MAPLES GROUP

UPDATE

Proposed Irish Tax Measures to Apply to Outbound Payments

In July 2023, the Irish Department of Finance published draft legislation containing new tax measures which would apply to certain payments from Irish companies. The proposed measures apply to payments of interest, royalties and dividends / distributions if each of the following conditions are met:

(a) the payment is between associated entities;
(b) the recipient is resident in, or created under, the laws of either a jurisdiction on the EU list of non-cooperative jurisdictions for tax purposes or a "zero-tax" jurisdiction (both referred to as "Specified Territories"); and
(c) the payment is not taken into account for certain tax purposes.

The proposals have been developed in the context of the OECD BEPS process and the recommendations of the European Commission that EU Member States take actions to reduce aggressive tax planning. The Department of Finance is engaged in a public consultation with a view to informing the terms of final legislation. This legislation would be implemented in late 2023 as part of the Irish Finance (No. 2) Bill 2023 and would be expected to come into effect from 1 January 2024.

The measures should not impact shareholders in regulated Irish funds (such as ICAVs) or, generally, investors in widely held structured finance vehicles, such as RMBS or CLO transactions. However, they are potentially relevant to intellectual property transactions, international corporate structures, investment holding companies and other forms of financing vehicles.

Scope of the Provisions

The provisions apply to payments of interest, royalties or dividends / distributions between "associated entities". An entity will be associated with an Irish company if it holds a majority shareholding, voting or profits interest in the Irish company, or if it has the ability, through the board of directors, to cause the affairs of the company to be conducted in accordance with its wishes. Therefore, Irish entities may be associated with their majority shareholder or investor, or with an entity which has control through the board of directors of the Irish entity.

The recipient must be resident in a Specified Territory or created under the laws of a Specified Territory. Obviously, this impacts entities which are tax resident in a Specified Territory, but it is also directed at partnerships and other entities which are not tax resident in the jurisdiction where they are formed or indeed any jurisdiction. As currently drafted, a partnership formed under the law of a Specified Territory may be impacted even if the ultimate partners are based elsewhere.

A Specified Territory includes a jurisdiction on the EU's list of non-cooperative jurisdictions for tax purposes. This list, which currently contains 16 countries, changes periodically as jurisdictions are removed from the list and others are added by the EU. A Specified Territory also includes a zero-tax jurisdiction. This is defined as a jurisdiction which imposes tax at a zero rate or does not impose any tax at all. There will be an element of judgement to determine whether a jurisdiction is a "zero-tax" jurisdiction based on its domestic laws.

The measures are designed to counter outbound payments which not taxed. Thus, if a payment to an entity is subject to a controlled foreign company ("CFC") tax charge or is taken into account in computing tax under the OECD global minimum tax (GLOBE) rules it will not be subject to the withholding tax measures.

Interest

Ireland currently has an interest withholding tax at a rate of 20%. There are a broad range of exemptions, including for listed debt (Quoted Eurobonds) and wholesale debt instruments. The proposed legislation would deny these exemptions to interest payments to associated entities in Specified Territories. It would also impose withholding tax on interest which is not yearly interest (such as may apply to short term funding agreements) where the conditions are met.

Royalties

The proposed legislation classifies all payments for the use of copyright, patents, trademarks, information and processes as royalties. Many such payments would not be within the scope of Irish withholding tax currently. The rate of Irish withholding tax on royalty payments within the scope of the proposed new rules would be 20%.

Dividends / Distributions

Ireland imposes dividend withholding tax at 25% on dividends or distributions by Irish companies. There are longstanding and widely used exemptions, including for dividend payments to companies (wherever resident outside Ireland) which are controlled by persons resident in a jurisdiction with which Ireland has a tax treaty. The proposed legislation would mean this exemption no longer applies.

What action should I take?

(A) Consultation Process

The consultation process will run until 8 August 2023. There are a number of concerns regarding the proposals and a number of areas where the definitions and approach are inconsistent with existing aspects of the Irish tax legislation. The measures also go beyond EU law requirements which generally target payments to jurisdictions on the EU list of non-cooperative jurisdictions for tax purposes rather than merely low or zero tax jurisdictions. The consultation should allow some of these issues to be resolved. The primary concerns include:

(a) the treatment of tax transparent recipients and the narrow range of foreign taxes which are taken into account in assessing whether a payment is appropriately taxed. Historically, and in other contexts, Ireland has treated payments as "subject to tax" if the income is directly or indirectly taxed, so for example a payment to a partnership, or "check the box" entity, would be treated as taxed where the ultimate owners bring it into account for tax purposes. That does not apply in the draft legislation and it is hoped that this approach would be reflected in the ultimate proposals;

(b) the extended definition of royalties means that non-recurrent payments which are part of ordinary business arrangements may become subject to withholding tax;

(c) the removal of the dividend exemption for vehicles controlled by persons who would otherwise have been paid dividends gross is concerning. For example, it is common in US multinational corporate and investment structures for an Irish company to be held by a "low tax" intermediate entity;

(d) many small and medium-sized Irish companies have raised external capital through the use of such vehicles and the proposals may dissuade investment; and

(e) the interaction of the proposals with Ireland's existing tax treaty obligations is unclear. Ireland has tax treaties with a number of Specified Territories. In addition, treaty residents may invest through such jurisdictions.

The Maples Group will be participating in the consultation through various Irish industry bodies and is happy to raise any specific points of concern or discuss the matters arising from the proposals.

(B) Review of existing structures to assess potential impact

The proposed measures will affect certain existing international corporate and investment structures merely because the investing entity into an Irish entity is located in a low tax jurisdiction, even though the ultimate investors are themselves taxed or otherwise located in tax treaty partner countries of Ireland. Those structures could be subject to additional Irish tax because of these proposed changes.

Please let us know if we can assist you in reviewing existing structures to assess the potential impact of these proposed changes.

Further Information

For further information, please liaise with your usual Maples Group contact or any of the persons listed below.

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