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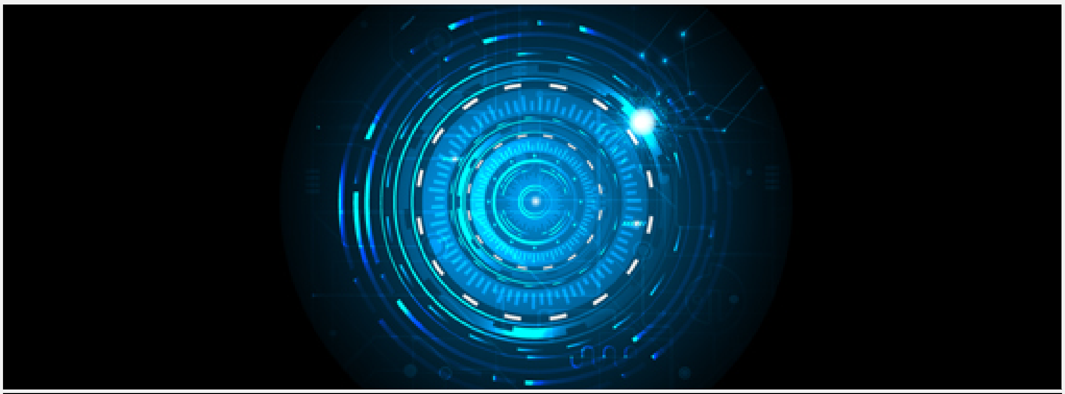

Ireland’s Department of Finance issues draft transfer pricing legislation

Global Transfer Pricing Alert 2019-025

The Irish Department of Finance on 2 September issued “Ireland’s Transfer Pricing Rules Feedback Statement,” which contains draft legislation to update Ireland’s domestic transfer pricing regime from 1 January 2020.

The document follows on from a period of public consultation launched in February 2019 to collate views regarding updating Ireland’s domestic transfer pricing law to align with the 2017 OECD transfer pricing guidelines and other amendments to broaden the scope of transfer pricing law in Ireland. (For prior coverage of the public consultation, see Global TP Alert 2019-005).

The draft legislation contained in the feedback statement represents a fundamental rewriting of the existing domestic transfer pricing law. The contents of the feedback statement are expected to be included in the forthcoming Finance Bill in October 2019. The proposed changes, if implemented as set out in the draft legislation, would be effective from 1 January 2020.

Feedback statement details

The 24-page feedback statement contains draft legislation amending Part 35A of the Taxes Consolidation Act 1997 (TCA 1997) which, in the words of the Department of Finance, “could apply for chargeable periods commencing on or after 1 January 2020.” The relevant draft provisions are discussed in more detail below.

Basic transfer pricing rules

The current legislation as contained in Section 835C TCA 1997 is updated to broaden the applicability of the transfer pricing rules to not only trading income and expenses for companies in Ireland but also to non-trading income and expenses taxed at 25 percent. Also within the scope of the proposed new legislation are arrangements relating to the acquisition and disposal of chargeable assets (such as tangible and intangible assets).

Also included in the proposed Section 835C TCA 1997 are new provisions that allow the recharacterization of transactions for transfer pricing purposes. The current transfer pricing law in Ireland can be interpreted to preclude recharacterization, but the new provisions make it clear that when the form of a financial or commercial arrangement is inconsistent with the substance of the relations between related parties transacting with each other, the arm's length conditions may be determined by the actual commercial or financial arrangements in place between the parties.

Interestingly, the legislators decided to include specific clauses in this section to deal with recharacterization, bearing in mind that the 2017 OECD transfer pricing guidelines already contain updated guidance in this area in Chapter I, D2 – "Recognition of the accurately delineated transaction." Taxpayers will need to consider both the OECD and Irish domestic provisions in this area when determining the characterization of intercompany transactions for transfer pricing purposes.

Incorporation of OECD guidance into Irish legislation

The current wording included in Section 835D TCA 1997 refers to the 2010 version of the OECD transfer pricing guidelines. The proposed amendments to this section explicitly refer to the relevant guidelines published by the OECD, which will be applicable from 1 January 2020, including:

- The 2017 OECD transfer pricing guidelines issued on 10 July 2017;
- The *Guidance for Tax Administrations on the Application of the Approach to Hard-To-Value-Intangibles* issued on 4 June 2018;
- The *Revised Guidance on the Application of the Transactional Profit Split Method* issued on 4 June 2018; and
- Any additional guidance the OECD may publish subsequent to the updating of the current domestic legislation that may be brought forward by Ministerial Order.

Grandfathered arrangements

The existing Irish transfer pricing rules allow for the exemption from the transfer pricing rules of certain arrangements entered into before 1 July 2010, to the extent the terms and conditions of such arrangements did not subsequently change. The proposed new legislation would remove this exemption for chargeable periods beginning on or after 1 January 2020. It should be noted that Section 835F TCA 1997, which contains documentation provisions, still exempts "grandfathered" transactions from documentation requirements when both parties to the transaction are Irish tax resident companies. Such transactions between Irish tax resident companies will still need to be priced at arm's length, irrespective of the fact that there will be no formal documentation requirements in place.

When an Irish tax resident company has a "grandfathered" transaction with a foreign related party, no exemption would be available, that is, transfer pricing documentation requirements would be applicable under Section 835F.

Extension of transfer pricing rules to SMEs

Small and medium-sized enterprises (SMEs) are currently outside the scope of Irish transfer pricing documentation requirements. The exemption is based on EU Recommendation 2003/361/EC, as issued by the European Commission on 6 May 2013. The proposed amendments to Section 835E TCA 1997 contained in the draft legislation refine the operation of the SME exemption under Irish law for transfer pricing purposes.

Companies classified as "small enterprises" would continue to fall outside the ambit of Ireland's domestic transfer pricing documentation requirements from 1 January 2020, but would still be required to adhere to the arm's length principle. However, companies classified as "medium enterprises" would be subject to the domestic transfer pricing law provisions (including documentation requirements) from 1 January 2020.

The applicable EU-based thresholds rely on monetary thresholds and staff numbers on a consolidated global group basis, as listed in EU Recommendation 2003/361/EU:

	Staff headcount		**(Annual turnover**		**Balance sheet total)**
Small	< 50	**AND**	≤ €10 million	**OR**	≤ €10 million
Medium	< 250		≤ €50 million		≤ €43 million

The proposed changes dealing with medium-sized enterprises also provide that transfer pricing documentation requirements would be applicable only to certain "relevant arrangements." These are:

- Arrangements that are within the charge to tax under Schedule D for the Irish company as either an expense or income item, the arrangement in place is with a "non-qualifying relevant person" (e.g., a foreign counterparty), and the aggregate consideration payable or receivable in the accounting period exceeds EUR 1 million;

- Arrangements that involve the supply or acquisition of an asset (tangible and intangible) that constitutes a disposal or acquisition under Ireland's capital gains tax provisions, where the counterparty to the transaction is not tax resident in Ireland and:
  - The asset immediately after it is acquired by the other person is not a chargeable asset (that is, it's not within the charge to tax in Ireland); or
  - The asset immediately before it is acquired by the Irish company is not a chargeable asset for the other person (that is, it's not within the charge to tax in Ireland); and
  - The market value of the asset disposed of or acquired exceeds EUR 25million.

The proposed legislative amendments also exclude transfers of assets between Irish tax resident companies from the scope of the transfer pricing documentation requirements. Such transfers may also be subject to group relief under the relevant Irish capital gains tax provisions to provide exemption from a tax charge.

Finally, the proposed amendments provide that medium-sized enterprises would be subject to reduced transfer pricing documentation requirements and would be required to provide the following details to satisfy documentation requirements:

- A description of the business of the medium-sized enterprise, including organizational structure, business strategy, and key competitors; and
- For each relevant arrangement:
  - A copy of all relevant agreements;
  - A description of the transfer pricing method used and the reasons for selection, together with supporting evidence that the price selected represents the arm's length price;
  - The amount of the consideration payable or receivable; and
  - A description of the functions performed, risks assumed, and assets employed.

Enhanced transfer pricing documentation requirements

The proposal would update Section 835F TCA 1997 to provide specific requirements for companies within scope to prepare transfer pricing documentation in accordance with Annex I and II of the 2017 OECD transfer pricing guidelines, that is, the master file and local file approach.

The draft legislation provides for consolidated revenue-based thresholds to apply before it is necessary to prepare the master file and/or local file as follows:

- Master file – revenue threshold of EUR 250 million

- Local file – revenue threshold of EUR 50 million

The due date for completion of the relevant documentation would be contemporaneous with the filing of the annual corporation tax return, approximately nine months after the end of the accounting period. The relevant documentation must be made available upon request in writing by Irish Revenue within 30 days of the request. There is no requirement to file transfer pricing documentation with the corporation tax return.

The section also includes provisions dealing with arrangements that were in place before 1 July 2010 (grandfathered arrangements). Draft Section 835F(4) sets out that documentation would not be required to be provided to the Irish Revenue for such arrangements when both parties to the arrangement are Irish tax resident companies. However, as discussed above, the feedback statement indicates that exemption from transfer pricing for grandfathered arrangements would cease from 1 January 2020. This means that while there would be no requirement to have transfer pricing documentation for domestic grandfathered arrangements, such arrangements would still need to be priced at arm's length.

Special transfer pricing rules for non-trading income

The proposal inserts a new Section 835CA TCA 1997 into Part 35A that is to be considered in conjunction with Section 835C TCA 1997 (Basic Rules on transfer pricing). Subsection 3 of Section 835CA indicates that transactions between two Irish tax resident companies that are *not* taxed under Case I or II of Schedule D for either company are exempt from transfer pricing requirements. This means that in the case of two Irish tax resident companies that transact with each other and the underlying arrangement is a non-trading transaction that is taxed under Case III to V rules (interest income, rental income) for both companies, there would be no requirement to apply transfer pricing principles. However, if the arrangement involves an Irish tax resident company that is taxed under Case III to V rules and the counterparty entity is a foreign company outside the Irish tax net, this exemption would *not* apply. Thus, the basic transfer pricing rules contained in Section 835C TCA 1997 would continue to apply to the Irish company.

In addition, the above principles would *not* apply (and therefore the transfer pricing rules would be applicable) when:

- One of the Irish tax resident companies is subject to tax under Case I or II of Schedule D; or
- The arrangement between the two Irish tax resident companies is part of a scheme involving a second arrangement (presumably with a foreign related party) and the main purpose of the first arrangement between the two Irish tax resident companies is to obtain a tax advantage in connection with the second arrangement.

These complex anti-avoidance provisions contained in the draft legislation appear to be aimed at certain interest-free loan transactions involving Irish tax resident companies with foreign related parties.

Extending transfer pricing rules to capital transactions

With the proposed extension of transfer pricing rules to capital transactions, certain provisions in the existing transfer pricing law that deal with capital allowances and the interaction with the broader tax acts that deal with chargeable gains on dealings involving capital assets must be considered.

Section 835H TCA 1997 deals with the interaction of transfer pricing and capital allowances. The section is rewritten, and the draft legislation confirms that the application of transfer pricing law will not apply in certain circumstances, including:

- In the determination of capital allowances on capital expenditure when the total expenditure incurred on the asset does not exceed EUR 25 million;
- In the determination of certain balancing charges to be levied under the tax amortization regime for qualifying intangible assets under Section 291A TCA 1997;
- In the determination of a balancing allowance or charge when the market value of the asset at the time of the event giving rise to the balancing adjustment does not exceed EUR 25 million; and
- Other circumstances apply when the acquirer and supplier of the asset make certain joint elections for capital allowances purposes, certain transfers governed by other sections of the Irish tax acts (such as company reconstructions and amalgamations, mergers, farm buildings and conversions).

A new Section 835I TCA 1997 is inserted that deals with the applicability of transfer pricing rules in computing arm's length chargeable gains or allowable losses on the transfer of assets between related parties. The section indicates that transfer pricing rules would not apply in computing the chargeable gain or allowable loss when certain circumstances apply, including:

- When the market value of the asset does not exceed EUR 25 million upon disposal or acquisition; and
- When disposal or acquisition occurs and other sections of the tax acts apply (such as those dealing with company reconstructions and amalgamations and certain intragroup transfers).

The EUR 25 million amount referred to in the section would include the value of any other asset that had at any time formed part of the asset being disposed/acquired, and the value of any asset subject to any scheme in place to avoid reaching the EUR 25 million threshold to disapply transfer pricing rules.

Comments

The draft transfer pricing legislation as contained in the feedback statement is likely to materially form part of the finalized legislation that will progress through the Irish Parliament in the autumn of 2019. The issues addressed in the document are open for further consideration and feedback by interested stakeholders until 13 September 2019.

The rewrite of Ireland's transfer pricing law represents a substantial change to existing laws, not only aligning Ireland's law with the latest OECD principles but also broadening the regime to non-trading and capital transactions, with associated implications with regard to related parts of Ireland's tax law that must be considered. Certain changes, including enhanced language dealing with recharacterization and anti-avoidance clauses aimed at certain perceived tax planning structures, provide the Irish Revenue with increased tools to apply transfer pricing principles to some transactions.

A noteworthy item that has been deferred relates to extending transfer pricing rules to branch profit allocations. The public consultation had sought stakeholder feedback on the introduction of the OECD Authorized Approach into domestic law, but it has been decided to defer any changes until further consultation takes place.

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