling interest in the company that is subject to the charge.

3 New CFC Regime

In Finance Act 2019, Ireland also introduced controlled foreign company ("**CFC**") rules for accounting periods beginning on or after 1 January 2019 in accordance with the requirements of ATAD.

A CFC is defined for these purposes as, broadly, a non-Irish resident company controlled by an Irish resident company or companies. For the purpose of this test, "control" is defined broadly and includes both direct and indirect control. However, just because a company is regarded as a CFC does not of itself result in a CFC charge arising. A CFC charge will only arise to the extent that:

1. the CFC has undistributed income (it is important to note that the term ‘undistributed profits’ for this purpose does not extend to include capital gains); and

2. the CFC generates income by reference to activities carried on in Ireland (in very general terms, if the CFC relies on people in Ireland to manage assets or risks which generate income for the CFC, the CFC will be regarded as generating income by reference to Irish activities).

In cases where the CFC relies on Irish activities to generate its income, no CFC charge will arise if it can be established that:

(a) the arrangements were entered into on arm’s length terms;

(b) the arrangements are subject to Irish transfer pricing rules;

(c) the essential purpose of the arrangements is not to secure a tax advantage; or

(d) the CFC did not have any non-genuine arrangements in place.

A number of exemptions from the CFC charge are included in the Irish legislation including an effective tax rate exemption, a low profit margin exemption, a low accounting profit exemption and an exempt period exemption. The new CFC rules in Ireland also permit a one year “grace period”, whereby, for newly acquired foreign subsidiaries of Irish companies, no CFC charge will arise.

In the context of the effective tax rate exemption, gains earned by the CFC must be included when calculating the comparative levels of tax. Given that Ireland has a relatively high capital gains tax rate of 33%, the conditions for the tax rate exemption may be difficult to satisfy in years when a CFC disposes of an asset at a gain. The CFC charge must be calculated in accordance with transfer pricing principles and should reflect the amount that the CFC would have paid a third party for the relevant Irish activities on which it relies to generate income.

4 MLI

On 29 January 2019, Ireland deposited its instrument of ratification of the MLI with the OECD. As a result, the MLI entered into force in Ireland on 1 May 2019, and from that date the updated mutual agreement procedure provisions can be relied on where the treaty partner jurisdiction has also completed the ratification process. The MLI will only begin to take effect to update Ireland’s double tax treaties:

- from 1 January 2020 for withholding tax provisions; and
- for accounting periods beginning on or after 1 November 2019 for all other purposes.

Ireland did not adopt the MLI changes to the PE definition designed to apply to commissionaire arrangements. Neither did Ireland adopt the narrower specific activity exemptions to the fixed place of business PE definition. Ireland will move to mutual agreement to determine residence in the case of dual residence entities.

5 Other developments

Some other important recent Irish tax developments include:

- **Consultation on Transfer Pricing** - On 18 February 2019, Ireland's Department of Finance launched a public consultation on Ireland's transfer pricing regime and confirmed that the Irish transfer pricing rules will be updated with effect from 1 January 2020 to include incorporation of the 2017 OECD Transfer Pricing Guidelines, removal of grandfathering for pre 1 July 2010 transactions and potential extension of these transfer pricing rules to non-trading income.

- **Consultation on anti-hybrid and interest limitation rules** – A public consultation on anti-hybrid and interest limitation rules required to be implemented under ATAD closed on 18 January 2019 and draft legislation in relation to these measures is expected to be published in 2019. While Ireland remains of the view that it is entitled to a derogation from introducing interest limitation rules until the end of 2023, the Department of Finance have stated that it is anticipated that transposition of such rules could potentially advance, at the earliest, to Finance Bill 2019.

- **New Double Taxation Treaties -** Ireland signed a double taxation convention with Ghana on the 7 February 2018 and procedures to ratify this Convention are currently underway. New double taxation treaties have also recently been agreed with the Netherlands, Oman and Uruguay. In addition, the protocols to existing double taxation treaties with Germany and Switzerland have been negotiated.