MAPLES GROUP

UPDATE

Irish Real Estate Loans – Recent Case Law

A recent Irish Tax Appeals Commission (the "TAC") determination (72TACD2023) confirms that loans secured on Irish land are within the scope of Irish capital gains tax[1].

This decision is significant for non-Irish resident investors, such as international banks and investment funds, who acquire or sell Irish loans secured on Irish land. These may be Irish real estate loans or corporate loans of a multinational secured over the real estate of the group including Irish land or buildings.

Background

The Irish distressed debt market was the most active in Europe between 2012 and 2016. In 2015 alone, €23.3bn of Irish loans were sold. This was driven by sales of Irish loan books by the National Asset Management Agency (NAMA) and Irish banks. The taxation position of those who acquired these distressed loans was the subject of intense political debate in the years that followed.

The published position of the Irish Revenue Commissioners ("Revenue") was that profits from sales of loans secured on Irish land were subject to Irish capital gains tax. Not all advisors or taxpayers agreed with this position. The matter was, and remains, one of the more controversial areas of Irish practice.

Recent Case

The case involved a sale of distressed loans in 2016. The seller (the "Appellant") was a company which was resident outside Ireland. The issue before the TAC was whether the Appellant was subject to Irish capital gains tax on the sale of the loans.

The TAC outlined the relevant portions of Irish tax law. As a non-Irish resident company, the Appellant is subject to Irish capital gains tax in respect of gains from disposals of "land" in Ireland. On any literal reading, a loan is clearly not land. However, the Irish legislation defines land (in section 5 of the Taxes Consolidation Act 1997(TCA)) as including any "interest in land". Revenue successfully argued that as the loans were secured on Irish land, they constituted an interest in the land.

The TAC reviewed the recent High Court case of Cintra[2] which concluded that land included not just a freehold or leasehold interest, but also "*one of the lesser interests formally recognised by the Common Law and now codified in s.11(4) of the 2009 Act [The Land and Conveyancing Law Reform Act 2009]".* The 2009 Act specifically includes an "incumberance" which includes a mortgage.

Accordingly, the TAC concluded that the mortgages and charges contained in the loan

[1] https://www.taxappeals.ie/en/determinations/72tacd2023-cgt

[2] Cintra Infrastructure Internacional Slu v the Revenue Commissioners [2023] IEHC 72.

portfolio comprise an 'interest in land' and are therefore within the charge to capital gains tax.

Additional Points

Under the relevant double tax agreement, Ireland retained the right to tax Irish "immovable property". Immovable property was defined according to Irish law. As the TAC had concluded that land included a mortgage, the DTA offered no protection.

Under section 29 TCA, Irish capital gains tax also applies to gains from unlisted shares and securities deriving their value from Irish land. As the TAC had determined that the mortgages and charged in the loan portfolio, it did not consider it necessary to determine whether the loans were "securities" within the meaning of section 29 TCA. This is unsurprising, however it leaves some points unresolved. Historically, sales of listed debt would have been treated as outside the scope of Irish capital gains tax, but this case suggests that the position is less certain where the debt is secured.

The Appellant alleged Revenue's published positions on the application of capital gains tax was confused and uncertain. The TAC was not convinced that this was material to the dispute. However, it noted that, to the extent such arguments relied upon a claim of "legitimate expectation", the TAC was not the correct venue for such a claim. This is a reminder of the need, in the case of an argument based on legitimate expectation, to consider whether a different judicial forum is required.

Section 980 Tax Clearances

The case has relevance to transactions involving disposals of performing and non-performing loans by non-resident entities.

Under section 980 TCA, a buyer of a "specified asset" (which includes land and therefore secured loans) must be provided with a tax clearance certificate. This is known as a CG50A. If one is not provided, then the buyer must withhold 15% from the purchase price and pay this over to Revenue. The requirement applies even when there is no capital gains tax at stake, such as where performing, or newly originated loans are involved.

The procedure for non-residents to apply for a CG50 can be cumbersome and does not always align with commercial timelines. Nonetheless, it will continue to be a feature of the Irish loan market.

It is important to note that current Revenue guidance provides that no such certificates are required when the seller is an Irish "section 110" company or regulated investment fund. Certain other exemptions also apply to specific forms of sale. Hence there continues to be a practical benefit from using Irish entities to hold Irish loans.

What happens next?

The Revenue Commissioners are currently updating their published guidance on this area. It would not be surprising if any revision referred to this decision, as it clearly supports their views.

The TAC's published determination does not contain any indication that the case will be appealed. This may be the end of this particular dispute. Taxpayers with an interest in this area should note that TAC does not operate a policy of precedent regarding its determinations (save for a special process for strikingly similar appeals) and so the case does not have the same effect as case law in the traditional legal system.

There continues to be activity in the loan market, as loan portfolios are traded on the secondary market, existing loans are refinanced and there are sales by banks who are retreating from the Irish market. Hence, the issue may be litigated again in the future by another taxpayer.

If you would like further information, please liaise with your usual Maples Group contact or the members of our Tax team below.

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