Tax Issue - Summer 2020

Welcome to the Summer 2020 edition of the Tax Issue.

Whilst Covid-19 has occupied the minds of most businesses for the last three months, the world of taxation does not stop. In this issue we provide an overview of the recent High Courtcase involving Perigo, which has raised some very interesting questions in relation to concepts of legitimate expectative in Irish tax law.

The judgment in this case is eagerly awaited by tax practitioners. We also review a number of interesting recent determinationsof the Tax Appeals Commissioners, one of which Revenue is appealing to the High Court which will make for very interesting reading as the Appeal Commissioner relied on EU VAT caselaw (which is generally binding in Ireland) in making their determination.

We also look at updated Revenue guidance notes in relation to short term business visitors undertaking employment duties in Ireland. Revenue have issued welcome clarification and have changed their previous approach, which was proving tobe very confusing and was making the system unworkable. The new approach by Revenue is welcome.

Finally we provide a summary of some international tax developments that Irish corporates need to be aware of including the changes in Ireland's transfer pricingregime with effect from accounting periods beginning on or after 1 January 2020 and DAC 6 reporting obligations.

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

1. **Corporate Tax**
2. **Covid-19 Update**
3. **Tax Appeals Commissioners Determinations**
4. **Locums Incorporating their Trades - Areas for Concern**
5. **VAT**
6. **Employee Payroll Deductions in relation to non-Irish employments exercised in the State**
7. **International Tax**

1. Corporate Tax

Perrigo Case – "Legitimate Expectation"

In a previous issue we had written about Revenue issuing a notice of assessment on Perrigo, a large pharmaceutical company, demanding c. €1.6 billion in corporation tax. In short, the liability had arisen from Revenue's belief that a sale of Intellectual Property by then Elan in 2013 was not actually part of Elan's trade, where the profit would have been taxable at 12.5% but instead should have been treated as a capital gain liable to an effective tax rate of 33%. As Perrigo subsequently acquired Elan and its business they are responsible for the underpayment of the liability. Perrigo appealed this Notice of Assessment and the case is listed with the Tax Appeals Commission who will ultimately make a determination.

However, what is interesting is that Perrigo is taking a two pronged approach against the notice of assessment. As mentioned above they are appealing the notice of assessment through ordinary avenues but they have also sought a Judicial Review of Revenue's treatment in the High Court. In the case before the High Court, Perrigo has argued that the tax treatment of sales of Intellectual Property rights to drugs by then Elan over a twenty year period means that Perrigo should have a "legitimate expectation" that Revenue would accept that trading treatment applied to the sale of the rights of the disputed drug. At its most basic, the doctrine of legitimate expectation is based upon the idea that where a public body states that it will or will not do something, a person who has reasonably relied on that statement should be entitled to enforce it. The "legitimate expectation" argument put forth by Perrigo is also based on the fact that over the years Revenue had audited Elan and this issue had never arisen. Therefore, they had a legitimate expectation that Revenue would not challenge the treatment. In effect, Perrigo are arguing that the Revenue Commissioners didn't have the legal right to raise the assessment. The High Court has now heard the submissions made by both Perrigo and the Revenue Commissioners and will give judgement at a date yet to be determined.

This is not a tax case per se, and the High Court is not being asked to consider the underlying technical tax point. The Tax Appeals Commissioner will have to make a determination on this matter in due course. The claim for legitimate expectation however is a very interesting argument and the decision by the High Court may have far reaching implications for other parties. The outcome is being keenly watched by tax advisors and we will provide further updates on the case.

2. COVID-19 - Update

Temporary Wage Subsidy Scheme

Revenue have confirmed that the temporary wage subsidy scheme will remain in place until the end of August. The Government has indicated that it may be extended for certain sectors, although it will be "fine-tuned". However, there has clearly been a change in Revenue's approach towards those taxpayers claiming TWSS over the last few weeks. The Revenue have now established a compliance programme that is expected to run for several months under which they will be contacting all taxpayers that have availed of the wage subsidy.

Letters started to issue to taxpayers last week giving the taxpayer 5 days to respond to Revenue queries, which is an extremely tight timeframe, especially as many businesses are just starting to reopen in very challenging circumstances. All taxpayers that have availed of the TWSS should expect to receive a letter from the Revenue. In anticipation of the Revenue letter, those employers that have availed of the scheme should put their supporting documentation together so that they can quickly respond to Revenue. It is also very important that taxpayers availing of the TWSS review their continued eligibility for the scheme. In particular it is worth noting that whilst the scheme is scheduled to run until the end of August, the Government has accelerated the plan for exiting the "lockdown" with much more businesses opening over the last two weeks than may have originally been anticipated. These businesses need to carefully consider whether they are still entitled to the TWSS.

Additional Measures to Support Businesses - Interest Suspension & Debt Warehousing Scheme

On Friday 8th May, Revenue provided updated information on the suspension of interest on late payment of taxes and further detail on the tax debt warehousing arrangement.

i. Interest Suspension

The charging of interest on late payments is suspended automatically for SMEs with annual turnover of less than €3m (i.e. businesses which are managed by Revenue's Business Division) for:

- May and June PAYE liabilities and
- May / June VAT liabilities.

Businesses managed by the Large Corporates Division (LCD) and the Medium Enterprises Division (MED) can request a suspension of interest relating to the above liabilities if they are experiencing temporary cash flow or trading difficulties. Requests should be made via My Enquiries to the Collector-General's office or via the business's usual LCD or MED contacts.

ii. Tax Debt Warehousing

On 2 May last, the Government announced that it will legislate to provide for the deferral of Value Added Tax (VAT) and PAYE (Employer) tax debts arising during the Covid-19 crisis. Revenue will operate the scheme on an administrative basis pending the enactment of the necessary legislation.

VAT and PAYE (Employer) tax debts will be ring fenced to allow for a payment deferral while a business is unable to trade or was subject to restricted trading due to the COVID-19 related health restrictions. Further, tax debts arising two months after the business resumes normal trading will also be ring-fenced.

Period 1 – Covid-19 restricted trading phase:

This period covers VAT & PAYE tax debts built up while the business is unable to trade or was subject to restricted trading due to COVID-19 and a further two months after the business re-commences normal trading. As outlined above, there will be no collection of the relevant tax debts during this period.

In order to avail of the scheme, the tax debt will have to be quantified by the business through the filing of all relevant returns for the restricted trading phase. If a best estimate return of liability has been made for any period, the correct return will have to be filed to ensure the debt benefits from the warehousing.

Period 1 may vary for businesses and sectors depending on when the relevant Government restrictions are relaxed in line with the roadmap for re-opening society and business.

Period 2 – Zero interest phase:

The outstanding VAT and PAYE tax debts will be warehoused for a 12 month period following the resumption of "normal" trading. During this period Revenue will not seek to collect the debt and no interest will be charged. However, please note that businesses are required to pay current tax liabilities as they arise.

Period 3 – Reduced interest phase:

At the end of the "warehoused" 12 month period a reduced interest rate of 3% per annum will be charged on the tax debt incurred from Period 1. This represents a reduction from a current rate of c.10% per annum on overdue VAT and PAYE (Employer) liabilities.

Residence Rules

Existing guidance states that where an individual is prevented from leaving the State on his or her intended day of departure due to extraordinary natural occurrences or an exceptional third party failure or action – none of which could reasonably have been foreseen and avoided – the individual will not be regarded as being present in the State for tax residence purposes for the day after the intended day of departure provided the individual is unavoidably present in the State on that day due only to 'force majeure' circumstances. Where a departure from the State is prevented due to COVID-19, Revenue will consider this 'force majeure' for the purpose of establishing an individual's tax residence position.

Temporary Measures in relation to the close company surcharge

The close company surcharge applies to investment income of close companies and income of close service companies that is not distributed with 18 months of the end of the accounting period in which the income arose. In cases where a distribution is not made within this timeframe due to COVID- 19 Revenue will, on application, extend the 18 month period for distributions by a further 9 months.

Late Filing of Tax Returns

The application of a surcharge for the late submission of the corporation tax return CT1 for periods ending June 2019 (i.e. due by 23 March 2020 onwards) has been suspended until further notice. This also applies to the late submission of iXBRL financial statements for accounting periods ending March 2019 onwards.

Revenue have also confirmed that where such a CT1 is filed late due to COVID-19, the CT1 may be completed without restriction of reliefs, such as loss relief and group relief that would otherwise apply.

3. Tax Appeals Commissioners Determinations

Close Service Company

The Tax Appeals Commissioners (TAC) recently considered the definition of what constitutes a 'professional service' for the purposes of the close service company surcharge.

By way of background, Irish tax legislation provides for a surcharge on the undistributed income of certain professional service companies that are "close companies" (i.e. an Irish company that is under the control of 5 or fewer participators). The surcharge applies where the principal part (more than 50%) of the company's income is derived from the carrying out professional services. The legislation imposes a surcharge of 15% on 50% of the company's undisputed professional and service income. The surcharge does not apply if such income is distributed within 18 months of the end of the accounting period in which it arose.

The TAC case concerned an accountancy practice that provided clients with consultancy, advisory, audit, tax compliance and bookkeeping services. The accountancy practice did not include the surcharge in their corporation tax return on the basis that the principal part (i.e. more than 50%) of the income for the year under review was derived from 'non-professional' services such as the provision of bookkeeping & payroll services and a once off project involving a share redemption. The taxpayer also argued that time spent by junior members of staff did not constitute a professional service as many of the employees had not completed professional exams.

The Appeal Commissioners agreed that the bookkeeping and payroll services provided did not constitute a professional service for the purpose of the surcharge. However, they did find that time spent by junior members of staff in connection with the audit file and the once off consultancy project were professional services. This was on the basis that company was providing these services on foot of their status as a firm registered with the Institute of Chartered Accountants. The Appeals Commissioner stated in their determination that "*great weight should be placed on the guidance of a professional accountancy services regulating body, such as ICAI, in determining what constitutes the work of an accountant(s) or the provision of accountancy services.*"

Subsequent to the decision in the TAC case, Revenue have updated their Tax Duty & Manual to confirm that preliminary work done which of itself could be considered "nonprofessional" in nature, but which is integral to enabling the company to provide a "professional" service, such work should not be classified in isolation as non-professional but rather will be considered to be integral to and part of a "profession/professional service". The publication also confirmed that any business involving tax planning, be it investing or structuring, should be considered a professional service. Revenue have specifically updated their guidance notes to state that *"Where a professional body provides guidance regarding the activities of that profession, the guidance will be an important factor in establishing if a company is a "service company"* which is very similar to the actual determination of the Appeals Commissioner, referred to above.

Supply of medical services

Under general VAT principles, the supply of medical services is exempt from VAT whereas the provision of staff is a Vatable activity subject to VAT at the standard rate. Revenue have long argued that where a doctor incorporates and provides services (such as locum or after hours services) that the intermediary company is doing just that, providing staff (23% VAT) rather than providing medical care. It is on this basis that Revenue have raised assessments to various entities since beginning its "Medical Consultants Project" demanding VAT that had, according to them at least, been underpaid.

Interestingly, a recent decision by TAC has cast doubt over the position taken by Revenue. In the case brought before TAC, the appellant was a GP who disagreed with notices of assessment to VAT raised by Revenue in respect of the years 2011 to 2013 inclusive (albeit the 2011 assessment was disregarded as out of time). Revenue took the position that the intermediary company set up by the locum was providing staffing services and not medical care on the basis that the GP's intermediary company had been engaged by clinics rather than directly with patients.

TAC concluded in favour of the taxpayer and quashed the assessments raised by Revenue. In arriving at the decision the commissioner relied on settled law of the Courts of Justice of the European Union stating that "*The settled law requires that the medical services exemption also applied to a company where the services are being provided "by persons who possess the necessary professional qualifications". To determine otherwise would be to undermine and disregard the clear jurisprudence of the CJEU"*.

It is worth reiterating that Irish VAT law is actually based on EU law and decisions of the European Courts on VAT matters can be binding. This applies not just to taxpayers but to the Revenue as well.

It is interesting to note that the Revenue issued updated guidance notes that reiterated their view of the treatment of medical consultants/locums in May of this year (see further commentary in Section 4). In their guidance notes, they reaffirmed their view that the supply of locum services by a company constituted a supply of staff subject to VAT at the standard rate. Notwithstanding the Appeal Commissioner's succinct determination which referenced very clear EU caselaw, the Revenue Commissioners have confirmed that they will be appealing the decision of the Tax Appeals Commission to the High Court. We will keep the matter under review.

4. Locums Incorporating their Trades – Areas of Concern

In recent years Revenue have paid significant attention to Medical Consultants and, in particular, to those who have incorporated their business. The systematic review, dubbed the "Medical Consultants Project", began in 2013 and has yielded significant tax settlements over the years. Revenue have recently released further guidance regarding the incorporation of locum practices and some of the stumbling blocks they have identified during the audit of these entities.

We have summarised their main points below:

- In order for travel expenses to be reimbursed to the employee tax free, the travel expenses must be incurred wholly, exclusively and "necessarily" in the performance of the duties of that employment. Expenses incurred which merely put an employee in a position to exercise his or her employment are not incurred in the performance of the duties of the employment. For example, expenses incurred on travel between an employee's home and normal place of work are not allowable. In most cases, the normal place of work of an employee/director of an intermediary (locum company) will be the premises of the intermediary's client, for example, a hospital or office. Obviously when Revenue audit entities that provide locum services, those companies are failing to treat the reimbursement on some travel expenses as a Benefit in Kind and, therefore, liable to income tax.

- Another area that Revenue have focused on is in relation to expenses which they consider not to be deductible for corporation tax purposes but have been claimed by taxpayers as a deduction nonetheless. It is important to ask yourself prior to taking a deduction for any expense whether that expense was truly "wholly and exclusively incurred for the purposes of the trade". Revenue have also directed people's attention to the requirement to maintain proper books and records. Obviously these matters, which should be fairly straightforward, are causing problems for taxpayers and this really shouldn't be the case.

- Revenue have also pinpointed wages paid to family members as a bone of contention. As part of their audits Revenue must have come across situations whereby a salary was paid to a family member who was not actually providing any service to the company or an excessive salary was paid to a family member that was not in keeping with the services being provided. On these occasions Revenue have indicated that the salary, or a proportion thereof, will not be deductible for corporation tax purposes.

- VAT treatment of locum services (considered in detail in Section 1).

With the exception of VAT, most of the above would apply to any personal service company and not just those providing the services of a locum. Given Revenue's increased scrutiny in these areas and the hefty interest and penalties being imposed, it is more important than ever that corporation tax returns are prepared correctly and in line with the facts of the situation. As these audits have borne significant fruit from Revenue's perspective it is unlikely that they will go away in the near future.

5. VAT

Deferral of the introduction of the VAT eCommerce package

In a previous tax issue we discussed the Action Plan adapted by the EU Commission to reboot the current EU VAT system and in particular the four "quick fixes" that were introduced with effect from 1 January 2020. Part of this plan was the proposed extension of the Mini One Stop Shop (MOSS) to "distance sales".

The new rules were due to come in effect from 1 January 2021. However, on 8 May 2020 the Commission proposed to postpone the introduction of new e-commerce VAT rules by six months to 1 July 2021 because of the practical difficulties created by the lockdown measures taken to contain the coronavirus pandemic.

The new rules are referred to as the VAT e-commerce package and aim to significantly expand the scope of the MOSS scheme which currently applies to business-to-consumer (B2C) supplies of telecommunications, broadcasting and electronic (TBE) services in the EU. The new One Stop Shop (OSS) will now include other B2C services and B2C supplies of goods (distance sales).

> Currently there is a huge administrative burden on businesses who supply B2C goods where they breach the 'distance sale threshold' as the business is forced to register for VAT in the other EU jurisdiction and operate VAT accordingly. Under the new rules, EU based suppliers will report these supplies under the revised 'One Stop Shop' which will eliminate the requirement for multiple VAT registrations in different jurisdictions.

> The principle of taxing in the country of destination will also apply to all other services supplied B2C which will all be reported through the OSS. A threshold of €10,000 will apply to the total value of both TBE services and 'distance sales'.

> The 2021 changes also include new VAT rules applicable to a taxable person who facilitates supplies by way of an 'electronic interface' (e.g. a website). These new rules relate to the online sale of goods by a vendor outside the EU. Where goods are imported from outside the EU and have a net value in excess of €150 the online platform will be deemed for VAT purposes to be the supplier of goods sold to customers in the EU by companies using the marketplace or platform and will have to collect and pay the VAT on these sales.

These new deeming rules will also apply to all online platform sales if the goods are located in the EU at time of sale.

> An import scheme will be created covering distance sales of goods imported from third countries or territories to customers in the EU up to a value of €150. The seller will charge and collect the VAT at the point of sale to EU customers and declare and pay that VAT globally to the Member State of identification in the OSS. These goods will then benefit from a VAT exemption upon importation. The introduction of the import scheme will coincide with the abolition of the current VAT exemption for goods in small consignment of a value of up to €22.

6. Employee payroll tax deductions in relation to non-Irish employments exercised in the State

Over the last number of years Revenue has changed their position and approach to how they apply the provisions of the employment article of double taxation agreements on almost an annual basis. They have updated their guidance notes on multiple occasions over the last number of years, at one point making it almost impossible for short term temporary assignees to Ireland to be relieved from Irish payroll taxes.

Ireland is one of the most open economies in the world and the approach of Revenue created significant issues for multinational companies as well as confusion and unnecessary complexity. Perhaps one of the most controversial aspects of previous Revenue updates in this area was the fact that Revenue seemed to be applying an *"economic employer"* concept, which is applied in other jurisdictions, in an Irish context. Some commentators have argued that this concept did not exist in Irish law wherein focus tended to be on the pure "legal" employer rather than an "economic" employer. The effect of this is that arguably in their previous interpretation Revenue were over reaching their legislative remit.

The updated guidance from Revenue is welcome as it reflects a much more practical approach and is more in accordance with international practice. As regard the "economic employer concept, Revenue have specifically stated *"In a change from previous practice, Revenue will consider the legal nature (emphasis added) of the term employer in determining whether a genuine foreign employment exists".*

Under the new guidance notes with effect from 1 January 2020, Revenue will not enforce the operation of PAYE in cases where 60 or less workdays are spent in the State in a tax year (subject to the other relevant conditions being satisfied). Each year should be considered on a standalone basis. For those temporary assignees who spend greater than 60 days (but less than 183 days) in the State in a tax year, it will be necessary to apply for a dispensation from the operation of PAYE. New simplified procedures are in place concerning the application for a PAYE dispensation.

In order to qualify for the relief from Irish payroll taxes under double taxation treaties there is a requirement that the costs of the foreign employment are not "borne" by an Irish Permanent establishment. Revenue have confirmed that in cases where a re-charge of costs occurs, such costs will be considered to be "borne" by the Irish entity. However Revenue have also confirmed that *"Management charges (with a mark-up) are not considered recharges for the purpose of interpreting this article".*

The above changes and clarifications by Revenue are welcome. RBK can assist you with your inbound and outbound employment tax planning.

7. International Tax

Transfer Pricing (TP)

Ireland has had formal transfer pricing legislation since 2011. The legislation provided that the relevant person is required to have certain documentation in place and available for review if requested by Revenue. Previously, Revenue accepted documentation that had been prepared in accordance with either the OECD Transfer Pricing Guidelines or the code of conduct adopted by the EU Council in relation to transfer pricing documentation. This was implemented to reduce the additional burden imposed on multi-national groups as there would already be documentation in place where the counterparty is resident in territory which already has transfer pricing legislation.

Changes were introduced in Finance Act 2019 and are in force for accounting periods beginning on or after 1 January 2020, effectively to legislate for the 2017 updated OECD Transfer Pricing Guidelines. The most significant changes for many groups are set out below:

> Grandfathering provisions that had applied to certain pre 1 July 2010 transactions will no longer apply.

> Extension of transfer pricing to non-trading transactions between group companies within the remit of TP legislation with the exception of non-trading transactions involving two parties both subject to Irish taxation, i.e. wholly domestic transactions, provided the arrangement has no tax avoidance motive or benefit.

> Extension of the provisions to capital allowances and certain capital gains relating to transactions between associated companies. Intra-group sales and purchases of assets will also be subject to Ireland's transfer pricing rules if the market value of the assets is more than €25 million.

> Larger businesses operating in Ireland must prepare an OECD standard Master and Local Files to evidence their compliance with transfer pricing rules. It is no longer sufficient to rely on counterparty transfer pricing reports prepared. An Irish business of any size will have an annual obligation to prepare a Local File if it is a member of a global group that has a turnover greater than €50 million. An Irish business will have a further Master File obligation if it is a member of a global group that has a turnover greater than €250 million. The Master File is a group-wide document that introduces a tax authority to the business, its transfer pricing policies and capital structure. The files must be prepared by the due date for filing the relevant corporate tax return (i.e. within 9 months of the accounting year end).
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> The Local File is a detailed document showing that all material intra-group transactions are executed using the arm's lengths pricing. Businesses used to have 3 months to submit documentation to Revenue upon request. This has now been reduced to 30 days. Failure to prepare and submit the required documentation will attract penalties of €25,000 or greater for larger businesses; or €4,000 for those companies under the €50 million threshold.

> Previously SMEs were exempt from the formal TP rules. However FA 2019 extended the TP rules to SMEs (subject to Ministerial Order). An SME is defined as an entity which on a group basis employs fewer than 250 people and has either: (i) turnover not exceeding €50 million, or (ii) balance sheet values of less than €43 million. Medium companies need only apply transfer pricing rules for cross-border arrangements above €1 million. Documentation obligations are also substantially reduced relative to the Master and Local File framework mentioned earlier. The date of implementation of TP rules for SMEs is subject to Ministerial Order.

Revenue have also ramped up their own internal transfer pricing expertise. It is clear that corporate groups can expect to see more activity from Revenue in this area than has heretofore been the case. Irish corporate groups should review their structures, their inter-company pricing 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. Documentation is critically important.

Proposed Deferral of DAC 6 Reporting Deadlines

The EU Council Directive 2018/822 concerning cross-border tax arrangements, known as DAC 6 introduces an obligation on both intermediaries (i.e. lawyers, tax advisers & accountants) and tax payers to disclose potentially aggressive tax planning arrangements to their local tax authorities. It also requires tax administrations to subsequently exchange this information with the tax authorities in other jurisdictions. DAC6 mirrors many of the concepts and principles of the Irish domestic mandatory disclosure reporting requirements introduced in recent years and is designed to increase transparency across jurisdictions.

A DAC6 reporting obligation is triggered when a cross border transaction falls within one of the “hallmarks” which are detailed in the Directive. There are certain arrangements that will only become reportable where one of main benefits of the arrangement is obtaining a tax advantage. There are also some arrangements that are automatically reportable regardless of whether the main benefit of the transaction was to claim a tax advantage i.e. instances where double deductions have been claimed for tax depreciation or where double tax relief is claimed in more than one jurisdiction.

In light of COVID-19 the EU Commission has proposed the following deferrals:-

Reportable Transaction	Original Reporting Date	Proposed Deferral Date
Introduction of reporting within 30 days of the reportable transactions taking place	1 July 2020	1 January 2021
Historical transactions that took place between 25 June 2018 to 30 June 2020	31 August 2020	28 February 2021

Irish Revenue confirmed in an eBrief on 26 June that they have opted into the deferral.

How can RBK help?

If you need assistance to avail of any of the above measures or wish to discuss in confidence, please contact your usual RBK contact or:

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