Tax Issue - Spring 2020

Welcome to the first edition of the Tax issue for 2020.

In this issue we focus on human capital and, in particular, the role of the tax system in helping Irish businesses to attract and retain top talent. In an increasingly globalised world the competition for talent is not restricted to the domestic Irish market but is truly an international challenge. Ireland's tax system has a number of provisions and reliefs that can apply for inbound assignees to Ireland. In this issue we look at a number of these reliefs and the conditions required to avail of them.

It is vitally important that both the individuals and their employers are aware of the intricacies of the Irish tax system and potential reliefs that may be applicable. It can be quite a minefield for businesses and individuals trying to navigate their way through dense legislation and changing Revenue practice. RBK Tax can assist employers and employees in structuring international assignments and ensuring they avail of applicable tax reliefs.

We also take a look at recent developments in the area of "employee" versus "self-employed". Readers may remember that in our Summer 2019 tax issue we discussed a recent determination of the Tax Appeals Commission (TAC) on this point. The Appeals Commissioner ruled in favour of Revenue in TAC.

The taxpayer appealed that decision to the High Court which issued its ruling in favour of Revenue in December 2019. This is a very important ruling for businesses. In light of this "precedent" it is likely that this is an area that Revenue will pay particular attention to in future Revenue interventions and it is important that taxpayers carefully review their current operating structures in light of the decision. RBK Tax can assist businesses by undertaking PAYE "health checks" to identify risk areas and ensure that your practices and procedures are up to date with current Revenue practice.

We also look at an unwelcome change in Revenue practice in respect of the treatment of distributions from Irish Approved Retirement Funds (ARFs) for Non-Residents. Whilst many people would regard an ARF as a pension fund, technically from a tax perspective an ARF is regarded as a 'capital asset'. Whether it is a "pension" or a "capital" asset can have very significant tax implications for non-resident individuals that are in receipt of distributions from an ARF.this issue we will take a look at a number of "quick fixes" that were introduced into EU VAT legislation effective from 1 January 2020.

This edition is published just before the nation goes to the polls. The new government, of whatever shade, will bring with it new taxation policies. As a small open economy we are very dependent on access to international markets. It is critical that our taxation policy is such that it supports international business, both inbound and outbound. The ability to attract talent to Ireland to enable Irish businesses compete internationally at the cutting edge is essential.

In this month's issue, we look at the latest developments in the fllowing:

Global Mobility - Taxation

Ireland is a very open economy and continues to rank as one of the most globalised countries.   Increased globalisation amongst multi-nationals goes hand in hand with internationally mobile employees and executives. With the increasing rate of integration in global markets and the great number of employees being assigned to Ireland, it is important that both the individuals and their employers are aware of the intricacies of the Irish tax system and potential reliefs that may be applicable.

Outlined hereunder are some reliefs and practical knowledge to be aware of ahead of an assignment.

1.1 Remittance Basis of Taxation

Irish resident but non-domiciled individuals are subject to Irish tax on:

> Irish source income and capital gains on an arising basis

> Foreign (non-Irish source) income and gains only to the extent that the gains/income are remitted (brought into) Ireland

The above is referred to as the "remittance" basis of taxation. The remittance basis provides opportunities for non-domiciled individuals who are moving to Ireland for a temporary period to structure their affairs in order to reduce their exposure to Irish income tax (top tax rate in excess of 50%) in respect of non-Irish source income and gains. This means that income and gains from sources outside of Ireland will not be taxable in Ireland as long as the funds are not remitted to Ireland. This can be highly beneficial to temporary residents who only wish to remain in Ireland for a few years and where income earned in Ireland from their employment is sufficient to meet day to day living expenses.

Remittances of income and gains from a foreign bank account earned in tax years prior to the tax year in which the individual takes up residence in Ireland can generally be made with no Irish tax, although there are complex provisions where remittances are brought into Ireland from a "mixed bank account" (ie foreign bank account with income and gains earned pre and post taking up Irish residence).

Note there are quite complex anti-avoidance rules designed to catch "deemed remittances".

1.2 Special Assignee Relief Programme (SARP)

SARP was introduced in Finance Act 2012. At a high level, SARP provides relief from income tax (it does not apply to USC or social security) where an individual with a minimum basic salary of €75,000 per annum (excluding all bonuses, commissions or other similar payments, benefits, or share based remuneration) is assigned to Ireland from a foreign employment to take up employment in Ireland.

This can either be with the foreign employer (e.g. assigned to an Irish branch of the foreign company) or an assignment to an Irish group entity.

There are a number of conditions in order to claim the relief including the following:

> Immediately prior to being assigned to work in Ireland, he/she must have worked outside of Ireland for a minimum period of 6 months.

> He/she arrives in Ireland in any of the tax years 2012 to 2020, at the request of his or her relevant employer to perform, in the State, duties of his or her employment for that employer or to take up employment in the State with an associated company of that relevant employer and to perform duties in the State for that company;

> He or she performs duties referred to above for a minimum period of 12 consecutive months from the date he or she first performs those duties in Ireland.

> He/she was not tax resident in Ireland for the 5 tax years immediately preceding the year of his or her arrival in Ireland to take up employment here

> He/she Is tax resident in Ireland for all tax years for which the relief is claimed.

The relief operates by effectively excluding from the charge to income tax 30% of the individual's Irish employment income, inclusive of bonus and commissions (capped at €1m) in excess of €75,000. The relief can be claimed for a maximum of 5 consecutive years commencing with the tax year in which the employee arrives in Ireland. The relief is generally applied at source through payroll. An individual claiming SARP is regarded as a chargeable person for income tax purposes and is required to file an Irish income tax return.

Where the relief is available it is vitally important that the employer submit to Revenue a SARP 1A Form certifying the requisite details within 90 days of the employees arrival in Ireland (this was previously 30 days). If this submission is not made on time Revenue can refuse the relief.

1.3 Social Insurance (PRSI)

As a general rule of thumb, Irish social security is payable where an individual carries out their employment duties in Ireland. Where an individual is assigned to work in Ireland for a temporary period it is possible to obtain relief from Irish social security and for the employee to be retained within their "home country's" social security scheme.

Where an individual is assigned from another EU country an application can be made in that foreign country for what is known as an E101 Certificate/A1 Portable Document. If granted this can be shown to the authorities in Ireland as confirmation that the individual is exempt from paying PRSI. The employer will instead withhold and pay social insurance on the employee's behalf in the country from which the E101 Certificate/A1 Portable Document was obtained.

Where the individual is assigned from outside the EU the availability of the exemption from paying PRSI is dependent upon whether a bilateral social security agreement has been signed between Ireland and the other country. Ireland has signed these agreements with a number of countries including the UK, USA, Canada and Australia.

The area of social insurance can be quite complicated. Depending on circumstances the country in which social insurance should be paid is not immediately obvious and can require a detailed review of the individual's background. RBK can assist individuals/companies in this process.

1.4 Payroll Operation for Short Term Business Visitors (STBV)

Where a foreign entity assigns an employee to work in Ireland temporarily, depending on the period of the assignment, there can be a requirement for that foreign entity to register for payroll taxes in Ireland and operate Irish payroll taxes on the employee's wages that are attributable to the duties carried out in Ireland. This can lead to a double taxation of the individual's salary both in their country of residence and in Ireland.

Whilst double tax relief may be available to the individual, in the absence of any concession from Revenue, there is a requirement for the individual to claim double tax relief by filing an income tax return after the end of the tax year. This can have a significant detrimental cash flow impact for the employee.

Irish Revenue will in certain circumstances allow the relaxation of the obligation to operate payroll taxes. Unfortunately Revenue have significantly muddied the waters over the last number of years, changing their practice in December 2016 which had the impact of significantly restricting the circumstances in which they would allow relaxation of payroll taxes.

In March 2019, Revenue issued updated guidance in which they added further unhelpful commentary distinguishing between STBVs coming to Ireland for one tax year and STBVs working in Ireland for short term periods over consecutive tax years. This created significant confusion for multi-nationals and was effectively unworkable. In light of intense lobbying, in December 2019 Revenue issued revised guidance effectively removing the requirement to consider consecutive tax years and reinstating the previous position whereby one considered this on a tax year by tax year basis for STBVs. Revenue's commentary is outlined below:

"With effect from 1 January 2020, for the purposes of determining whether a dispensation from the operation of PAYE is required, employers are required only to consider the number of work days spent in the State in a single year of assessment, that is, in the year of assessment concerned. There is no requirement to consider work days spent in the State in two consecutive years or to be so spent in future years. Further guidance on the operation of this Tax and Duty manual will issue in early 2020."

The current position set out below:

Number of Irish work-days in a Tax year	PAYE Obligation
Up to 60 workdays	No PAYE obligation
60 - 182 workdays	PAYE Dispensation required to remove PAYE obligation
183 or more days	PAYE must be operated

We look forward to yet further guidance from Revenue later this year. Hopefully, this time Revenue will ensure that their application of the Irish tax system does not provide a hindrance to attracting STBVs to Ireland.

There are a number of conditions that are required to be satisfied in order to avail of the PAYE Dispensation. RBK can assist you in determining your entitlement to relief from PAYE and making the submission to Revenue.

1.5 Capital Acquisitions Tax (CAT) – Temporary resident

iCAT is a tax on the receipt of gifts and inheritances. A charge to CAT can arise where either the donor/testator or the person receiving the gift/inheritance are resident in Ireland. There is a special relief for individuals who are temporarily resident in Ireland but are not domiciled in Ireland. For CAT purposes such individuals are only regarded as "resident" in Ireland when they have been resident or ordinary resident in Ireland for 5 consecutive tax years.

This provides opportunities for individuals who are temporarily resident in Ireland to structure their affairs in order to mitigate their exposure to Irish CAT. Note that where the asset subject to the gift/inheritance is Irish situs property (such as Irish real estate), the gift/inheritance of same is within the charge to Irish CAT regardless of the residence status of the donor/testator or beneficiary.

Capital Taxes

2.1 Distributions from Irish Approved Retirement Funds (ARFs) for Non-Residents

Whilst many people would regard an ARF as a pension fund, technically from a tax perspective an ARF is regarded as a 'capital asset' rather than a 'pension'. Whilst this distinction may seem somewhat academic or akin to splitting hairs, whether it is a pension or a capital asset can have very significant tax implications for non-resident individuals that are in receipt of distributions from an ARF.

A distribution from an ARF is subject to Irish PAYE withholding tax - deducted and paid to Revenue by the Qualified Fund Manager (QFM) making the distribution. A non-resident individual would generally be subject to income tax in their jurisdiction of residence. Under the terms of most double taxation agreements, 'pension' income is taxable only in the jurisdiction in which the individual is resident for tax purposes. In the past, Irish Revenue had allowed for a refund of Irish PAYE for non-resident individuals in respect of distributions from ARFs where the individual could provide documentation proving that the distribution was being taxed in the jurisdiction in which they were resident (provided Ireland had a double taxation agreement with that jurisdiction).

The above treatment reflected a practical approach of Revenue, eliminating double taxation for individuals. Unfortunately however, since December 2017, Irish Revenue no longer apply this practical approach. Their commentary (reviewed October 2019) is set out below:

"Revenue had previously allowed on an administrative basis that the tax deducted by a QFM from an ARF distribution could be refunded where the taxpayer could demonstrate that the distribution had been taxed in the DTA country in which they were resident. However, as there is no legislative basis for this approach, it will no longer be permissible".

The strict legislative approach is much more complicated as the Irish tax treatment of the ARF distribution has to be traced to the underlying income, gains or capital which it represents. If the income/gain is specifically exempt from Irish tax under the relevant article of the DTA, then any Irish tax withheld should be refundable. It is a very onerous task for individuals and fund managers to split the payments between the different sources of income and gains. An even harsher treatment arises in respect of distributions of the capital that was originally invested in the ARF. Revenue have stated that:

"Where a distribution involves the return of all or part of the original capital invested in an ARF, then, unless there is a capital article in the DTA, any Irish tax charge under Part 30 of the TCA 1997 that relates to a capital disbursement is not limited by the DTA".

Unfortunately, the vast majority of double taxation agreements entered into by Ireland do not include a 'capital article'. It should be noted that a 'capital article' is distinct from the 'capital gains tax' article. In instances where there is no capital article in the DTA, Revenue regard Ireland as having the right to tax the distribution of the capital amount. The amount of the distribution may also be taxable in the individual's jurisdiction of residence as akin to pension income, leading to double taxation.

The above treatment is overly harsh and can be very distressing for pensioners who have moved abroad and wish to draw down from their ARF, which they regard as akin to a pension fund. The previous administrative approach by Irish Revenue was practical and applied the spirit of double tax agreements that Ireland has entered into. It is hoped that Revenue will reconsider their approach and we understand that submissions have been made to Irish Revenue to reconsider the treatment.

RBK can assist you with reviewing your pension and your funding options.

Payroll Taxes

3.1 Self-employed v Employee – Developments

In our Summer 2019 tax issue we discussed a recent determination of the Tax Appeals Commission (TAC) in relation to the age old question of whether an individual is an employee (operating under a contract of services) or is self-employed (operating under a contract for services) . The TAC considered the applicable law on this matter in a case relating to the employment status of food delivery drivers in the context of a takeaway.

The Appellant in the case argued that the drivers were carrying out their activities as self-employed individuals whilst the Revenue Commissioners argued that they were employees. After a detailed review of relevant caselaw, the TAC determined on the basis of the facts and circumstances that the drivers were employees. This included consideration of the lack of bargaining power of the drivers as they had no input in relation to the terms of their contract which was drafted by the Appellant and the drivers were not able to negotiate the rates of pay. Another test applied by the TAC, known as the enterprise test, found that the drivers did not advertise their services, they could not subcontract their work and their business did not take on credit risk or business risk.

The taxpayer (a Domino's pizza franchise) appealed this decision to the high court. In a decision reported on December 2019, the High Court rejected the company's appeal. The appellant had said its contract with the drivers recognises the freedom the drivers have to work when they choose. They argued the TAC was wrong to rely on an English case which found a driver's right to cancel shifts at short notice did not relieve the driver of work-related obligations and that the TAC failed to follow Irish law in relation to *"ongoing reciprocal commitment"* between employer and employee to perform work.

Revenue argued the contract required the driver to initiate an agreement in relation to availability for work. It said a roster was drawn up by a store manager based on availability sheets and the Commissioner found, once a driver was rostered for one or more shifts, there was a contract *"containing mutual obligations"*

The High Court upheld the decision of the TAC finding that the English law on mutual obligations, did not go against Irish law but *"rather recognised the necessity to adapt to modern means of engaging workers"*. The High Court found that the Appellant had not shown that the commissioner misapplied the law in Ireland concerning the concept of mutual obligations.

This is a very important case and it is important that taxpayers carefully review their current operating structures in light of the decision. Revenue are very keen where possible to classify individuals as employees rather than self-employed contractors. The reason is that it effectively reduces the risk of non-compliance - Revenue find it easier to collect tax from one "employer" rather than multiple individuals. In light of this "precedent" it is likely that this is an area that Revenue will pay particular attention to in future Revenue interventions.

RBK tax department can assist you with reviewing your payroll compliance, identifying risk areas, undertaking PAYE healthchecks and advising you on your options to regularise any errors.

Corporation Tax

4.1 Malta-Ireland double taxation

In Finance Act 2014 Ireland introduced legislation to target aggressive tax planning involving the so called "double Irish" structure. Under the structure Irish incorporated but non-resident companies could be established to hold valuable intellectual property assets and generate royalty income from same with minimal tax cost. Based on Irish tax legislation that applied prior to the Finance Act 2014 amendments, such entities were not regarded as resident for tax purposes in Ireland with the effect that Irish corporate tax did not arise on the royalty income. Due to significant negative publicity Ireland introduced legislation to abolish the anomaly in Irish legislation.

Whilst the legislation effectively abolished the double Irish structure, it was however possible to obtain a similar tax treatment with an Irish incorporated but Maltese tax resident company. This structure (referred to as the "Single Malt") was not impacted by the changes in the legislation introduced in Finance Act 2014. The tax arbitrage arose by virtue of the interaction between Irish and Maltese domestic tax legislation and the provisions of the Ireland/Malta tax treaty, which effectively facilitated double non-taxation.

In 2018 Ireland and Malta entered into a Competent Authority Agreement under Article 24 of the Ireland/Malta double taxation treaty. In effect the jurisdictions have agreed that where the interaction of the treaty provides for the potential for double non-taxation then the provisions of the treaty facilitating this aggressive tax planning will not apply. Such an Irish incorporated company will be treated as Irish resident.

The competent Authority Agreement has effect for taxable periods ending on or after a period of six months after the Multilateral Instrument is ratified by both Malta and Ireland. As Ireland and Malta ratified the MLI in April and May 2019 respectively the provisions will now apply.

These new provisions should be carefully considered by any corporate groups that have Irish incorporated but Maltese resident companies in their structures.

4.2 Transfer pricing

Ireland has had formal transfer pricing legislation since 2011. In Finance Act 2019 Ireland's transfer pricing rules were overhauled quite significantly whereby, the 2017 OECD transfer pricing guidelines were effectively brought into Irish domestic legislation. The new changes came into force on 1 January 2020.

One of the most material changes to out transfer pricing legislation is the extension of transfer pricing to non-trading transactions. Previously Irish transfer pricing legislation only applied to trading transactions. This legislation will impact on group structures where interest free funding loans may have been granted by Irish companies to other group companies. Note however that the extension of the legislation to non-trading transactions does not apply where both parties to the transaction are within the charge to Irish tax. The notional interest arising will be treated as passive income subject to the 25% rate of corporation tax.

Whilst there is still currently an exclusion for SMEs, it is proposed that transfer pricing legislation will be extended to SMEs. The date of implementation is subject to a Ministerial Order.

Irish corporate groups should review their structures and in particular any financing arrangements in place that involve the granting of interest free loans to related companies in other jurisdictions in order to determine whether the new legislation applies to them.

VAT

The European Commission has described the EU VAT system as an *"asset of the Single Market….removing obstacles that distorted competitions and prevented the free movement of goods."* However, the EU VAT system has struggled to keep up with the increasing globalisation of business and in particular with developments in E-Commerce.

In 2016, the EU Commission adopted an Action Plan on VAT to reboot the current EU VAT system to make it simpler, more fraud-proof and business friendly. Key elements of the EU's VAT Action Plan have already been agreed and adopted.

The EU proposes significant changes to the EU VAT system from January 2021 to move towards a definitive VAT system. This includes the proposed extension of the Mini One Stop Shop (MOSS) to "distance sales".

In the short term 4 "quick fixes" were introduced effective from 1 January 2020. These are considered below:

1. Harmonise call-off stock relief across the EU

Call-off stock relates to goods that are sent from one EU Member State to a warehouse or client's storage facility in another EU State. One of the key requirements for call off stock relief is that the end customer is known before the goods are shipped to other EU State but the title in the goods remains with the seller. In the absence of call off stock relief the supplier would have to register for VAT in the member state of arrival, account for VAT on the acquisition of the goods and charge foreign VAT on the subsequent sale(s) as the goods are called off.

Call off stock relief allows the end customer to simply account for VAT on the reverse charge basis when the goods are called off. There is no requirement for the supplier to register for VAT in the other EU Member State.

Whilst Irish VAT legislation already provides for call off stock relief, not all EU Member States provide the relief. A new Article 17A has been added to the VAT Directive that now requires all EU Member States to apply call off stock relief. This is a welcome development for Irish businesses that may hold Call Off Stock abroad.

2. EU cross-border chain transactions

A chain transactions is a successive supply of goods involving 3 parties (or more) and with only a single intra-EU movement of those goods. The goods must be transported or dispatched directly from the first supplier to the last business customer in the chain.

The new VAT rules introduce harmonised criteria for determining which of the transactions in a chain is the intra-community supply. Determining which party is making the intra community supply is important as it impacts on potential VAT registrations in other EU jurisdictions. These new rules are welcome in providing clarity on the circumstances in which registration for VAT in another EU Member State is required.

3. Harmonised documentation requirements

The EU VAT Implementing Regulation has been updated to specify what evidence will be required to support the application of the zero rate to an Intra Community Supply of goods. Previously, rules on the evidence required to prove a supply was an intra-EU supply differed between EU Member States.

In Ireland it is already a requirement to obtain satisfactory evidence that the goods have been removed from the jurisdiction. The quick fix harmonises and simplifies the regulations by introducing new rules that all Member States must comply with. This harmonisation gives a clear definition of what is satisfactory in all EU Member States. Suppliers must be able to produce two items of evidence from independent parties proving that a supply is destined for another EU Member State.

4. Mandatory VAT ID number verification for EU cross-border supplies of goods

Currently the zero rate can apply to an Intra Community supply even if the customer does not provide a valid VAT number issued by another Member State. From 1 January 2020 the zero rate will only apply where:

> The customer provides a valid VAT number, and

> The transaction must be included on the supplier's EC Sales List.

It was already a condition of zero-rating an intra-EU dispatch that you must obtain the customer's EU VAT number and display this on the invoice. However, the new rules bring in the additional requirement that an intra-EU dispatch cannot be zero-rated if the supply is not included on the supplier's EC Sales List for the relevant period.

These quick fixes apply to all EU Member States and are designed to simplify the VAT rules for B2B EU cross-border supplies of goods.

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