Tax on corporate transactions in Ireland: overview

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TAX AUTHORITIES

1. What are the main authorities responsible for enforcing taxes on corporate transactions in your jurisdiction?

The Office of the Revenue Commissioners (Irish Revenue) is responsible for enforcing all taxes and duties in Ireland, including those relevant to corporate transactions (*www.revenue.ie/en/index.html*).

Pre-completion clearances and guidance

2. Is it possible to apply for tax clearances or obtain guidance from the tax authorities before completing a corporate transaction?

Ireland has no legislative system that provides for pre-transaction clearance or rulings. It is possible to seek Irish Revenue's opinion in relation to the tax consequences of a particular transaction in advance of the transaction taking place and Irish Revenue have published guidance as to the procedures to be followed. The Irish Revenue state that these opinions are not legally binding, however provided that the request for an opinion submitted to Irish Revenue contains all of the relevant facts and circumstances in relation to the transaction, the opinion of Irish Revenue in relation to the transaction should not change.

Irish Revenue introduced a formal bilateral advance pricing agreement programme with effect from 1 July 2016 which allows taxpayers to agree the transfer pricing mechanism applicable to transactions between associated taxpayers acting cross-border.

Disclosure of corporate transactions

3. Is it necessary to disclose the existence of any corporate transactions to the tax authorities?

In 2011, Ireland introduced a "mandatory disclosure" regime which has the aim of requiring "promoters" and in certain cases taxpayers to disclose the nature of certain transactions on which they advise or which they use. The mandatory disclosure regime is intended as an early warning mechanism for Irish Revenue in respect of what they perceive as aggressive tax planning. The rules do not impact ordinary day-to-day tax advice between a tax adviser and a client that involves ordinary tax planning and structuring in the context of a transaction or commercial matter. Under the mandatory disclosure legislation, a disclosable transaction must be disclosed if it meets certain tests, which are broadly as follows:

- It falls within one of a particular set of the specified descriptions, these are broadly aimed at tax transactions which are new and innovative tax schemes or which are areas of specific concern and perceived high risk, that is, those relating to standardised transactions and particular types of tax advantage. The transaction falls within the specified descriptions if it satisfies one of the following conditions:
  - the relevant person involved might wish to keep the transaction confidential from other promoters;
  - the relevant person involved wishes to keep the transaction confidential from Irish Revenue;
  - a premium or contingent fee could potentially be charged for the transaction;
  - standardised documentation is involved, subject to specified exceptions;
  - the transaction falls within a specified type of transactions, for example, converting income into capital.
- It will, or might be expected to, enable a person to obtain a tax advantage.
- The tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the transaction.

There is a degree of complexity in assessing whether transactions are reportable and tax advisers will guide clients in this matter.

More generally, the Irish tax legislation does contain certain third-party reporting rules which may be relevant to particular transactions on a case-by-case basis. Equally, Irish Revenue have relatively broad powers to request information from a taxpayer in the course of an audit or investigation.

In addition to the Irish mandatory disclosure regime, in May 2018 the Council of the European Union adopted Directive (EU) 2018/822) amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC 6). The rules are aimed at cross-border tax arrangements. DAC 6 targets intermediaries such as tax advisers, accountants and lawyers that design and/or promote tax planning schemes and will require them to report schemes that contain certain hallmarks.

The Finance Act 2019 transposes DAC 6 into national law. The new Irish rules came into operation on 1 July 2020 and the first reports were required by 31 August 2020. However, as a result of the 2019 novel coronavirus disease (COVID-19) pandemic, the EU Council approved a deferral of the reporting requirements. It is up to individual EU member states to determine whether to avail of the option to defer. Ireland has chosen to defer reporting. Further to the deferral, in Ireland, the reporting deadline for reportable cross-border arrangements implemented between 25 June 2018 and 30 June 2020 is now 28 February 2021 and the 30-day period for arrangements implemented after 1 July 2020 commences from 1 January 2021.

If a corporate transaction is regarded as a cross-border arrangement under DAC 6, it may need to be reported by any person or entity who acts as an intermediary in relation to the transaction or, in some cases, by the parties to the transaction themselves. Any information

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reported to the local tax authority will then be contributed to a centralised directory accessible to the competent authorities of all EU member states.

An arrangement will be a "cross-border" arrangement where it concerns either more than one EU member state or concerns one EU member state and a third country (that is, a non-EU member state). A cross-border arrangement will be reportable if it falls within any one of the hallmarks set out in Annex IV of DAC6. In certain cases where a hallmark is met, the transaction will only be a reportable cross-border arrangement if a "main benefit test" is also met. The main benefit test will be met where obtaining a tax advantage (as defined in new section 817RA of the Tax Consolidation Act 1997 (TCA)) is one of the main benefits which a person may reasonably expect to derive from an arrangement, having regard to all relevant facts and circumstances.

Reporting obligations exist for both intermediaries and, where no intermediaries are required to report, certain taxpayers. The term "intermediary" is very broad and can apply to a number of different participants in an arrangement. It includes anyone who designs, markets, organises or makes available or implements a reportable arrangement, or anyone who helps with reportable activities and knows (or could reasonably be expected to know) that they are so doing. This can include accountants, financial advisers, lawyers, in-house counsel and banks. Reporting obligations may also extend to taxpayers in certain circumstances.

The legislation introduced under Finance Act 2019 provides for monetary penalties for non-compliance. The level of the penalty applicable depends on the type of breach involved. Certain breaches by taxpayers and intermediaries carry a penalty of up to EUR4,000 with a further penalty of up to EUR500 per day for each day on which the failure continues. Furthermore, the mere failure by the taxpayer to include the reference number assigned to a reportable cross-border arrangement in a return made by a taxpayer under the new rules exposes such a person to a penalty of up to EUR5,000.

MAIN TAXES ON CORPORATE TRANSACTIONS

Transfer taxes and notaries' fees

4. What are the main transfer taxes and/or notaries' fees potentially payable on corporate transactions?

Stamp duty

Key characteristics. Stamp duty is the principal transfer tax and is a tax on certain instruments (such as written documents).

Triggering event. A document is chargeable to stamp duty, unless exempted, where the document is both:

- Of a type set out in Schedule 1 to the Stamp Duties Consolidation Act 1999 (SDCA). This lists the different categories of document to which stamp duty applies. This includes conveyances or transfers on sale of Irish land and stocks or marketable securities of Irish incorporated companies.
- Executed in Ireland or, if executed outside Ireland, relates to something done or to be done in Ireland.

Liable party/parties. Generally, the purchaser or transferee is liable to pay stamp duty arising on a written instrument and a return must be filed and stamp duty paid within 30 days of the execution of the instrument.

Applicable rate(s). Stamp duty is generally charged on the consideration paid for the relevant asset (but in certain cases it may be charged on the market value of the asset). The main categories of instrument to which stamp duty applies and the applicable rates of duty are as follows:

- Transfers of shares or marketable securities (other than shares deriving their value from Irish non-residential real estate): 1%.
- Transfers of Irish non-residential real estate and, in certain cases, shares deriving their value from such property: 7.5%.
- Transfers of residential property:
  - 1% on consideration up to EUR1 million;
  - 2% on balance of consideration in excess of EUR1 million.
- Premiums on leases of buildings, land and other real property: 1% or 2%.
- Additional stamp duty is also chargeable on the average annual rent reserved by the lease at rates from 1% to 12% depending on the term of the lease:
  - leases not exceeding 35 years: 1%;
  - leases of between 25 and 100 years: 6%;
  - leases exceeding 100 years: 12%.

For exemptions and reliefs see *Question 11, Stamp duty reliefs.*

Corporate and capital gains taxes

5. What are the main corporate and/or capital gains taxes potentially payable on corporate transactions?

Corporation tax

Key characteristics. Corporation tax is chargeable on the worldwide profits of Irish tax resident companies. Companies that are not resident in Ireland are subject to corporation tax on profits arising from a trade carried on in Ireland through a branch or agency.

A company that is incorporated in Ireland is automatically deemed to be resident in Ireland for tax purposes. In all other cases, residence is based on where the company is centrally managed and controlled.

If a company incorporated in Ireland is managed and controlled in a treaty state, it may be regarded as resident in that other state under the "tie-breaker" clause of Ireland's double taxation treaty with that state.

Triggering event. Corporation tax (and corporation tax on capital gains) is charged on the profits and gains of companies arising in the relevant accounting period and based on the company's accounts in that period. Profit, for the purpose of corporation tax, consists of the trading and passive income of the company as well as any chargeable (that is, capital) gains arising in the tax year.

Liable party/parties. See above, *Corporation tax: Key characteristics.*

Applicable rate(s). Ireland has two rates of corporation tax, a 12.5% rate and a 25% rate.

The 12.5% rate applies to the trading income of a company which carries on a trade in Ireland (including certain qualifying dividends received from foreign subsidiaries where paid out of trading profits). There is no precise definition of what constitutes a trade for this purpose (generally where a company is carrying on a business or engages in activities in Ireland on a regular or habitual basis and normally with a view to realising a profit).

The corporation tax rate of 25% applies in respect of passive income, profits arising from a possession outside of Ireland and profits of certain trades such as dealing in or developing land and mineral exploration activities.

There is an exemption from corporation tax for new companies that start to trade before 31 December 2021 and do not exceed specified levels of corporation tax due.

The maximum annual tax liability for which shelter is available is EUR40,000. The amount of relief the company is entitled to is linked

to the amount of Pay Related Social Insurance (PRSI) paid by the company in respect of its employees (employer's PRSI). The company will be entitled to EUR5,000 relief for each employee in respect of whom it pays employer's PRSI, subject to a maximum of EUR40,000.

There are various other reliefs and exemptions available to trading companies, including capital allowances in respect of plant and machinery, industrial buildings and intellectual property, tax credits for research and development activities and relief for interest on borrowings incurred in the acquisition of shares in certain companies.

Capital gains tax/corporation tax on capital gains

Key characteristics. Irish tax resident companies are liable to capital gains tax (CGT) on the disposal of worldwide assets. Non-Irish tax resident companies are liable for gains arising on the disposal of certain assets, including:

- Land and buildings in Ireland (relief from CGT may be claimed in respect of real estate acquired between 6 December 2011 and 31 December 2014 which is held for a period of at least four years).
- Minerals in Ireland and rights or interests associated with mining for or searching for minerals in Ireland.
- Exploration or exploitation rights in the Irish Continental Shelf.
- Unquoted shares or securities deriving their value or the greater part of their value directly or indirectly from the above assets.
- Assets situated in Ireland that are used, held or acquired for business carried on in Ireland through a branch or agency.
- Assets of a life assurance company that are situated outside Ireland but held in connection with the life business carried on by the company in Ireland, that were used or held by or for the purposes of that company's branch or agency in Ireland.

Triggering event. CGT generally arises on the disposal of an asset. The chargeable gain is computed by deducting the costs of acquisition and disposal and the costs of any enhancement expenditure from the sales proceeds received on disposal. The application of capital losses carried forward may reduce the amount of gain.

CGT can also arise on certain events that are deemed to constitute disposals. These include situations where a company ceases to be a member of a group of companies or where certain value shifting acts occur with the effect of passing value from one shareholder to another.

CGT is aggregated by reference to the chargeable gains and allowable losses of a chargeable person in the particular tax year. Capital losses arising in a tax year can be set off against chargeable gains arising in the same year and any unutilised losses can be carried forward indefinitely.

Liable party/parties. Generally, it is the person disposing of the chargeable asset who is liable to pay CGT. However, where any of the assets listed below are disposed of, the person paying the consideration may be required to withhold 15% from the consideration and account for this to Irish Revenue:

- Land and buildings in Ireland.
- Minerals in Ireland and rights or interests associated with mining for or searching for minerals in Ireland.
- Exploration or exploitation rights in the Irish Continental Shelf.
- Unquoted shares or securities deriving their value or the greater part of their value directly or indirectly from the above assets.
- Assets situated in Ireland that are used, held or acquired for the purposes of a business carried on in Ireland through a branch or agency.
- Goodwill of a trade carried on in Ireland.

No deduction is required where the consideration is less than EUR500,000 (or EUR1 million if the asset disposed of is a dwelling) or where the person disposing of the relevant asset obtains a clearance certificate from Irish Revenue. A clearance certificate will be issued where Irish Revenue are satisfied that:

- The person making the disposal is Irish tax resident.
- The tax does not arise on the disposal.
- The tax has already been discharged.

Certain categories of person are not required to produce a clearance certificate, including regulated Irish funds, real estate investment funds and Irish financial institutions selling financial assets.

There are a number of exemptions and reliefs from CGT (*see Question 11, CGT exemptions and reliefs*).

Applicable rate(s). CGT applies at a current rate of 33% on the disposal of assets.

Value added and sales taxes

6. What are the main value added and/or sales taxes potentially payable on corporate transactions?

Value added tax (VAT)

Key characteristics. VAT is an EU transaction-based tax that is chargeable on the supply of goods and services in Ireland by a taxable person in the course or furtherance of a business carried on by him or her. VAT is also chargeable on:

- Goods imported into Ireland from outside the EU.
- The purchase of certain services from suppliers outside Ireland.
- The intra-EU acquisition of goods.

Any person carrying on business in Ireland whose annual turnover from taxable supplies exceeds certain thresholds (EUR75,000 for persons supplying goods and EUR37,500 for persons supplying services) must register for and charge Irish VAT. In addition, foreign traders who supply certain goods in Ireland may also be required to register for Irish VAT.

Triggering event. As set out above, VAT is chargeable on the supply of goods and services in Ireland by a taxable person in the course or furtherance of a business carried on by him or her.

Liable party/parties. Persons in business in Ireland generally charge VAT on the supplies they make and are entitled to a credit against this amount for any VAT charged to them on business purchases. Accountable persons must then either pay the balance to Irish Revenue or seek a refund of any VAT due to them using bi-monthly VAT returns.

Applicable rate(s). The rates of VAT vary as follows:

- The standard VAT rate is 23% and applies to supplies of goods and services not subject to the rates below (legal services are subject to VAT at the standard rate).
- The 13.5% rate applies to supplies of land and property, electricity, gas, heating fuel, waste disposal, short-term car hire and, since 1 January 2019, certain tourism-related services including the supply of holiday accommodation, admissions to cinemas, theatres, certain musical performances, museums and art gallery exhibitions.
- A 9% rate continues to apply in respect of newspapers and periodicals (including e-books and electronically supplied newspapers) and facilities for taking part in sporting activities.

- A rate of 4.8% applies to the supply of livestock and greyhounds and hire of horses.
- The 0% rate applies to certain food and drink, exports, books, oral medicine and children's clothing and footwear.
- The supply of the following goods and services are exempt from VAT:
  - most banking, insurance and financial activities;
  - medical services;
  - education and training services;
  - passenger transport.

Other taxes on corporate transactions

7. Are any other taxes potentially payable on corporate transactions?

Certain taxes, including interest withholding tax, dividend withholding tax (*see Question 9*), professional services withholding tax and relevant contract tax may be payable depending on the nature of the transaction and the type of business carried on by the parties to the transaction.

In addition, capital acquisitions tax (CAT) or gift tax at a current rate of 33% can apply where certain dispositions are deemed to constitute gifts. However, there are a number of reliefs and exemptions, which mean that CAT should not generally apply to business transactions where no benefit passes.

Taxes applicable to foreign companies

8. In what circumstances will the taxes identified in *Questions 4* to *7* be applicable to foreign companies (in other words, what "presence" is required to give rise to tax liability)?

Stamp duty

Stamp duty attaches to written documents and is not affected by the residence of the parties to that document. A document of a type specified in the legislation is chargeable to Irish stamp duty where it is either executed in Ireland or, if executed outside Ireland, relates to something done or to be done in Ireland (*see Question 4*).

Corporation tax

Companies not resident for tax purposes in Ireland are not subject to Irish corporation tax unless they carry on a trade in Ireland through a branch or agency.

A branch set up for investment purposes only, and not carrying on a trade, is not subject to Irish corporation tax, though certain Irish source income (mainly rent and interest) may be subject to income tax through withholding, subject to any available exemptions.

A non-resident company carrying on a trade through an Irish branch is subject to Irish corporation tax on the trading income arising directly or indirectly through or from the branch.

CGT/corporation tax on chargeable gains

Non-Irish tax resident companies are liable for gains arising on the disposal of certain specified assets (*see Question 5*).

VAT

The application of VAT to a supply of goods or services depends on the place of supply of those goods or services, and the tax residence of the parties to the transaction will not determine whether VAT is imposed.

Capital acquisitions tax (CAT)

A charge to CAT can arise where one of the following conditions is satisfied:

- The disponer (that is, the person providing the benefit of the gift or inheritance) is resident or ordinarily resident in Ireland at the date of the gift or inheritance.
- The beneficiary is resident or ordinarily resident in Ireland on the date of the gift or inheritance.
- The subject matter of the gift or inheritance is situated in Ireland.

DIVIDENDS

9. Is there a requirement to withhold tax on dividends or other distributions?

Dividend withholding tax (DWT) at a rate of 25% applies to dividends and distributions made by Irish tax resident companies.

However, there are a wide range of exemptions from DWT where the dividend or distribution is paid by the tax resident company to certain persons (provided in most cases that certain declarations are completed), including:

- Another Irish tax resident company.
- Companies resident in an EU member state (other than Ireland) or a country with which Ireland has concluded a double tax treaty and are not controlled by Irish residents.
- Companies that are under the control, directly or indirectly, of a person or persons who are resident in an EU member state or a country with which Ireland has concluded a double tax treaty and are not controlled by persons not so resident.
- Companies whose shares are substantially and regularly traded on a recognised stock exchange in another EU member state or country with which Ireland has concluded a double tax treaty or where the recipient company is a 75% subsidiary of such a company or is wholly owned by two or more such companies.
- A company resident in another EU member state with at least a 5% holding in the Irish paying company (under Directive 90/435/EEC on the taxation of parent companies and subsidiaries (Parent-Subsidiary Directive)).

Relief under a double tax treaty with Ireland may also be available.

SHARE ACQUISITIONS AND DISPOSALS

Taxes potentially payable

10. What taxes are potentially payable on a share acquisition/share disposal?

Corporation tax

An Irish tax resident company that trades in shares and financial assets may be subject to corporation tax on the income arising from the disposal of shares that form part of the trading assets of the company.

CGT/corporation tax on capital gains

An Irish tax resident company disposing of shares held as an investment may be subject to CGT/corporation tax on capital gains arising on a disposal.

A non-tax resident company is only liable to CGT on the disposal of certain specified assets (*see Question 5, Capital gains tax/corporation tax on capital gains*).

A purchaser may be required to withhold CGT of 15% of the consideration paid for unquoted shares where the consideration exceeds EUR500,000 and the shares derive the greater part of their value from certain assets relating to Irish land or mineral rights (*see Question 5, Capital gains tax/corporation tax on capital gains*).

Stamp duty

Stamp duty at a rate of 1% (provided the shares do not derive their value from immovable property) of the consideration paid for (or, where relevant, the market value of) the shares of an Irish incorporated company may be payable by the purchaser or transferee (*see Question 4*).

Exemptions and reliefs

11. Are any exemptions or reliefs available to the liable party?

CGT exemptions and reliefs

There are various exemptions and reliefs available from CGT including:

- **Substantial shareholding exemption.** Disposals by a company of a substantial shareholding in a subsidiary company that is resident in an EU member state or a country with which Ireland has concluded a double tax treaty are exempt from CGT if, at the time of the disposal:
  - the subsidiary company carries on a trade or is part of a trading group;
  - the disposing company holds or has held at least 5% of the ordinary share capital and economic interest in the subsidiary company for 12 months beginning not more than two years before the disposal.
- **Group relief.** Relief is available from CGT where both the company disposing of the shares and the company acquiring the asset are within a CGT group. A CGT group consists of a principal company and all its effective 75% subsidiaries, provided that such companies are resident in the EU, an EEA country or a country with which Ireland has a double taxation treaty. In addition, the shares must be within the charge to corporation tax on capital gains both before and after the transfer.
- The effect of the relief is that both the company disposing and the company acquiring the asset are treated as if the shares were acquired for such consideration as would secure that neither a gain nor a loss would accrue to the disposing company (that is, the acquiring company takes the shares at the same base cost as applied to the disposing company).
- **Paper-for-paper reconstructions.** Where shares are transferred as part of a bona fide scheme of reconstruction or amalgamation and certain additional conditions are met, no CGT arises for the disposing shareholders and the acquiring shareholder are deemed to have been received those shares on the same date and at the same cost as the old shares. The relief will only apply where the company acquiring the shares has, or as a result of the transaction will have, control of the target company or where the share-for-share exchange results from a general offer made to the members of the target company.

Stamp duty reliefs

There are a number of reliefs and exemptions available from stamp duty, including:

- **Group relief.** Relief is available from stamp duty for transfers between bodies corporate where, at the time of execution of the transfer document, the transferor and transferee are 90% associates, meaning that one of the following conditions applies:
  - one is the beneficial owner of not less than 90% of the ordinary share capital of the other;
  - one is beneficially entitled to not less than 90% of the profits of the other available for distribution to the shareholders;
  - one is beneficially entitled to not less than 90% of the assets of the other available for distribution to the shareholders on a winding-up; or
  - a third body corporate is beneficially entitled to 90% of the ordinary share capital, profits and assets available for distribution of both the transferor and transferee.
  - The 90% association must be maintained for a period of two years from the date of execution of the transfer document.
- **Reconstruction or amalgamation relief.** Relief may be available from stamp duty on a share-for-share exchange that is a bona fide reconstruction or amalgamation. Various conditions must be met including:
  - a company with limited liability must be registered or must increase its share capital with a view to the acquisition of not less than 90% of the issued share capital of the target company;
  - the acquiring company must be incorporated in an EU member state (including Ireland);
  - where shares are to be acquired, not less than 90% of the consideration for the acquisition must consist of the issue of shares in the acquiring company to the holder of shares in the target company in exchange for the shares in the target company; and
  - the acquiring company must retain the shares in the target company for at least two years.
- **Various.** Various other reliefs and exemptions are available including:
  - an exemption on the sale, transfer or other disposition of intellectual property including any patent, copyright, registered design, trade mark, design right, invention and domain name;
  - an exemption on the transfer of shares in a foreign company;
  - an exemption on the conveyance or transfer of a very wide range of financial services instruments and financial products;
  - an exemption on the transfer of certain assets, including aircraft and engines.

Tax advantages/disadvantages for the buyer

12. Please set out the tax advantages and disadvantages of a share acquisition for the buyer.

Advantages

The advantages of a share sale for the buyer include:

- Stamp duty is payable at a rate of 1% by a purchaser on the acquisition of shares (provided the shares do not derive their value from immovable property) whereas the rate of stamp duty payable on acquisition of non-residential property assets of a business is 7.5%.
- Trading losses existing in the target company can be offset against future corporation tax liabilities of the target, subject to certain conditions.
- No VAT is payable on the transfer of shares.

Disadvantages

The disadvantages of a share sale for the buyer include:

- No capital allowances or tax depreciation is available on the purchase of shares.
- If the target has previously acquired an asset intra-group, there may effectively be a deemed disposal of that asset (a de-grouping charge) and a consequent liability for the target.
- Absent the deemed disposal referred to above, the acquiring company does not benefit from any step up in the base cost of the assets of the target company.
- The tax history of the target company remains with the target company and may require resolution of any outstanding historic liabilities.

Tax advantages/disadvantages for the seller

13. Please set out the tax advantages and disadvantages of a share disposal for the seller.

Advantages

The advantages of a share sale for the seller include:

- A company disposing of shares may be able to take advantage of the substantial shareholding exemption (*see Question 11, CGT exemptions and reliefs*).
- A share sale avoids the potential double taxation associated with an asset sale (*see Question 18, Disadvantages*) because the disposing shareholders are only liable to CGT on disposal of the shares and no further extraction of the sales proceeds is necessary.

Disadvantages

The disadvantages of a share sale for the seller include that the selling company will generally be required to provide extensive covenant and warranty protection relating to tax to the acquiring company.

Transaction structures to minimise the tax burden

14. What transaction structures (if any) are commonly used to minimise the tax burden?

Where the substantial shareholding exemption is not available (*see Question 11, CGT exemptions and reliefs*), the target company may pay out a pre-sale dividend to reduce the potential CGT liability arising on a share sale. Certain anti-avoidance provisions may apply.

Depending on the transaction structure, it may be possible to make use of the reliefs available from CGT and stamp duty for reconstructions and amalgamations to reduce the potential tax liability (*see Question 11, CGT exemptions and reliefs*).

ASSET ACQUISITIONS AND DISPOSALS

Taxes potentially payable

15. What taxes are potentially payable on an asset acquisition/asset disposal?

CGT/corporation tax on chargeable gains

An Irish tax resident company may be subject to CGT/corporation tax on capital gains on disposals of business assets that are capital in nature. Non-tax resident companies are only liable to CGT on the disposal of specified assets. A purchaser may be required to withhold CGT at a rate of 15% (*see Question 5, Capital gains tax/corporation tax on capital gains*).

Stamp duty

Stamp duty, at a rate of up to 2% on residential and 7.5% on non-residential property assets may be payable by the purchaser in an asset acquisition (*see Question 4, Stamp duty*).

VAT

The sale or transfer of assets may be subject to VAT as a supply of goods or services (*see Question 6, Value added tax (VAT)*).

Capital allowances

Where assets are disposed of that qualify for capital allowances, the disposal may result in either a:

- Balancing charge being payable where assets are sold for an amount in excess of their tax written down value.
- Balancing allowance being due where the assets are sold for less than their tax written down value.

Exemptions and reliefs

16. Are any exemptions or reliefs available to the liable party?

CGT exemptions and reliefs

Reorganisation relief. Relief from CGT on the disposal of assets may be available where the transaction is structured as a reconstruction or amalgamation and the relevant conditions are fulfilled. Broadly, where the target company's assets (which must comprise an undertaking or part of an undertaking) are transferred to the acquiring company in exchange for the issue of shares in the acquiring company to the shareholders of the target company (a three-way share-for-undertaking transaction) then:

- No CGT arises for the target company, as it is deemed to have disposed of the assets at such a cost that no gain or loss is realised.
- No CGT arises to the shareholders in the target company.
- The acquiring company takes the assets at the original base cost of those assets to the target company.

In order for the relief to apply both the target company and the acquiring company must be resident in an EU member state (including Ireland) at the time of the transfer and the assets must be within the charge to CGT before and after the transfer.

A two-way share-for-undertaking structure where the target company transfers an undertaking or part of an undertaking to another company and that acquiring company issues shares directly to the target company and not to its shareholders does not qualify for the same relief from CGT.

Where a person acquires any land or building situated in any EEA state between 7 December 2011 and 31 December 2014 and holds this property for at least seven years, any gain arising will be exempt from CGT. Where the land is held for longer than seven years, the relief is pro-rated.

Stamp duty reliefs

Relief may be available from stamp duty through:

- **Group relief.** Relief from stamp duty is available for transfers between bodies corporate which are 90% associated in terms of ordinary share capital, profit and assets available for distribution (*see Question 11, Stamp duty reliefs*).
- **Reconstruction or amalgamation relief.** This relief (*see Question 11, Stamp duty reliefs*) can apply to three- or two-way share-for-undertaking transactions where the relevant conditions are met, including:

- a company with limited liability must be registered or must increase its share capital with a view to the acquisition of the undertaking or part of the undertaking of an existing company;
- the acquiring company must be incorporated in an EU member state (including Ireland); and
- where an undertaking is to be acquired, not less than 90% of the consideration for the acquisition must consist of the issue of shares in the acquiring company to the target company or to the holder of shares in the target company.

VAT

Relief may be available from VAT on an asset transfer between entities if the assets that are transferred form part of a business that is capable of operation as a going concern.

Tax advantages/disadvantages for the buyer

17. Please set out the tax advantages and disadvantages of an asset acquisition for the buyer.

Advantages

The advantages of an asset sale for the buyer include:

- The buyer may be able to claim capital allowances on the cost of acquisition of assets.
- The tax history and historic tax liabilities of the business generally stays with the selling group. If Irish real estate is acquired, the VAT history requires specific consideration as the purchaser may become responsible for VAT in relation to the acquired property.
- The buyer may obtain a step-up in base cost of the assets being acquired, which may result in a lower CGT liability on a future disposal when compared to a share sale.

Disadvantages

The disadvantages of an asset sale for the buyer include that the stamp duty rate applicable on an asset acquisition (7.5%) is higher than the rate applicable to a share acquisition (1%). Stamp duty can be minimised by novating the benefit of contracts (rather than by assigning) and by arranging for assets to pass by delivery where title to those assets is capable of passing by delivery.

Tax advantages/disadvantages for the seller

18. Please set out the tax advantages and disadvantages of an asset disposal for the seller.

Advantages

The advantages of an asset sale for the seller include:

- Capital losses on a sale of assets may be available to the seller to offset capital gains for CGT purposes.
- The sale of certain assets may trigger a clawback of allowances previously claimed (balancing allowances).
- Generally, where a purchaser acquires assets, the seller will not be required to provide covenant and warranty cover as the historic tax liabilities of the business remain with the selling group.

Disadvantages

The disadvantages of an asset sale for the seller include:

- The sale may trigger a balancing charge.
- An asset sale can lead to potential double taxation in the selling group:
  - the seller may be liable to CGT or corporation tax on chargeable gains on the disposal of the assets;
  - the shareholders in the selling company may be liable to income tax on distribution of the sales proceeds.

Transaction structures to minimise the tax burden

19. What transaction structures (if any) are commonly used to minimise the tax burden?

The reliefs from CGT, stamp duty and VAT as described at *Question 11* and *Question 16* may be available if the transaction is structured correctly.

LEGAL MERGERS

Taxes potentially payable

20. What taxes are potentially payable on a legal merger?

Irish tax legislation does not contain specific provision for domestic mergers without liquidation of one of the parties to the merger.

However, Ireland has implemented Directive 2009/133/EC on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different member states and to the transfer of the registered office of an SE or SCE between member states (Tax Merger Directive) through the EC Cross-Border Merger Regulations 2008 (*SI No. 157 of 2008*). The purpose of the Regulations and Directive is to facilitate mergers between different types of limited liability companies within the EU by providing for tax neutrality in relation to cross-border mergers, transfers of assets, exchanges of shares and divisions between companies resident in different EU member states.

Three types of merger are possible under the EU regime:

- Merger by acquisition.
- Merger by formation of a new company.
- Merger by absorption.

The effect of transferring assets, exchanging shares or dividing companies may have CGT, stamp duty and VAT consequences (*see Question 21*).

Exemptions and reliefs

21. Are any exemptions or reliefs available to the liable party?

There are specific reliefs on the exchange of shares and transfers of assets by way of merger (*see Question 11 and Question 16*). In addition, Irish Revenue has general authority to grant the reliefs provided by EU legislation (*see Question 20*) (if implementing legislation does not specifically provide for a particular relief). An application can be made to Irish Revenue for this.

The effect of the reliefs means that no tax arises on the transfer of all or part of one company to another in exchange for shares in the second company (which then trades), and no tax arises on the transfer of the assets. These reliefs apply to cross-border mergers (that is, transactions between companies from two different member states) and to transfers between two Irish companies.

There is a stamp duty exemption for the transfer of assets under a merger or cross-border merger in accordance with the relevant EU legislation.

Transaction structures to minimise the tax burden

22. What transaction structures (if any) are commonly used to minimise the tax burden?

The main purpose of the relief provided by EU legislation (*see Question 21*) is to allow cross-border mergers falling within the regime to be tax-neutral. The implementing legislation contains specific reliefs to reflect this, as well as giving Irish Revenue general authority to grant any reliefs described in the EU legislation but which have not been given specific effect in Ireland.

In general, transactions would be structured to take advantage of existing domestic reliefs, such as reorganisation relief and reconstruction relief that already cover many of the transactions contemplated by the cross-border merger regime.

JOINT VENTURES

Taxes potentially payable

23. What taxes are potentially payable on establishing a joint venture company (JVC)?

The transfer of assets or shares from one joint venture party to a JVC can trigger liability to CGT or corporation tax on capital gains for the selling party (*see Question 5*).

The JVC may be liable to stamp duty on the acquisition of assets or shares as part of the establishment (*see Question 4*).

VAT may also be payable where assets are transferred to a JVC on its formation (*see Question 6*).

Exemptions and reliefs

24. Are any exemptions or reliefs available to the liable party?

Depending on the structure of the transaction, it may be possible to claim relief from CGT, corporation tax on capital gains, stamp duty and VAT under reconstruction or amalgamation relief (*see Question 11* and *Question 16*).

Transaction structures to minimise the tax burden

25. What transaction structures (if any) are commonly used to minimise the tax burden?

If a JVC transaction is structured as a reconstruction or amalgamation, it may be possible to minimise the tax burden (*see Question 11* and *Question 16*).

COMPANY REORGANISATIONS

Taxes potentially payable

26. What taxes are potentially payable on a company reorganisation?

The taxes listed at *Question 4* to *Question 7* (that is, CGT or corporation tax on capital gains, stamp duty and VAT) may be payable on a company reorganisation.

Exemptions and reliefs

27. Are any exemptions or reliefs available to the liable party?

Relief may be available on CGT, corporation tax on capital gains, stamp duty and VAT, depending on the structure of the reorganisation. In particular, paper-for-paper relief (*see Question 11, CGT exemptions and reliefs* and *Question 16, CGT exemptions and reliefs*) and reconstruction or amalgamation relief (*see Question 11, Stamp duty reliefs* and *Question 16, Stamp duty reliefs*) may be available.

Transaction structures to minimise the tax burden

28. What transaction structures (if any) are commonly used to minimise the tax burden?

To minimise the tax burden, a reorganisation may be structured to qualify for the various reliefs described in *Question 11* and *Question 16*.

RESTRUCTURING AND INSOLVENCY

29. What are the key tax implications of the business insolvency and restructuring procedures in your jurisdiction?

There are three key corporate insolvency procedures in Ireland:

- Liquidation/winding-up.
- Receivership.
- Examinership.

Tax implications for the business

Liquidation/winding-up. The process of winding up a company involves the appointment of a liquidator whose role is to:

- Manage the orderly dissolution of the business.
- Distribute the assets of the company.
- Facilitate the payment of the company's creditors in accordance with the order of priorities.

When the winding up process begins, a company's current accounting period automatically comes to an end. The company also ceases to be the beneficial owner of its assets, which can have consequences for corporation tax group relief and group payment purposes (although not for CGT). For corporation tax purposes, trading losses will not be available for transfer to other members of the group following liquidation.

If the liquidator disposes of the company's assets in the course of the winding-up (whether by transfer to a third party or by *in specie* distribution to the company's shareholders) the company is treated as having disposed of those assets and is liable for any CGT arising. However, relief may apply as for CGT purposes, a company does not cease to be a member of a CGT group solely for being wound up. Therefore, it may be possible to transfer assets to the company's shareholders without triggering a CGT liability.

Stamp duty may also become payable on the transfer of assets to a third party or *in specie*.

The liquidation of a company may trigger the clawback of CGT and stamp duty reliefs previously claimed. For stamp duty purposes, a company in liquidation does not have beneficial title to its assets and therefore cannot claim group relief (*see Question 11, Stamp duty reliefs*). In addition, group relief previously claimed may be clawed

back where the 90% association is broken due to liquidation within two years of a transfer. It may be possible to apply to Irish Revenue for concessionary treatment in advance of liquidation in respect of these points.

The liquidator is also obliged to register and account for VAT in relation to all disposals. Where a company is insolvent and is a member of a VAT group, joint and several liability applies.

Receivership. A receiver, unlike a liquidator, is an agent of the company and is appointed by a secured creditor in respect of particular charged assets. The receiver's objective is to manage the charged assets and realise sufficient return to discharge the amount owing to the creditor. The tax consequences of the appointment of a receiver are generally not significant in that the receiver is an agent of the company. Corporation tax due by a company in receivership should be returned and paid by the company. Depending on the asset type, specific advice should be sought.

Examinership. An Irish incorporated company can undergo examinership (similar to the UK concept of administration). Examinership is a form of court protection which allows a company to continue trading under protection of the court. An examiner may be appointed on the application of an insolvent company to protect its assets for a 70-day period (which can be extended for not more than a further 30 days). The company usually enters into a scheme of arrangement with its creditors under which the liabilities of the company are written down. The claims of Irish Revenue as a creditor of the company may also be compromised in the course of an examinership.

The appointment of an examiner results in the end of an accounting period and any tax arising during the examinership must be accounted for by the company.

Tax implications for the owners

Liquidation/winding-up. A distribution of cash or assets to the shareholders of a company can give rise to a CGT charge for those shareholders.

Receivership. See the response set out above.

Examinership. As examinership is simply a court-sanctioned period of protection for a company from its creditors, there are no implications for the owners of the company and the company is liable for any taxes arising during the period of examinership in the normal way.

Tax implications for the creditors

Liquidation/winding-up. Where a liquidator or receiver disposes of an asset in the course of a winding-up or receivership, the liquidator/receiver and any person entitled to an asset by way of security or entitled to the benefit of a charge or encumbrance to an asset may be liable for any capital gains tax arising on that disposal. The tax charge is calculated by reference to the base cost and so on of the original debtor.

There may also be legal implications for creditors on a liquidation, depending on where a creditor falls in the order of priorities. Irish Revenue is a preferred creditor in liquidation situations.

Receivership. See above, *Tax implications for the creditors: Liquidation/winding-up.*

Examinership. There are no specific tax consequences for creditors on examinership.

SHARE BUYBACKS

Taxes potentially payable

30. What taxes are potentially payable on a share buyback? (List them and cross-refer to *Questions 4* to *7* as appropriate.)

CGT/corporation tax on capital gains

The tax implications arising on a share buyback differ according to whether or not the company is listed.

Unlisted/unquoted company. CGT treatment (*see Question 5*) can apply to the person making the disposal on a buyback where certain conditions are met, including:

- The acquisition is made by either an unquoted trading company or an unquoted holding company of a trading group.
- The transaction is carried out for the purpose of benefiting the trade carried on by the company making the acquisition or by any of its 51% subsidiaries.
- It does not form part of a scheme or arrangement the main purpose of which is to avoid the treating of the receipt as a dividend.
- The seller of the shares is resident and ordinarily resident in Ireland.
- The shares have been held by the seller for at least five years before disposal.
- The shareholder's interest in the acquiring company or the group to which the acquiring company belongs must be substantially reduced as a result of the buyback.

Where the buyback does not satisfy these conditions, distribution treatment will apply and dividend withholding tax may apply (*see below, Dividend withholding tax*).

Listed/quoted company. The redemption, repayment or purchase by a quoted company of its own shares is not treated as a distribution and instead is treated as a disposal of those shares by the shareholders. Therefore, any gain arising to the shareholders is subject to CGT.

Dividend withholding tax

Unlisted/unquoted company. Where an unquoted company redeems, repays or purchases its own shares, the premium paid to the person disposing of their shares is treated as a distribution and taxed as such (*see Question 9*).

If the conditions for capital gains treatment (*see above, CGT/corporation tax on capital gains*) do not apply, the person making the disposal may be subject to dividend withholding tax. Any amount paid by the acquiring company for its own shares over the amount of new consideration received by it on the initial issue of the shares is treated as a distribution.

Listed/quoted company. The redemption, repayment or purchase by a quoted company of its own shares is subject to CGT (*see above, CGT/corporation tax on capital gains*).

Stamp duty

For both quoted and unquoted companies, stamp duty is payable if the transfer of shares is effected by way of written instrument falling within Schedule 1 to the Stamp Duties Consolidation Act 1999. If the share certificates are transferred by delivery with no written instrument effecting the transfer, there should be no charge to stamp duty.

Exemptions and reliefs

31. Are any exemptions or reliefs available to the liable party?

CGT/corporation tax on capital gains

If the buyback satisfies the conditions to be treated as a disposal for CGT purposes, substantial shareholding exemption may be available (*see Question 11*).

Dividend withholding tax

If distribution treatment applies, exemption may be available from dividend withholding tax and income tax provided both companies are Irish resident. There are various exemptions from the requirement to withhold dividend withholding tax on payments to certain persons (*see Question 9*).

Stamp duty

If no stock transfer form is executed and share certificates are transferred by delivery, it may be possible to avoid stamp duty. In addition, where the buyback is structured as a share redemption that would involve converting the shares that are being bought back into redeemable shares, these shares may be redeemed without giving rise to a stamp duty charge.

Transaction structures to minimise the tax burden

32. What transaction structures (if any) are commonly used to minimise the tax burden?

The differing treatments that can apply to a share buyback for an unquoted company can present planning opportunities on the basis that:

- Distribution treatment may be more favourable for a body corporate or institutional shareholder where the exemption from dividend withholding tax and income tax applies for distributions between Irish resident companies.
- CGT treatment may be more favourable to individual shareholders.

PRIVATE EQUITY FINANCED TRANSACTIONS: MBOs

Taxes potentially payable

33. What taxes are potentially payable on a management buyout (MBO)?

Depending on whether an MBO is structured as a share or asset acquisition, CGT or corporation tax on capital gains, stamp duty and VAT may be payable in respect of the transaction (*see Question 10* and *Question 15*).

The acquisition of shares or other securities by management can result in employment taxes arising at the time of acquisition and/or on certain later events, particularly if the shares are acquired at an undervalue or are convertible or forfeitable. This can result in an obligation for the employer company to account for employment taxes.

Exemptions and reliefs

34. Are any exemptions or reliefs available to the liable party?

The reliefs from CGT or corporation tax on capital gains, stamp duty and VAT (*see Question 11* and *Question 16*) may be available on an MBO, depending on the structure of the transaction.

Transaction structures to minimise the tax burden

35. What transaction structures (if any) are commonly used to minimise the tax burden?

To use the reliefs described at *Question 11* and *Question 16*, an MBO may be structured as a qualifying reconstruction or amalgamation.

REFORM

36. Please summarise any proposals for reform that will impact on the taxation of corporate transactions.

In Ireland and other OECD countries, certain elements of the BEPS package have already been enacted into domestic law, including Country-by-Country Reporting (CbCR) and updating of transfer pricing legislation. In particular, several elements of OECD BEPS will be introduced through the "multilateral instrument" (MLI) that has been agreed between participating countries, including Ireland. The MLI entered into force in Ireland on 1 May 2019. As a general rule, it will have effect for Ireland's tax treaties:

- With respect to taxes withheld at source, from 1 January 2020.
- With respect to all other taxes levied by Ireland, for taxes levied with respect to taxable periods beginning on or after 1 November 2019.

The date on which the MLI modifies each treaty depends on when Ireland's treaty partners deposit their own instruments of ratification. Implementation of the BEPS project may impact certain aspects of the taxation of corporate transactions.

In addition to the actions to be taken as part of BEPS, Ireland must adopt laws and regulations necessary to comply with rules contained in the Anti-Tax Avoidance Directive (EU 2016/1164) (ATAD). Among the measures in the ATAD that require implementation are controlled foreign company (CFC) rules, interest limitation rules, hybrid mismatch rules and an exit tax regime. Ireland has introduced an ATAD-compliant exit tax regime (which came into effect from 10 October 2018) and new CFC rules (which came into force on 1 January 2019). More recently, Ireland has introduced legislation implementing the anti-hybrid rules contained in Council Directive (EU) 2017/952 amending Directive (EU) 2016/1164 (ATAD II). The Irish anti-hybrid rules apply from 1 January 2020.

The Exit Tax applies at a rate of 12.5% on any unrealised gains arising where a company migrates or transfers assets offshore, such that they leave the scope of Irish taxation. There are some exemptions provided for in the legislation, including where a migrating company continues to carry on a trade in Ireland.

In respect of Ireland's CFC rules, when introducing the implementing legislation Ireland chose to adopt the "Option B" model of CFC rules as described in ATAD. This model attributes undistributed income arising from non-genuine arrangements put in place for the essential purpose of obtaining a tax advantage. CFC income is attributed to the controlling company or a connected company in Ireland, where that controlling or connected company has "significant people functions" (SPF) in Ireland. The CFC charge

is based on an arm's length measurement of the undistributed profits of the CFC that are attributable to the SPF.

Whether a CFC charge is imposed on an Irish controlling company depends on the extent to which the CFC is regarded as having "non-genuine arrangements". A CFC is regarded as having non-genuine arrangements where both:

- The CFC would not own the assets or would not have borne the risks which generate all, or part of, its undistributed income, but for relevant Irish activities or SPF being undertaken in Ireland in relation to those assets and risks.
- It is reasonable to consider that the relevant Irish activities were instrumental in generating that income.

As regards Ireland's new anti-hybrid rules, the provisions are broad and are aimed at counteracting the various arrangements identified in the OECD's report involving hybrid instruments and/or hybrid entities. The rules are targeted at cross-border structures giving rise to one of the following outcomes:

- Tax deductible payments in one territory with no taxable inclusion in another territory.
- Double deductions where a payment is tax deductible in two territories against non-dual inclusion income.

The underlying purpose of the anti-hybrid rules is to prevent arrangements that exploit differences in the tax treatment of a financial instrument or an entity under the tax laws of two or more jurisdictions to generate a tax advantage; referred to as a mismatch outcome.

A number of updates to Ireland's transfer pricing rules were also introduced from 1 January 2020. Broadly, the changes bring Ireland's transfer pricing rules in line with the 2017 OECD Transfer Pricing Guidelines. While these guidelines had, in practice, already applied to Ireland's double tax treaties, the changes significantly broaden the scope of the Irish transfer pricing rules and include an extension of the rules to non-trading and capital transactions. Additionally, previously grandfathered arrangements predating 1 July 2010 are brought into scope for this first time.

Amongst the measures contained in ATAD is an interest deductibility limitation rule similar to the recommendation contained in the BEPS Action 4 proposals. It provides that interest costs in excess of 30% of an entity's earnings before interest, tax, depreciation and amortisation will not be deductible in the year in which they are incurred but may remain available for carry forward. However, the restriction on interest deductibility will only be in respect of the amount by which the borrowing costs exceed "interest revenues and other equivalent taxable revenues from financial assets".

Under the Directive, EU member states have a number of choices regarding implementation, including an option to allow taxpayers to deduct borrowing costs up to EUR3 million, and to exempt certain entities, such as entities which qualify as financial undertakings. Ireland has not published draft legislation indicating which of the various options and derogations it will implement. Further engagement with the European Commission is currently being undertaken but transposition could occur as early as 1 January 2021.

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