

THE TAX DISPUTES  
AND LITIGATION  
REVIEW

ELEVENTH EDITION

Editor  
David Pickstone

THE LAWREVIEWS

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AND LITIGATION  
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**Editor**  
David Pickstone

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# PREFACE

It is increasingly common for tax practitioners to be involved in disputes that span multiple jurisdictions. We operate in a global economy. Supply chains cross continents, and the increasing role of technology accelerates the pace at which economic activity becomes divorced from the structures intended to tax it. The pace of economic and technological change potentially increases the gap between the reality of commerce and that of taxation.

Although supranational agencies, such as the European Commission and the Organisation for Economic Co-operation and Development, work hard to keep pace with change, there is an inevitable lag between intention and action. Of late we have seen individual countries start to take unilateral actions, with digital taxation being a prime example. In coming years, a combination of economic developments and unilateral actions by individual countries is likely further to emphasise the importance of double tax treaties and the OECD multilateral instrument.

Hot on the heels of the economic impact of the covid pandemic, tax authorities face the compounding impact of the war in Ukraine and hugely increased energy prices. Pressure on government budgets, particularly in the UK, is increasing. In response, the UK and EU have introduced windfall taxes, and the US government has threatened an equivalent. Both the UK and EU are looking closely at compliance as a way to close the tax gap. The UK has increased compliance focus on individuals, and the EU has proposed VAT measures, including a move to real-time reporting and e-invoicing for cross-border businesses, and a single VAT registration across the EU.

Regardless of whether tax authorities increase in cooperation or increase in competition, one thing is certain: they will not stand still. Tax, and particularly the international approach to tax, is a permanent fixture on the political agenda. The resulting frequent (and sometimes abrupt) changes in key elements of tax law inevitably lead to high-value and complex disputes, which often take many years to resolve.

The purpose of this book is to provide insight into the issues that give rise to tax disputes in different jurisdictions, the procedures for resolving those disputes and the powers and approach of local tax authorities. It is hoped that it will provide valuable insight into the process, timescale and cost of resolving complex difficulties when they arise across more than one jurisdiction.

We are lucky to have contributions from many leading and impressive tax practitioners across a wide range of jurisdictions. Each provides an up-to-date insight into dealing with contentious tax issues in their jurisdiction. I have enjoyed and learned from reading their contributions and I hope you will do, too.

I would like to thank my friends and colleagues Victor Cramer, Lee Ellis and Anastasia Nourescu for their valuable assistance in compiling this and previous editions.

**David Pickstone**  
Stewarts Law LLP  
London  
February 2023

# IRELAND

*Andrew Quinn, William Fogarty, Robin McDonnell and Eugene McCormick<sup>1</sup>*

## I INTRODUCTION

Tax litigation involving large companies has become a regular feature of the Irish business landscape. This is due to a range of factors: significant international companies locating in Ireland and so correspondingly significant deal size, a reformed Irish tax appeals system, increased information flow to tax authorities (from both within Ireland and elsewhere) and enhanced resources, investigation and analysis by the Irish tax authorities, the Revenue Commissioners (Revenue). Tax litigation disputes are likely to increase in coming years as these trends continue.

The Irish tax disputes process was substantially reformed in 2016 when the Tax Appeals Commission (TAC) was established. This is an independent statutory body responsible for hearing appeals by taxpayers against decisions of Revenue concerning taxes and duties. The process has a number of features intended to expedite hearings and resolve disputes. The TAC may make a wide array of directions in relation to the preparation and conduct of an appeal. Statements of case and Outlines of arguments are typically sought in advance of any hearing. Case management conferences, at which directions are given for the orderly and efficient conduct of appeals, are directed in complex appeals. The TAC has the power to summon any person to appear before them and to take evidence on oath, but is also mandated to conduct its proceedings without undue formality and to take a flexible approach to procedural matters. The TAC also enjoys the right to determine an appeal without a hearing, where it considers it appropriate.

The TAC has enjoyed greater resources with an increased number of staff and commissioners, and a leveraging of IT systems. The TAC has actively managed its caseload in recent years, successfully clearing its inherited backlog of tax appeals and reducing the average waiting times for hearing dates. In 2020, the framework for the resolution of tax appeals was further strengthened by the appointment of the first chairperson of the TAC, a role established by the Finance (Tax Appeals and Prospectus Regulation) Act 2019. While tax appeals to the TAC can be costly and time-consuming, these various measures all serve to promote the reduction in the costs of determination of tax disputes.

TAC hearings may be in public, or if an application is made, wholly or partly in private. The TAC is required to publish its determination no later than 90 days after notifying the parties of the determination. The determinations are regularly published on the TAC website,

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<sup>1</sup> Andrew Quinn, William Fogarty, Robin McDonnell and Eugene McCormick are partners at Maples and Calder.

providing tax practitioners and taxpayers with important insights into the issues and Revenue arguments. Where the appeal was held in private, the names and personal details of parties are redacted.

A party who is dissatisfied with the TAC's determination, on the grounds that it is erroneous on a point of law, may require the TAC to state and sign a 'case stated' for the opinion of the High Court. In substance, the 'case stated' procedure is an appeal on a matter of law. High Court proceedings are generally in public. Further recourse can be had from a decision of the High Court to the Court of Appeal and, in certain limited circumstances, a further appeal may be brought before the Irish Supreme Court. In the usual way, matters of interpretation of the European Union treaties which impact the outcome of an appeal can be referred to the Court of Justice of the European Union.

## **II COMMENCING DISPUTES**

### **i Initiating tax disputes**

The Irish tax system is a self-assessment system. Taxpayers are responsible for determining their own tax liabilities, filing returns and paying tax on the basis of that determination. Revenue has broad powers to audit, investigate and make enquiries into taxpayers' returns and affairs.

Tax disputes are usually initiated by Revenue issuing a notice of assessment against a taxpayer. This occurs where Revenue considers that there has been a failure to file an appropriate return, pay tax due, or the taxpayer has otherwise breached its obligations under tax legislation.

A dispute may also arise in the course of a Revenue audit or other compliance intervention and, where this cannot be settled between Revenue and the taxpayer, an application can be made to have this referred to the TAC.

It is also possible to seek judicial review directly in the High Court in respect of a decision of Revenue.

### **ii Time limits**

As a general rule, a Revenue assessment cannot be made more than four years after the end of the accounting period in which the tax return in respect of such chargeable period was filed.

The general four-year period can be extended in certain circumstances.

Where Revenue make an assessment against a taxpayer, then with a limited number of exceptions, the taxpayer has a period of 30 days from the date of the notice of assessment to lodge their 'notice of appeal' with the TAC. Circumstances in which the 30-day time period for the making of appeals to the TAC may be extended include absence, sickness or 'other reasonable cause'.

### **iii Disclosure**

In general, Revenue enjoys significant powers to request the production of information, books and records from a taxpayer. Revenue also has power to require a third party to provide information, books, records and documents in relation to a taxpayer in certain circumstances. There are also a number of provisions which require taxpayers, advisers or other intermediaries to disclose information to Revenue where they engage in particular transactions or activities. The EU Mandatory Disclosure Regime (DAC6) has been implemented into Irish law, with the first reports filed by 31 January 2021.

There is no statutory requirement for a taxpayer to disclose particular information during the TAC process. However, the TAC enjoys the power to make a wide range of directions, including requiring a party to provide documents, statements, accounts, returns, computations, explanations, particulars, records, certificates, declarations, schedules and such other items or information as it considers relevant to the adjudication of the matter under appeal. Moreover, the TAC will often direct that the taxpayer submit a 'statement of case' relating to the matter under appeal, namely, a detailed submission setting out the factual basis for the appeal, which involves listing (and sometimes enclosing) documents that will be relied on at the hearing. Further, the burden of proof in all cases before the TAC is generally on the taxpayer. This means that a taxpayer will, in practice, be required to disclose information in order to support their appeal.

There is no general discovery process in matters before the TAC. There is no right of discovery in appeals before the High Court from the TAC. However, although rarely granted, discovery is available in principle in judicial review proceedings before the High Court where the court deems the documents relevant and necessary to a fair disposal of the matter.

#### **iv Avoiding disputes**

There are a number of mechanisms for taxpayers to correct any errors in their returns, thereby avoiding disputes.

First, there is the 'self-correction' facility. This allows taxpayers to regularise their tax affairs in respect of minor errors without incurring penalties.

Of broader application is the 'qualifying disclosure' regime that allows taxpayers to make a 'prompted qualifying disclosure' or an 'unprompted qualifying disclosure'. Such disclosures can assist in the mitigation of penalties and may prevent prosecution and publication on the periodic public list of tax defaulters.

There is also a separate disclosure regime under Ireland's statutory general anti-avoidance provision, discussed further below, which has been used rarely.

Revenue has very broad powers to enter into settlements with taxpayers before, or in the course of, a formal disputes process. In practice, cooperation and dialogue with Revenue can be important tools in avoiding or shortening disputes.

#### **v Freedom of information requests**

Freedom of information (FOI) requests under the Freedom of Information Acts are a useful tool for taxpayers, allowing individuals to request access to records, amendments of records or reasons for a decision of a public body, including Revenue. A FOI request can be made with respect to information created after 21 April 1998, subject to certain exemptions. The EU General Data Protection Regulation (GDPR) also entitles taxpayers to make a request to Revenue to access their personal data held by the latter.

### **III THE COURTS AND TRIBUNALS**

#### **i The courts – appeals**

If it is dissatisfied with the TAC's determination, a party may appeal to the High Court. The appeal can only be on the basis that the determination is erroneous on a point of law; save for exceptional circumstances, the TAC's findings of fact are final and conclusive and

new evidence may not be adduced. The TAC will then issue a 'case stated' (in substance, an appeal) listing a set of questions for the opinion of the High Court. In recent years both Revenue and taxpayers have used the appeal process following TAC decisions.

Decisions of the High Court can, in turn, be appealed to the Court of Appeal. A decision of the Court of Appeal may only be further appealed with the leave of the Supreme Court: the latter Court must first be satisfied that the issues in the proposed appeal involve a matter of general public importance or that the appeal is necessary in the interests of justice. A direct (or 'leapfrog') appeal from the High Court to the Supreme Court is only possible where the Supreme Court is satisfied that the above test has been met and 'exceptional circumstances' justify a direct appeal.

In certain circumstances, where there is no agreement on the liability to a penalty or where the agreed penalty is not paid, the penalty can be determined by a court at the request of Revenue. The relevant court will be determined depending upon the level of penalty in question, as set by the jurisdictional limits of each court of first instance.

## **ii The courts – judicial review**

Judicial review is the procedure by which the High Court can scrutinise and supervise how public bodies and certain tribunals exercise their powers or carry out their duties. Decisions of Revenue, and decisions of the TAC, are in principle amenable to judicial review. The court will review the manner in which a decision is made, rather than the substance or merit of the decision. The court can affirm or quash a decision made by a public body.

There is a significant degree of curial deference toward specialist tribunals (in this context, the TAC) which runs through the judicial review remedy. The grounds for judicial review are generally lack of jurisdiction, bias or the appearance of bias, procedural unfairness or unreasonableness. In addition, judicial review may be available where Revenue actions interfere with taxpayers' legitimate expectations or where Revenue actions or legislation infringe constitutional rights.

Applications for judicial review must be brought within three months of the decision giving rise to the right of review, unless there is a good and sufficient reason for extending time.

A significant area of focus in TAC and Court tax decisions in recent years has been the jurisdiction of the TAC and the precise boundaries between it and judicial review depending on the taxpayer's grounds of complaint and the remedy it seeks.

## **iii The courts – criminal proceedings**

Criminal offences are prosecuted in the name of the Office of the Director of Public Prosecutions (DPP) with the assistance of the Office of the Revenue Solicitor. The role of the courts in criminal tax litigation depends on the seriousness of the charge.

The prosecution of all criminal offences begins in the District Court, which can then send the case forward to a higher court depending on the severity of the offence.

If the matter is tried before the District Court, it is usually for a summary offence, which is a criminal offence punishable by up to 12 months' imprisonment or a fine of up to €5,000 or both. The law provides for only one mode of trial for summary offences, which is called the summary procedure. Summary procedures are determined by a District Court judge in the absence of a jury.

If the offence is an indictable offence, it is dealt with in the Circuit Court or the Central Criminal Court (the criminal division of the High Court).

#### **iv The Commercial Court**

Apart from the TAC, there is no dedicated tribunal to deal with tax litigation in Ireland. However, there is a special division of the High Court known as the Commercial Court, which deals with disputes that are commercial in nature and, among other criteria, involve a claim in excess of €1 million. Judicial review proceedings and appeals from the TAC are both amenable to being heard before the Commercial Court where they otherwise meet the criteria to be transferred to that division of the High Court.

#### **v Non-judicial procedures**

A taxpayer can use the Revenue's complaint and review procedure to review Revenue decisions as the first step of any tax dispute. A request for an internal or external review should be submitted within 30 working days of the date of the first local review decision. An appeal to the TAC can be made at the same time as the review, in accordance with the time limits set out above.

A taxpayer can submit a complaint to the Office of the Ombudsman, which examines complaints about the administrative actions of government departments and offices, including the Office of the Revenue Commissioners.

### **IV PENALTIES AND REMEDIES**

Irish tax legislation contains many civil and criminal penalties that can be imposed depending on the nature of a tax default.

Fixed penalties generally apply to breaches of the tax legislation that may not actually give rise to a tax liability, such as failure to file an accurate return, failing to keep full and true records with respect to value added tax or breach of the payroll taxes regulations.

Tax-g geared penalties apply in situations where the tax default gives rise to a tax liability. The level of any penalty applied depends on factors such as the nature of the tax default, whether the taxpayer made a qualifying disclosure and the extent to which the taxpayer co-operated with Revenue. The highest penalty is 100 per cent of the underpaid tax, which can arise in cases of deliberate default on the part of the taxpayer, where there was no qualifying disclosure and the taxpayer did not cooperate with the Revenue.

Criminal penalties, as well as imprisonment, can be imposed where a person commits a 'Revenue offence'. In its Code of Practice, Revenue has provided guidance on the types of tax offences it is most likely to prosecute including serious tax evasion. Where a body corporate commits a tax offence, any person who was a director, manager, secretary or other officer, or a member of the committee of management or other controlling authority of the body at the time of the offence, can be personally prosecuted for an offence.

Revenue may also charge interest on late payments of tax at a rate of either 0.0219 per cent or 0.0274 per cent per day of the unpaid tax, depending on the nature of tax at issue. In 2020, temporary measures providing for the warehousing of tax debt and reduced interest rates were introduced as part of the Irish government's emergency covid-19 relief package.

## V TAX CLAIMS

### i Recovering overpaid tax

Overpaid tax will be refunded on a valid claim being made by a taxpayer, so long as a claim is made within four years of the end of the chargeable period to which the claim relates. Such a claim will usually be made automatically on the filing of the appropriate tax return evidencing the actual tax liability of the taxpayer compared with the tax paid.

Where that refund arises because of a mistaken assumption by Revenue, or where the tax is not repaid within 93 days of when the repayment claim becomes valid, interest at the rate of 0.011 per cent per day or part of a day will be paid.

Prior to making a refund of any overpaid tax, the Revenue is permitted to offset an overpayment against any other tax liability (under any tax head).

### ii Challenging administrative decisions

There is a body of case law which has established that, in appropriate circumstances, claims based on administrative law grounds of legitimate expectation may be made out against Revenue. Where a taxpayer seeks to make a claim for legitimate expectation he or she is required to bring judicial review proceedings in the High Court against Revenue.

In Ireland, the criteria required to establish legitimate expectation were set out in the Supreme Court decision of *Glencar Exploration v. Mayo County Council*,<sup>2</sup> which remains the authority in this area:

- a the public authority must have made a relevant promise or representation;
- b the representation must form part of a transaction or relationship between that person or group and the public authority; and
- c the representation must create a reasonable expectation that the public body will abide by the representation.

It is difficult, in practice, to succeed in claims of legitimate expectation against Revenue. Where Revenue has made a representation as to a course of action which is outside its statutory powers, the taxpayer will not succeed. In 2020, legitimate expectation was claimed by the US pharmaceutical company Perrigo in a case concerning the largest tax assessment levied by Revenue in the history of the Irish state (in the amount of €1.64 billion).<sup>3</sup> The claim was denied by the High Court as the representations on the part of Perrigo were not proven to be sufficient.

### iii Claimants and related parties

#### *Revenue's complaint and review procedure/Ombudsman*

In cases where the dispute relates to allegations of unfairness towards a particular taxpayer, as distinct from the actual imposition of tax, it is most likely that the Revenue's complaint procedure should be followed or that the Ombudsman be consulted.

2 *Glencar Exploration plc v. Mayo County Council*: [2002] IR, 84.

3 *Perrigo Pharma International DAC v. John McNamara, the Revenue Commissioners, the Minister of Finance, Ireland and the Attorney General* ([2020] IEHC 552).

### ***Revenue opinions***

While Revenue does issue opinions on certain matters, these are not legally binding. Revenue's guidance notes on providing technical assistance provide that an opinion given by Revenue is based on the specific facts relevant to that case and its particular circumstances only. Any material change in the facts or circumstances could affect an opinion, and any such changes should be brought to the notice of the office which gave the opinion or interpretation so that the case can be reviewed. An opinion given in relation to a specific case should not be relied on in any other case. An opinion will be given on the basis of the legislation as it exists at the time of the request. Redacted forms of opinions issued can be obtained through a freedom of information request. Revenue opinions and rulings may be helpful in a claim based on legitimate expectation.

### ***Claimants***

Only the party who is the assessable party for tax purposes can bring a claim against Revenue. In the case of a person who suffers tax wrongly, but indirectly (as can happen with VAT), recovering such wrongly incurred tax would generally be a matter of contract law between the parties. An aggrieved person would not have any recourse to the Revenue.

In group scenarios, except in the case of VAT, all parties file their own tax returns. It is generally a matter of contract law between the parties how they treat relief surrendered, and tax liabilities arising or reduced as a result of the use of group relief. Only the taxpayer filing the return can claim a refund of tax due to it.

## **VI COSTS**

For cases heard before the TAC, each side is responsible for bearing its own costs irrespective of the outcome. In cases before the courts, the awarding of costs is at the discretion of the courts, but the general rule is that costs are awarded to the successful parties. This is, however, at the discretion of the courts in all instances. In particular the courts may even award costs to unsuccessful parties where the matter before the court is one of 'public interest'. An award of costs rarely covers all of a party's expenditure in prosecuting or defending the case.

## **VII ALTERNATIVE DISPUTE RESOLUTION**

The use of alternative dispute resolution mechanisms in Ireland for tax disputes is rare. Directive 2017/1852 on Tax Dispute Resolution Mechanisms in the European Union (the Directive) was published on 10 October 2018, and, under the Directive, tax authorities would be required to resolve multi-jurisdictional tax disputes through a mutual agreement procedure (MAP), failing which such disputes would be resolved through binding arbitration.

Ireland has signed the OECD's Multilateral Instrument (MLI), which among other things, provides that mandatory binding arbitration will apply in cases where a dispute cannot be resolved through the MAP currently provided for in the Model OECD Tax Treaty. Ireland has opted to adopt this provision of the MLI, and this new dispute resolution mechanism will amend the double taxation treaties that Ireland has signed with other countries provided the other countries have also opted to adopt this provision of the MLI.

Formal mediation is not currently employed in tax disputes with Revenue.

## VIII ANTI-AVOIDANCE

Ireland has a general statutory anti-tax avoidance provision in the form of Section 811 of the Taxes Consolidation Act 1997 (TCA). This section enables Revenue to designate a transaction a 'tax avoidance transaction'. This is where the Revenue forms the opinion that a transaction gives rise to a tax advantage and that the transaction was not undertaken or arranged primarily for any reason other than to give rise to a tax advantage. Where the Revenue finds a transaction is a 'tax avoidance transaction', Revenue can then assess the tax benefits of the transaction and adjust the taxation due on the transaction to withdraw any tax advantage.

Section 811C applies in respect of transactions commenced after 23 October 2014 and allows Revenue to consider additional matters, such as the form and substance of the transaction, when determining whether a transaction is a tax avoidance transaction. Revenue is not required to form an opinion that a transaction is a tax avoidance transaction but, rather, when having regard to the relevant matters, whether 'it would be reasonable to consider' that a transaction is a tax avoidance transaction. This lowers the threshold for a transaction to be considered a tax avoidance transaction, and while it tries to address some of the deficiencies of Section 811, it also makes less clear whose responsibility it is to make the determination as to reasonableness.

There are two exclusions in Section 811. The first applies where a transaction was undertaken to realise profits in the course of the business activities of the person, and was not undertaken or arranged primarily to give rise to a tax advantage. The second is where the transaction was undertaken or arranged for the purpose of benefiting from any relief, allowance or abatement provided by tax legislation and does not abuse or misuse the provision. In December 2011, the Supreme Court issued its seminal decision with regard to Section 811 in *O'Flynn Construction Limited & Others v. The Revenue Commissioners*,<sup>4</sup> the first decision of the Supreme Court concerning Ireland's general anti-avoidance legislation. The Supreme Court found in favour of Revenue. The case involved what the court described as a 'highly artificial and contrived' series of transactions to gain a relief from tax under the export sales relief scheme. The decision of the Supreme Court centred on whether the transactions involved constituted a misuse or abuse of a relieving provision. The judgments (both majority and minority) provide a useful summary on statutory interpretation. O'Donnell J, in the majority, held that Section 811 requires a purposive approach to statutory interpretation. He noted that the legislation was specifically required to overcome the rejection by the Irish courts of a 'substance over form' approach to statutory interpretation. The Revenue, in forming its opinion under Section 811, is expressly required to consider the form and substance of the transaction. In addition, in considering whether there has been misuse or abuse of a relieving provision, regard must be had to the purpose of the relieving provision. As such, the Court held that a scheme which aims to allow the shareholders in a non-exporting company to benefit from export sales relief is surely a misuse or abuse of the scheme having regard to the purpose for which the provision is provided.

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<sup>4</sup> *Revenue Commissioners v. O'Flynn Construction Ltd and Others*: [2011] IESC 47.

Case law has continued to develop in respect of Section 811 in recent years. The recent case of *Hanrahan v. Revenue Commissioners* involved a rejection of Revenue's use of Section 811.<sup>5</sup> In essence, the case concerned a taxpayer who used certain anti-avoidance provisions to avoid a capital gains liability. The High Court concluded that where there is a specific piece of anti-avoidance legislation, there is no place for a general anti-avoidance rule. This position represents an important limitation on Revenue's ability to deploy Section 811.

## IX DOUBLE TAXATION TREATIES

The MAP article in double taxation treaties is the mechanism whereby disputes between tax authorities in relation to the application of double tax treaties are addressed. As noted above, the MAP in Ireland's treaties will be amended by the MLI as and when it comes into force. It is likely that use of MAP procedures will increase given the impact of the MLI.

To date, there have been a limited number of cases before the Irish courts regarding double tax treaties. The case of *O'Brien v. Quigley*<sup>6</sup> concerned the question of a 'permanent home' for the purposes of the tie-breaker provisions of the double taxation treaty (DTA) between Ireland and Portugal. Revenue claimed taxing rights while the taxpayer was resident in Ireland as well as Portugal. Therefore, the taxing rights had to be determined in accordance with 'tie break' provisions of the DTA, which provide that an individual shall be deemed to be a tax resident where he or she has a permanent home available to him or her. The High Court held that for a permanent home to exist there must be an element of personal link between the taxpayer and the accommodation, and the taxpayer must intend to use the premises or keep it available for his or her permanent use. On that basis, the court held that the taxpayer did not have a permanent home in Ireland.

As regards the interpretation of tax treaties, Ireland acceded to the Vienna Convention on the Law of Treaties with effect from 6 September 2006. In *Kinsella v. The Revenue Commissioners*,<sup>7</sup> the court noted that even before this, it was clear from the decision of Barrington J in *McGimpsey v. Ireland*<sup>8</sup> that, in interpreting an international treaty, a court ought to have regard to the general principles of international law, and in particular the rules of interpretation of such treaties as set out in Articles 31 and 32 of the Vienna Convention. These articles require that a court interprets a treaty in good faith in accordance with the ordinary meaning to be given to its terms in their context, and in the light of the treaty's object and purpose. Where such an interpretation leaves the meaning of the treaty ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, then recourse can be made to supplementary means of interpretation.

Avoiding litigation is the preferable route for taxpayers and the Revenue alike. Therefore, in cross-border transactions, it is possible for taxpayers to enter into an advance pricing agreement (APA), agreeing with Revenue the arm's-length price for arrangements with related parties outside Ireland. The conclusion of an APA will provide the taxpayer with certainty that its transfer pricing arrangements are in compliance with Ireland's transfer pricing rules.

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5 *Hanrahan v. Revenue Commissioners* [2022] IEHC 43.

6 *O'Brien v. Quigley* [2013] IEHC 398.

7 *Kinsella v. The Revenue Commissioners*: [2007] IEHC 250.

8 *McGimpsey v. Ireland* [1988] IR 567.

The Irish courts' interpretation of the Treaty on the Functioning of the European Union and the European Economic Area will follow the interpretation rules for other international treaties (i.e., as set out in the Vienna Convention).

## X AREAS OF FOCUS

Irish real estate is an area of scrutiny by Revenue. Many international investors have invested in Irish real estate and related assets and we are aware of several areas of focus by Revenue in this regard, including the investment structures adopted and the question as to when an 'interest is land' (and thus a change to tax) exists.

As evidenced by the *Perrigo* litigation (see Section V.ii), Revenue is prepared to litigate against large international companies where it considers that tax is due. Ireland is a European base for many large international companies and consequently transactions, and these will continue to be in scope of Irish revenue scrutiny.

In the wake of the covid-19 pandemic, a number of financial supports were made available to affected businesses. Revenue is now auditing the eligibility of the claimants and has indicated that it can, and will, seek recovery of sums advanced where the conditions for claiming support were not satisfied. Revenue has said that companies found to have 'abused' the various schemes would be 'vigorously pursued' and there are strong indications that this will continue over coming years.

Taxpayers are adapting to the TAC regime. Historically, there was a tendency to allow the taxpayer's legacy tax advisers to conduct litigation and settlement with Revenue. There is an increasing tendency to utilise lawyers who may have no historical role with the tax issues in conducting the litigation instead of, or alongside, the legacy advisers. This trend is driven by corporate governance considerations for the taxpayer to have an independent party involved, and also reflects that the TAC hearing is the only opportunity to adduce evidence on which any decision, including further appeals, can be based.

Accordingly, if there are grounds for appeal, it will be helpful to have a well-argued and comprehensive set of facts adduced before the TAC. Failure to do so may severely limit the grounds of appeal should the TAC decision be unfavourable to the taxpayer.

Taxpayers are also increasingly using the Commercial Court to benefit from swifter resolution of appeals from the TAC. This route, when coupled with the more efficient TAC processes, can lead to quicker resolution of tax disputes.

## XI OUTLOOK AND CONCLUSIONS

International tax trends will continue to dominate the Irish tax landscape. The implementation of EU Anti-Tax Avoidance Directives and the OECD's Base Erosion and Profit Shifting (BEPS) framework have radically changed Irish tax law.

In some sectors, this is not problematic. Ireland has long had a regime that rewards companies who base substantive trading operations here. In many senses, this is precisely the route that the BEPS initiatives encourage. Companies have benefited from centralising their intellectual property and trading activity in a single jurisdiction such as Ireland. However, those positions can still be scrutinised by non-Irish tax authorities. There is an ongoing need for international businesses to adopt a defensive approach to their legal and tax affairs. This requires formal review of intra-group arrangements that is routinely updated and adapted to

changing laws and circumstances. Such document-intensive approaches, with sophisticated advisers, are intended to provide ready responses to the inevitable questions that will arise for taxpayers.

The information made available to tax authorities under EU DAC6 may well form the basis of future audits and investigations. The reporting of cross-border arrangements will become an increasingly important part of a taxpayer's arrangements with its advisers. Investors, lenders and counterparties are increasingly concerned with whether any arrangement is reportable under DAC6. Although reporting has commenced, or will do shortly, the impact and analysis of the reports is likely to inform how tax authorities and legislatures react and take measures involving corporate structures in the future.

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