

Tax Residence of Irish Companies and Funds – Irish and International Tax Considerations in Light of COVID-19 Travel Restrictions

Background

The outbreak of COVID-19 has resulted in a unique and alarming health crisis. In addition to the health aspects, there will be a significant economic impact worldwide. The Irish Government has announced various measures to restrict contact between individuals to reduce the spread of the virus. Many other countries have also announced restrictions, including restrictions on flights and travel into and out of Europe. Many governments have also requested that all individuals practice “*social distancing*”, a call that was reiterated by the Irish Prime Minister, Taoiseach Leo Varadkar, in a historic State of the Nation address on St. Patrick's Day.

In this update, we examine the possible impact of travel restrictions with regard to maintaining the Irish tax residence of Irish companies and funds.

Tax Residence

Irish incorporated companies (including regulated funds which are constituted as bodies corporate such as ICAVs) are treated as tax resident in Ireland for Irish tax purposes by virtue of their place of incorporation. However, this treatment is displaced if the company is also treated as tax resident in another jurisdiction under the terms of a double taxation agreement (“DTA”) which Ireland has entered into.

Typically, this arises where the Irish entity is determined to be managed or controlled from the other DTA jurisdiction. Where both Ireland and a DTA jurisdiction assert a claim for tax residency, the tie-break clause in Ireland's DTAs generally provides that a company will only be regarded as resident where it is effectively managed. This may require the mutual agreement of both the Irish and relevant foreign tax authorities.

In addition, companies and funds incorporated in Ireland will generally need to ensure that steps are taken to avoid creating a taxable presence in another country. Those implications could arise if, for example, decisions relating to the company were taken by directors or other persons located in that other country.

Accordingly, care must be taken from an Irish tax perspective, and also from the perspective of any other relevant country that might assert taxing rights, that the necessary steps are taken so that central management and control is located in Ireland and not elsewhere.

It should also be noted that certain companies may have additional requirements in this regard. For example, a “*qualifying company*” for the purposes of section 110 of the Irish Taxes Consolidation Act 1997 (commonly known as a “*Section 110 company*”) must also “carry on its business” in Ireland and this will also be relevant to the conduct of the board meetings.

From an Irish tax perspective, to ascertain the place of central management and control, broadly speaking, it is necessary to look at where board level strategic management and control is exercised. As such, the composition of the board of directors and the procedures followed with respect to board meetings is important.

It is generally recommended that in order to maintain Irish tax residence of an Irish incorporated company (the "Company"), certain procedures are followed, including that:

- The composition of the board of directors of the Company (the "Board") is comprised of a majority of Irish resident directors;
- The Board takes all decisions affecting matters of policy and strategy (or otherwise relating to the central management and control of the Company's business) at meetings of the Board held in Ireland; and
- The use of written resolutions of the Board is generally avoided and the majority of directors attending each Board meeting are physically present in Ireland.

COVID-19 Travel Restrictions and Tax Residence

The advent of travel restrictions in the wake of the COVID-19 global pandemic means it may not be possible to follow the optimal procedures from a tax residence perspective with respect to the holding of Board meetings. Non-Irish resident directors, and indeed Irish resident directors, may be unable to travel or return to Ireland due to flight restrictions. The court decisions which consider and lay down the principles regarding tax residence do not generally provide for any relief for extenuating circumstances. However, as an Irish legal matter, it is generally the fact pattern over a period of time that is key.

The Irish Revenue released guidance about COVID-19 related travel restrictions on 23 March 2020. Where a director of a company is present in another jurisdiction as a result of COVID-19 related travel restrictions, and would otherwise be present in Ireland, the Irish Revenue is prepared to disregard such presence outside of Ireland for corporation tax purposes. This would apply therefore to the tests for tax residence.

The Irish Revenue recommends that both the director and the company maintain a record of the facts and circumstances of the bona fide relevant presence in Ireland, or outside of Ireland, for production to the Irish Revenue in the event that it is requested by the Irish Revenue. We consider that this should be reflected in the Board minutes.

Where a Board meeting is scheduled and necessary in the coming weeks, it will be important to consider the holding of meetings from both an Irish and overseas tax perspective. Details of the fact pattern, including the historic position, should be considered. If a meeting is being undertaken by way of conference call, certain procedures should be put in place and appropriate wording included in board minutes. It may be considered appropriate, for example, to have non-Irish resident directors merely participate as observers to the meeting or indeed not dial into the meeting at all. In certain cases, the use of alternate directors who are resident in Ireland might be considered or the use of a special sub-committee for a time period. We would also recommend that the Board note the COVID-19 situation and its impact on travel.

Constitutional Documents

In some instances, the location of directors during meetings may feature in the constitutional documents or other material documents of an entity. In extreme cases, such provisions could invalidate a decision of a board, or give rise to a breach of an agreement, if the board members

are located outside Ireland. As a general rule, we have advised against the inclusion of such clauses, precisely because they do not easily accommodate the difficult positions directors may find themselves in. If such provisions exist, it may be necessary or advisable to consider amending the constitutional documents or seeking a waiver.

Maples Group

We are closely monitoring any developments in this regard and the Maples Group tax team has been advising a number of clients on these practices and procedures with respect to upcoming board meetings.

Further Information

Please reach out to any member of the team listed below or to your usual Maples Group contact if you would like to discuss this or any other tax impact arising from COVID-19.

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