Transfer Pricing 2020

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the sixth edition of *Transfer Pricing*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Germany and Switzerland.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Jason M Osborn of Mayer Brown LLP, for his continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

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Ireland

Joe Duffy and Tomás Bailey

Matheson

OVERVIEW

Principal legislation

1 | Identify the principal transfer pricing legislation.

The primary Irish transfer pricing legislation is contained in Part 35A of the Taxes Consolidation Act 1997 (TCA), which applies to accounting periods commencing on or after 1 January 2011 for transactions the terms of which were agreed on or after 1 July 2010.

Enforcement agency

2 | Which central government agency has primary responsibility for enforcing the transfer pricing rules?

The Revenue Commissioners deal with transfer pricing and all other tax matters. The Irish competent authority team within the Revenue Commissioners is responsible for tax matters under Ireland's treaties. There are transfer pricing specialists and economists within the Revenue Commissioners dealing with transfer pricing matters.

OECD guidelines

3 | What is the role of the OECD Transfer Pricing Guidelines?

The OECD Transfer Pricing Guidelines are tantamount to being Irish law by virtue of Irish tax legislation, which states that the transfer pricing rules are to be construed in such a way as to ensure, as far as practicable, consistency with the OECD Transfer Pricing Guidelines. Consequently, Irish law does not go into any detail about how to apply the arm's-length principle. New and revised versions of the OECD Transfer Pricing Guidelines are incorporated into domestic Irish law by legislative amendment. Although the 2017 edition of the OECD Transfer Pricing Guidelines has not been incorporated into Irish domestic law to date, it is expected to be incorporated with effect from 1 January 2020.

Covered transactions

4 | To what types of transactions do the transfer pricing rules apply?

The transfer pricing rules apply, in a domestic and cross-border context:

- to arrangements involving the supply and acquisition of goods, services, money or intangibles;
- where at the time of the supply and acquisition the supplier and acquirer are associated; and
- to the profits or gains or losses arising from the relevant activities are in respect of trading activities.

Where an arrangement between associated entities is made otherwise than at arm's length, an adjustment may be made where the Irish taxpayer has understated trading income or overstated trading expenses.

An arrangement is defined very broadly and includes any agreement or arrangement of any kind (whether or not it is, or is intended to be, legally enforceable). Two persons may be associated directly or indirectly by virtue of participation in the management, control or capital of the other. A trading activity typically involves significant activities conducted regularly by persons or employees in Ireland and will typically qualify for the 12.5 per cent corporation tax rate.

The transfer pricing rules do not apply to small or medium-sized enterprises (SMEs) – broadly, enterprises with fewer than 250 employees and either a turnover of less than €50 million or assets of less than €43 million on a group basis.

Arrangements that were agreed before 1 July 2010 and remain unchanged are not subject to the transfer pricing rules.

Arm's-length principle

5 | Do the relevant transfer pricing rules adhere to the arm's-length principle?

Yes.

Base erosion and profit shifting

6 | How has the OECD's project on base erosion and profit shifting (BEPS) affected the applicable transfer pricing rules?

Ireland participated fully in the OECD's BEPS project and has implemented several best practice recommendations to date. As noted above, new and revised versions of the OECD Transfer Pricing Guidelines are incorporated into Irish law by legislative amendment. The BEPS Actions 8 to 10 recommendations will not be applied to non-double tax agreement (DTA) situations under domestic transfer pricing rules until they become legally effective. However, the updated OECD Transfer Pricing Guidelines will be applied with effect from October 2015 to disputes in relation to profit allocation under DTAs. As noted, it is expected that Ireland will incorporate the 2017 edition of the OECD Transfer Pricing Guidelines into domestic law with effect from 1 January 2020.

PRICING METHODS

Accepted methods

7 | What transfer pricing methods are acceptable? What are the pros and cons of each method?

The transfer pricing rules do not specify acceptable or preferred transfer pricing methods. However, the legislation requires the transfer pricing rules to be construed in such a way as to ensure, as far as practicable, consistency with the OECD Transfer Pricing Guidelines. Therefore any transfer pricing method that is selected and applied in accordance with the OECD Transfer Pricing Guidelines should be acceptable from an Irish transfer pricing perspective.

In accordance with the OECD Transfer Pricing Guidelines, the taxpayer should select the methodology that is most appropriate for the particular transaction.

The following transfer pricing methods are acceptable in Ireland:

- the Comparable Uncontrolled Price (CUP);
- the Cost-plus Method;
- the Resale Price Method;
- the Transactional Net Margin Method (TNMM); and
- the Profit Split Method (PSM).

While each of the above methods are accepted by Irish Revenue, there is no specific commentary published that articulates Irish Revenue's view on each of the methods. However, Irish Revenue is showing greater interest in two-sided methods in practice, or at the very least in reviewing the method applied on both sides of a transaction.

Cost-sharing

8 | Are cost-sharing arrangements permitted? Describe the acceptable cost-sharing pricing methods.

Cost-sharing arrangements are permitted. Intragroup cost-sharing arrangements should be implemented in a manner consistent with the OECD Transfer Pricing Guidelines. Therefore, the conditions applying to the cost-sharing arrangement should be consistent with the arm's-length principle and should be adequately documented.

Best method

9 | What are the rules for selecting a transfer pricing method?

Transfer pricing methods should be selected in accordance with the OECD Transfer Pricing Guidelines. There are no preferred methods prescribed by the transfer pricing rules. Therefore traditional transaction methods and transactional profit methods may be used, but the selection of a transfer pricing method should always aim at finding the most appropriate method given the particular factual circumstances.

Taxpayer-initiated adjustments

10 | Can a taxpayer make transfer pricing adjustments?

Where the transfer pricing adjustment arises in respect of an obligation to make a payment to a connected person outside Ireland, as a result of an adjustment to the profits of that connected person, then an adjustment may only be taken in Ireland by way of a correlative relief application to the Irish competent authority.

Transfer pricing adjustments made in other situations (eg, as a year-end true-up) are generally acceptable as long as they comply with the arm's-length standard.

Safe harbours

11 | Are special 'safe harbour' methods available for certain types of related-party transactions? What are these methods and what types of transactions do they apply to?

The Revenue Commissioners have published guidelines confirming the availability of a safe harbour for low-value intragroup services. Where the safe harbour applies, the Revenue Commissioners will accept a mark-up of 5 per cent of the taxpayer's relevant cost base without the need for a benchmarking analysis. The safe harbour is largely based on the guidance contained in section D of Chapter VII of the 2017 edition of the OECD Transfer Pricing Guidelines.

In addition, the transfer pricing rules do not apply to SMEs.

DISCLOSURES AND DOCUMENTATION

Documentation

12 | Does the tax authority require taxpayers to submit transfer pricing documentation? Regardless of whether transfer pricing documentation is required, does preparing documentation confer any other benefits?

A taxpayer is not obliged to submit transfer pricing documentation unless requested by the Revenue Commissioners. However, the taxpayer is obliged to retain and have available for inspection sufficient documentation and records to demonstrate the taxpayer's compliance with the transfer pricing rules. The records must be prepared in a timely manner and must demonstrate that the taxpayer's relevant income has been computed in accordance with the transfer pricing rules. The records must be prepared in English or Irish in written form or by means of any electronic, photographic or other process permitted for accounting records. The records must be retained for a period of at least six years after the completion of the relevant transaction to which they relate.

A taxpayer who fails to submit documentation when requested by the Revenue Commissioners may be liable to a penalty. The Revenue Commissioners can apply to the High Court of Ireland for a court order to compel a taxpayer to submit records or documentation.

Taxpayers are obliged to retain such records and documentation that enable true returns to be made under the self-assessment system of corporation tax compliance. A failure to do so may result in the taxpayer incurring penalties. In addition, a comprehensive and robust system of document and record retention will strengthen a taxpayer's position in any engagements with the Revenue Commissioners. For example, a record of the transfer pricing analysis that was carried out should be sufficient to show that reasonable care has been taken and should therefore mitigate tax-geared penalties in the event of underpayment.

Taxpayers must have available records as may reasonably be required for the purposes of determining whether the trading income has been computed on an arm's-length basis. Irish tax legislation is not prescriptive as to the form of that documentation. The Revenue Commissioners have published guidance on documentation requirements. The key points noted in the Revenue Commissioners' guidance are as follows.

There is no standard or required form of transfer pricing documentation. However, the EU Council Code of Conduct, EU Transfer Pricing Documentation, and Chapter V of the OECD Transfer Pricing Guidelines are considered good practice.

Documentation should be available at the time the relevant tax return is made, although it is best practice that the documentation is prepared at the time of the transaction in question.

Suitable documentation may already be held by another group company.

The extent of documentation depends on the facts. The cost and administrative burden of preparing documentation should be commensurate with the risk involved. For example, it would be expected that complex and high-value transactions would generally require more detailed analysis and related documentation than simple, easily understood and comparable, high-volume transactions.

The quality of the documentation will be a key factor in determining whether an adjustment on audit should be regarded as correcting an innocent error or as being a technical adjustment. The quality of the documentation will depend on its suitability for purpose. Again, for complex high-value transactions the benchmark for what represents quality documentation will be higher.

Although a separate master file and a local file is not technically required, the information required to be kept on a master file and a local file should be treated as being reasonably required for the purposes of determining whether the trading income has been computed on an arm's-length basis. Therefore, taxpayers should comply with the BEPS Action 13 documentation requirements in order to satisfy Irish domestic obligations. Taxpayers are not obliged to file this information with the Revenue Commissioners.

Country-by-country reporting

13 Has the tax authority proposed or adopted country-by-country reporting? What are the differences between the local country-by-country reporting rules and the consensus framework of Chapter 5 of the OECD Transfer Pricing Guidelines?

Country-by-country (CbC) reporting applies to fiscal years beginning on or after 1 January 2016. The Irish legislative framework largely follows the OECD BEPS Action 13 proposal. However, the Irish approach departs from the OECD proposal with respect to secondary reporting obligations. In Ireland, a constituent entity that is neither an ultimate parent entity nor a surrogate parent entity is obliged to request information from its ultimate parent entity to complete a full CbC report. If the ultimate parent entity refuses or fails to provide sufficient information to enable the constituent entity to file a full CbC report, the constituent entity is obliged to notify the Revenue Commissioners of that refusal and file an 'equivalent country-by-country report'. The 'equivalent country-by-country report' contains details of the filing constituent entity and its subsidiaries only. Failure by the constituent entity to request the information from the ultimate parent entity will result in penalties for the constituent entity. There are no penalties if the constituent entity requests the information and that request is refused.

Timing of documentation

14 When must a taxpayer prepare and submit transfer pricing documentation?

Records and documentation must be maintained in a timely manner on a continuous and consistent basis. Best practice dictates that all documentation should be prepared contemporaneously.

Taxpayers are not obliged to submit transfer pricing documentation until they are requested to do so by the Revenue Commissioners. The Revenue Commissioners are obliged to give taxpayers a reasonable opportunity to submit the relevant documentation. If a taxpayer fails to comply with a request for documents, the Revenue Commissioners may serve a demand on the taxpayer seeking the relevant documents within a period not less than 21 days.

Failure to document

15 What are the consequences for failing to submit documentation?

A taxpayer who fails to submit the relevant documentation within the time period prescribed in the notice may be liable to a penalty of €4,000.

ADJUSTMENTS AND SETTLEMENT

Limitation period for authority review

16 How long does the tax authority have to review an income tax return?

Where a taxpayer has delivered a return containing a full and true disclosure of all material information, the Revenue Commissioners may not make an assessment or an amendment to an assessment after the end of four years commencing at the end of the tax year in which the return is filed. Unless and until a full and true return has been filed, the four-year time limit does not begin to run. The Revenue Commissioners may raise an assessment at any time where they have reasonable grounds for suspecting fraud or neglect.

Rules and standards

17 What rules, standards or procedures govern the tax authorities' review of companies' compliance with transfer pricing rules? Does the tax authority or the taxpayer have the burden of proof?

When transfer pricing rules were initially introduced in Ireland, a collaborative approach was adopted by Irish Revenue in respect of reviewing what transfer pricing models and methods Irish taxpayers were using within their frameworks. This approach was implemented by means of the Transfer Pricing Compliance Review (TPCR) programme, where taxpayers were selected on a risk assessment basis to conduct a self-review on their transfer pricing for a specified period.

Initially, the TPCR programme operated smoothly and allowed Irish taxpayers and Irish Revenue to work together without the need for, or the pressure of, an audit. However, in recent years, Irish Revenue has adopted a more investigative approach to reviewing transfer pricing compliance. This is a marked departure from the collaborative stance that Irish Revenue adopted in previous years in respect of such investigations. As a result, TPCRs have been replaced by aspect queries and formal audits in order to review a corporate taxpayer's transfer pricing policies.

Irish Revenue's Transfer Pricing Unit (TPU) was established to review and adjust Irish taxpayers' transfer pricing policies where necessary. A TPU review typically begins by way of an aspect query, which is regarded as a targeted intervention for the purpose of checking a particular risk that is shown by Irish Revenue's risk review system. The aspect query mirrors the audit process, but aspect queries are not regarded as audits. Despite this, it is becoming commonplace for aspect queries to develop into more serious investigations that ultimately result in transfer pricing adjustments being made.

A transfer pricing audit takes place in the same way as a corporation tax audit. The Code of Practice for Revenue Audits (the Code) governs how Irish Revenue conducts its audits and ensures that the audits are implemented in an efficient, professional and courteous manner. The Code also includes details on the audit and how the audit settlement procedure operates (ie, interest and penalties).

Under Ireland's self-assessment system, the taxpayer bears the burden of proving compliance in the event of an audit. Under Irish legislation Irish Revenue exercises broad rights of review with regard to review of compliance with transfer pricing rules in Ireland.

Disputing adjustments

18 If the tax authority asserts a transfer pricing adjustment, what options does the taxpayer have to dispute the adjustment?

A taxpayer can appeal a transfer pricing assessment to the Tax Appeals Commission at first instance. The decision of an Appeal Commissioner may be appealed on a point of law to the High Court, the Court of Appeal and the Supreme Court (in circumstances where the Supreme Court decides to exercise its appellate jurisdiction in circumstances specified by the Constitution).

Procedural defects in the Revenue Commissioners' conduct may be challenged by way of judicial review.

Where the transfer pricing adjustment results in double taxation, the taxpayer may present the case to the Irish competent authority for relief pursuant to the mutual agreement procedure (MAP) article of the relevant DTA.

RELIEF FROM DOUBLE TAXATION

Tax-treaty network

19 Does the country have a comprehensive income tax treaty network? Do these treaties have effective mutual agreement procedures?

Ireland currently has an extensive network of 73 effective DTAs, including most major trading nations. The DTAs generally contain an article providing for a MAP.

Requesting relief

20 How can a taxpayer request relief from double taxation under the mutual agreement procedure of a tax treaty? Are there published procedures?

The Revenue Commissioners have published updated guidelines on the procedure for making a MAP request. To activate the MAP, a taxpayer must apply to the Revenue Commissioners in writing, setting out the details of its case. The written MAP request must include the following information:

- i. *identity (such as name, address, tax identification number or birth date, contact details) of the taxpayer(s) covered in the MAP request and of the other parties to the relevant transaction(s);*
- ii. *details of the relationship between the taxpayer and the other parties to the relevant transaction(s);*
- iii. *the legal basis for the request i.e. the specific tax treaty and/or EU Arbitration Convention including the provision(s) of the specific article(s) that the taxpayer considers is not being correctly applied by either one or both contracting states (and to indicate which state and the contact details of the relevant person(s) in that state);*
- iv. *facts and circumstances of the case (including any documentation to support these facts such as financial statements and intercompany legal agreements, the taxation year(s) or period(s) involved and the amounts involved, in both the local currency and foreign currency);*
- v. *an analysis of the issues involved (supported with relevant documentation, for example, tax assessment notices, tax audit report or equivalent leading to the alleged double taxation, evidence of tax paid (where applicable)), including:*
  - a *the taxpayer's interpretation of the application of the specific treaty provisions(s), to support its basis for making a claim that the provision of the specific tax treaty is not correctly applied by either one or both contracting states; and/or*
  - b *an explanation by the taxpayer why it considers that the principles set out in article 4 of the EU Arbitration Convention have not been observed;*
- vi. *the request should state whether the issue(s) presented in the MAP request have been previously dealt with, for example, in an advance ruling, APA, settlement agreement or by any tax tribunal or court. This includes details of any appeals and litigation procedures initiated by the taxpayer or the other parties to the relevant transactions. A copy of any such rulings, agreements or any court decisions concerning the case should be provided;*
- vii. *any other information or documentation requested by the Competent Authority. Responses to requests for additional information should be complete and submitted within the time stipulated in the request for such information or documentation;*
- viii. *an undertaking that the taxpayer shall respond as completely and quickly as possible, providing wholly accurate and complete information, to all reasonable and appropriate requests made by a Competent Authority and have documentation at the disposal of the Competent Authorities;*
- ix. *confirmation of whether the MAP request was also submitted to the Competent Authority of the other Contracting State – if so, the MAP request should make this clear, together with the date of such submission, the name and the designation of the person or the office to which the MAP request was submitted. A copy of that submission (including all documentation filed with that submission) should also be provided unless the content of both MAP submissions are the same.*

When relief is available

21 When may a taxpayer request assistance from the competent authority?

A taxpayer should request assistance from the Irish competent authority as early as possible and in advance of the applicable time limitation.

The time limit laid down by the OECD Model Convention for presenting a MAP request is three years from the first notification of the action resulting in potential double taxation. In practice, the majority of Ireland's DTAs include this three-year time limit, although some DTAs provide for a two-year limit or no time limit.

In the absence of a specified time limit, the domestic legislation stipulating the time limit for claiming a repayment of tax may apply giving a period of four years from the end of the relevant accounting period to apply for a MAP request. However, certain of Ireland's DTAs, such as the US–Ireland DTA, provide that the MAP shall be available notwithstanding domestic time limits.

The MAP is generally available irrespective of any domestic remedies available and it may be initiated before, during or after litigation, but if initiated while such litigation is ongoing the litigation would generally be suspended.

Limits on relief

22 Are there limitations on the type of relief that the competent authority will seek, both generally and in specific cases?

There are generally no limitations on the type of relief the Revenue Commissioners may seek.

Success rate

23 How effective is the competent authority in obtaining relief from double taxation?

The Irish competent authority is generally effective in ensuring that a taxpayer obtains relief from double taxation. Typically, the Irish competent authority is asked to engage in a MAP, or the Revenue Commissioners are asked to give correlative relief, for a transfer pricing adjustment raised in another jurisdiction. The Irish competent authority and the Revenue Commissioners will endeavour to ensure that the taxpayer has sought to vigorously defend its position and that ultimately any settlement represents a robust and fair application of the OECD Transfer Pricing Guidelines.

In 2018, the Revenue Commissioners completed negotiations to eliminate double taxation through MAPs in approximately 28 per cent of its open case inventory.

ADVANCE PRICING AGREEMENTS

Availability

24 Does the country have an advance pricing agreement (APA) programme? If so, is the programme widely used? Are unilateral, bilateral and multilateral APAs available?

Ireland introduced a formal bilateral APA programme that became effective on 1 July 2016. The APA programme replaces the Revenue Commissioners' ad hoc approach to agreeing APAs and provides for the initiation by taxpayers of APAs in Ireland.

Ireland actively participates in bilateral APAs, but will not generally conclude unilateral APAs. Where the relevant issues involve more than two tax jurisdictions, the Revenue Commissioners will consider entering into a series of bilateral APAs to deal with multilateral situations.

In 2018, Irish Revenue negotiated three Advance Pricing Agreements (APAs) with Competent Authorities of other jurisdictions to eliminate double taxation. In total, Irish Revenue received nine APA requests during the course of 2018.

Process

25 Describe the process for obtaining an APA, including a brief description of the submission requirements and any applicable user fees.

A company's access to the APA programme is subject to the terms of the MAP article of the relevant DTA. An application for an APA may be made by a company that is tax-resident in Ireland, or by a permanent establishment of a non-resident company.

The Revenue Commissioners adhere to the detailed guidelines for concluding APAs that are contained in Annex to Chapter IV: Advance Pricing Arrangements of the OECD Transfer Pricing Guidelines. All bilateral APAs are negotiated on the basis of identifying an arm's-length remuneration for the transactions covered by the APA, and in each case the transfer pricing method applied will be in accordance with one of the methodologies contained in Chapter II of the OECD Transfer Pricing Guidelines.

In addition, when negotiating a bilateral APA with an EU member state, the Revenue Commissioners will adhere to the best practices for the conduct of APA procedures, which are set out in the Guidelines for Advance Pricing Agreements within the EU which have been published by the EU Joint Transfer Pricing Forum.

The APA programme involves the following five stages.

- pre-filing: the pre-filing meeting will enable the parties to establish whether an APA is appropriate and will facilitate a discussion of the relevant issues (ie, the transactions involved, proposed TP methodology etc);
- formal application: the formal APA application will require submission of information including an executive summary, details on the company background, industry analysis, the covered transactions, functional analysis, economic analysis (covering the proposed methodology, search for comparables and any adjustments), financial information and details of any related audit enquiries;
- evaluation and negotiation: the Revenue Commissioners will formulate their view based on a detailed evaluation of all information submitted. The Revenue Commissioners will then enter into negotiations with the relevant competent authority to resolve any differences arising, with the objective that one agreed set of terms and conditions can be provided to the taxpayer;
- agreement: where an agreement is reached, the Revenue Commissioners will notify the taxpayer in writing of the agreed terms and conditions within 30 days. If the taxpayer accepts the agreed terms, the Revenue Commissioners will liaise with the other competent authority to finalise the APA. If the agreed terms are not accepted, the Revenue Commissioners will consult with the other competent authority regarding modification where possible; and
- annual reporting: the taxpayer will be obliged to file an annual report with the Revenue Commissioners detailing how it has complied with the terms of the APA. The TP issues covered by the APA will not be subject to audit adjustments by the participating tax authorities, provided the terms and conditions of the APA are consistently satisfied.

The Irish competent authority should receive the same information as the other competent authority or authorities. There are no user fees payable to the Revenue Commissioners.

Time frame

26 How long does it typically take to obtain a unilateral and a bilateral APA?

It will typically take 18 to 24 months to conclude a bilateral APA.

Duration

27 How many years can an APA cover prospectively? Are rollbacks available?

Typically, APAs cover three to five years, but the Revenue Commissioners will consider other fixed periods subject to the agreement of the other tax administration. However, in no case will the Revenue Commissioners agree to a period that extends more than five years beyond the date of agreement of the bilateral APA with the competent authority of the other tax administration. Rollbacks are available.

Scope

28 What types of related-party transactions or issues can be covered by APAs?

The APA programme will apply to complex transfer pricing issues only, where the appropriate application of the arm's-length principle is in doubt or there is a significant risk of double taxation. The Revenue Commissioners list a number of factors which indicate the appropriateness of a particular matter for an APA, including:

- significant doubt exists over the appropriate methodology or whether a bespoke methodology is being applied;
- the application of the methodology is complex or requires complex calculations;
- reliable comparables are not readily available or require significant and complex adjustments or both; and
- the transaction is real (ie, not hypothetical) and is not expected to change throughout the duration of the APA.

Independence

29 Is the APA programme independent from the tax authority's examination function? Is it independent from the competent authority staff that handle other double tax cases?

APA negotiations are typically handled by the competent authority team, which handles double tax cases under a DTA. This team is separate from the Revenue Commissioners' case officer assigned to that taxpayer. The Revenue Commissioners highlighted the importance of objectivity and independence when establishing the competent authority team.

Advantages and disadvantages

30 | What are the key advantages and disadvantages to obtaining an APA with the tax authority?

The advantages and disadvantages in Ireland are similar to those in most countries.

Advantages include:

- certainty and enhanced predictability;
- reduced scrutiny going forward;
- avoiding costly and time-consuming litigation or examinations;
- a better understanding of the business on the part of the Revenue Commissioners; and
- the opportunity to establish or improve a relationship with the Revenue Commissioners in a non-adversarial environment.

Disadvantages include:

- external professional fees;
- close scrutiny of a transaction by the Revenue Commissioners;
- significant time of key executives;
- no guarantee that the tax authorities will agree terms that are acceptable to the taxpayer;
- a large amount of information must be volunteered to the Revenue Commissioners; and
- information submitted may be exchanged with tax authorities outside the APA procedure.

SPECIAL TOPICS

Recharacterisation

31 | Is the tax authority generally required to respect the form of related-party transactions as actually structured? In what circumstances can the tax authority disregard or recharacterise related-party transactions?

The Revenue Commissioners will have due regard to Chapter I of the OECD Transfer Pricing Guidelines concerning when, exceptionally, it may be appropriate to consider disregarding the legal form of a structure:

- the economic substance of a transaction differs to its form; and
- the form and substance differ from those that would have been adopted by independent enterprises behaving in a commercially rational manner and the actual structure practically impedes the Revenue Commissioners from determining the appropriate transfer price.

Under Irish domestic law, the Revenue Commissioners are generally entitled to consider the substance rather than form of a transaction, or may disallow certain specific tax reliefs where the transaction is not carried out for bona fide commercial reasons or can be considered a tax avoidance transaction within the meaning of the Irish general anti-avoidance legislation.

The Supreme Court decision of *O'Flynn Construction Limited v Revenue Commissioners* [2011] IESC 47 is considered as support for a substance-over-form doctrine in Irish tax law and reverses the long-standing position of form over substance as enunciated in the UK case of *IRC v Duke of Westminster* 19 TC 490 and endorsed by the Irish courts in *McGrath v McDermott* III ITR 683.

Selecting comparables

32 | What are some of the important factors that the tax authority takes into account in selecting and evaluating comparables? In particular, does the tax authority require the use of country-specific comparable companies, or are comparables from several jurisdictions acceptable?

The Revenue Commissioners have not published guidelines on the evaluation of comparables and there is no requirement to limit comparability analysis to Irish or European comparables. However, the principles outlined in Chapters I and III of the OECD Transfer Pricing Guidelines clearly will be relevant. The Revenue Commissioners typically adopt a pragmatic approach in evaluating comparables. In general, Irish tax legislation and the Revenue Commissioners place considerable weight on the commerciality of transactions. Therefore, in determining the appropriateness of the comparables identified, results that do not apparently make commercial sense (eg, when there is a substantial deviation from other results) should be investigated further.

Secret comparables

33 | What is the tax authority's position and practice with respect to secret comparables? If secret comparables are ever used, what procedures are in place to allow a taxpayer to defend its own transfer pricing position against the tax authority's position based on secret comparables?

The Revenue Commissioners do not use secret comparables, but will use the same commercial databases typically used by taxpayers.

Secondary adjustments

34 | Are secondary transfer pricing adjustments required? What form do they take and what are their tax consequences? Are procedures available to obtain relief from the adverse tax consequences of certain secondary adjustments?

Generally, secondary transfer pricing adjustments are not a feature of the Irish tax landscape.

Non-deductible intercompany payments

35 | Are any categories of intercompany payments non-deductible?

There are no specific categories of intercompany payment that are non-deductible. However, there are limitations on the deductibility of certain interest payments to related parties where the related securities are:

- securities issued otherwise than for new consideration or are convertible directly or indirectly into shares;
- securities where the interest paid is to any extent dependent on the company's results or is at more than a reasonable commercial rate; or
- securities issued by an Irish company and held by a non-resident related company (other than a related company in an EU member state or a DTA partner country, or by certain Irish-resident finance companies where the interest represents a reasonable commercial rate).

Otherwise intercompany payments are subject to the same rules on deductibility as third-party payments. In order for a trading expense to be deductible, it must be incurred wholly and exclusively for the purposes of the trade and must not be capital in nature. It is typically considered by the Revenue Commissioners that an excessive (or non-arm's-length) expense payment is not wholly and exclusively incurred for the purpose of a trade.

Anti-avoidance

36 What legislative and regulatory initiatives (besides transfer pricing rules) has the government taken to combat tax avoidance with respect to related-party transactions? What are the penalties or other consequences for non-compliance with these anti-avoidance provisions?

An exit tax was introduced with effect from 10 October 2018. The tax was introduced as part of Ireland's implementation of the EU Anti-Tax Avoidance Directive (ATAD). See below for further details.

Another legislative initiative that has been introduced to combat tax avoidance is the Controlled Foreign Company (CFC) rules. Like the exit tax, the CFC rules have also been introduced as part of Ireland's implementation of ATAD. In very general terms, a CFC charge may arise under the legislation in respect of a CFC if and to the extent the CFC relies on activities carried on in Ireland to generate its profits. However, if those activities are remunerated on arm's-length terms, no CFC charge should apply. The CFC charge is applied at the Irish corporation tax rates (12.5 per cent to the extent that the profits of the CFC are generated by trading activities and 25 per cent in all other cases). The CFC charge will be reduced and credit will be given for foreign tax paid by the CFC on its income and other CFC charges imposed by other countries by reference to the profits of the CFC. Irish Revenue is expected to publish guidelines on the application of the CFC rules in the near future.

The standard tax interest and penalty provisions apply in respect of a failure to pay tax arising by virtue of the exit tax or CFC charge.

Implementing measures are not anticipated to give effect to the ATAD general anti-abuse rule (GAAR) in Ireland, on the basis that Ireland's domestic tax code contains an ATAD-compliant GAAR.

Location savings

37 How are location savings and other location-specific attributes treated under the applicable transfer pricing rules? How are they treated by the tax authority in practice?

There are no specific rules on location savings, and typically the Revenue Commissioners will not assert location-specific attributes in applying the transfer pricing rules.

Branches and permanent establishments

38 How are profits attributed to a branch or permanent establishment (PE)? Does the tax authority treat the branch or PE as a functionally separate enterprise and apply arm's-length principles? If not, what other approach is applied?

A non-Irish-resident company that is trading in Ireland through a branch or agency is subject to tax in Ireland on any trading income arising directly or indirectly through or from the branch or agency or any income from property or rights used by, or held by or for the branch or agency.

There is no guidance on how to determine what trading income arises directly or indirectly through a branch or agency. However, the Revenue Commissioners will typically accept an allocation determined on a just and reasonable basis that is applied in a consistent manner. In this regard the Revenue Commissioners would typically apply the separate enterprise theory as provided for in most of Ireland's DTA and would seek to apply arm's-length principles.

Exit charges

39 Are any exit charges imposed on restructurings? How are they determined?

As noted above, as part of Ireland's implementation of ATAD an exit tax was introduced with effect from 10 October 2018. The exit tax arises when:

- a company migrates its place of residence from Ireland to any other jurisdiction;
- assets of an Irish PE are allocated from the PE back to head office or to a PE in another jurisdiction – this provision only applies in respect of companies that are resident in an EU Member State other than Ireland; or
- the business of an Irish PE is allocated from the PE back to head office or to a PE in another jurisdiction – again, this provision only applies in respect of companies that are resident in an EU Member State other than Ireland.

The exit tax is charged at 12.5 per cent and applies to a latent gain inherent in the relevant assets. The latent gain is calculated by deducting the market value of the relevant assets at the date of the migration (or allocation) from the price paid on acquisition (or base cost). The exit charge does not apply to assets that remain within the Irish tax charge (for example, Irish real estate or assets that continue to be used in the business of an Irish branch). The exit charge may be deferred and paid over five years. If the exit charge is unpaid, Irish Revenue may pursue any other Irish resident group company or a director who has a controlling interest in the company that is subject to the charge.

Temporary exemptions and reductions

40 Are temporary special tax exemptions or rate reductions provided through government bodies such as local industrial development boards?

No.

UPDATE AND TRENDS

Tax authority focus and BEPS

41 What are the current issues of note and trends relating to transfer pricing in your country? How is the OECD's project on base erosion and profit shifting affecting both policymakers and tax administrators?

Ireland is a member of both the EU and OECD, and has been an active participant in discussions surrounding the development of initiatives and legislation in relation to both these organisations over recent years. Ireland's tax system is currently in the process of undergoing significant changes in order to reflect both OECD BEPS recommendations and tax legislation which has been introduced at an EU level.

In February 2019, the Irish Department of Finance launched a consultation on Ireland's Transfer Pricing Rules (the Consultation). The Consultation confirmed that the 2017 OECD Transfer Pricing Guidelines will be incorporated into Irish law from 1 January 2020. In addition, the Consultation confirms that the grandfathering that currently exists for pre-1 July 2010 agreements will be removed from 1 January 2020. Revised transfer pricing documentation requirements (ie, requirements to prepare master and local files) agreed under BEPS will also be introduced for accounting periods beginning on or after 1 January 2020. The Consultation also confirms that the transfer pricing rules will be extended to apply to non-trading income also.

Another noteworthy feature, from a tax policy perspective, is the speedy implementation of ATAD provisions into Ireland's tax legislation (as outlined in question 36). In particular, the new exit tax was introduced without prior notification in October 2018 considerably in advance of the 1 January 2020 ATAD deadline.

In addition to the appetite for proactive implementation at tax policy level, the Irish Revenue Commissioners have adopted a more aggressive stance with regard to transfer pricing aspect queries and audits. In particular, as noted, the issuance of aspect queries and commencement of transfer pricing audits in place of collaborative compliance are becoming more commonplace. Currently, there is at least one transfer pricing assessment being appealed to the Irish Tax Appeals Commission (TAC), with the likelihood of more appeals to be before the TAC in the future.

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