Irish Tax Monitor

In this issue of the Finance Dublin Tax Monitor our panel analyses a recent judgement from the Court of Justice of the European Union that looks set to weaken the EU Commission's case in the Apple Case; changes around Section 110 companies, some of which have created uncertainties, are also analysed. Key cases from the Tax Appeal Commissions also features as do updates to the Transfer Pricing guidance, capital acquisition tax, digitalisation and VAT and BEPs.

State Aid

What implications does the Court of Justice of the European Union's judgement in the Fiat Chrysler Finance Europe case (C-885/19 P) have for other 'State Aid' cases?

Tatiana Kelly, Senior Manager, Tax Technical & Policy Centre, Deloitte: On 8 November 2022 the Court of Justice of the European Union (CJEU) delivered a significant judgement in Fiat Chrysler Finance Europe v Commission, Joined Cases C 885/19 P and C 898/19 P. While the case concerned State aid granted by the Luxembourg tax authorities, Ireland also joined the appeal as an intervener, given its own State aid case and similarity of the issues raised.

The CJEU found that the Commission should have assessed Fiat's Luxembourg transfer pricing arrangement solely in light of Luxembourg rules and administrative guidance on transfer pricing, instead of merely abstractly looking at the objective pursued by the general corporate income tax system. The CJEU emphasised that as taxation is a prerogative of individual Member States, and is not harmonised at EU-level, the existence of State aid must be reviewed by reference to national tax systems alone. The Court stated that only national laws applicable in the relevant Member State should be taken into account to identify the appropriate reference system for direct taxation. The CJEU has ruled that the Commission lacked authority to make this independent interpretation.

The judgment could have consequences given that the Commission has used similar reasoning in other cases pending appeal before the CJEU. The CJEU's decision may diminish the strength of the Commission's arguments in these pending cases and impact its approach to utilising the State aid rules to tackle what it perceives to be unfair tax practices by Member States generally. The decision also casts doubt on the Commission's previous determinations that a selective advantage was granted in each of the cases currently under appeal.

Tatiana Kelly

The Deloitte Contributors in the February 2022 Roundtable Panel were:
Tatiana Kelly, Senior Manager, Tax Technical & Policy Centre, Deloitte; Fiona McLafferty, Managing Director, Tax and Legal, Tax Controversy, Deloitte; Colm Stringer, Manager, Corporate Tax, Financial Services, Deloitte; Mark Barrow, Manager, Corporate & International Tax, Deloitte; Lavannia, Manager, Tax and Legal - Transfer Pricing, Deloitte; John Stewart, Director, Tax and Legal, VAT, Deloitte; Mary O'Toole, Assistant Manager, Tax and Legal - Private Clients, Deloitte.

Tax Appeals Commission

Can you comment on the Tax Appeals Commission's most noteworthy determinations in 2022?

Fiona McLafferty, Managing Director, Tax and Legal, Tax Controversy, Deloitte: In Determination 52TACD2022 the issue was whether a

Fiona McLafferty

loan waiver reflected as non-operating income in the profit and loss account constituted capital or should be treated as revenue. The tax amount was €25,614,160. The dispute centred on whether the accounting treatment reflected in the financial statements should determine the tax treatment. Oral evidence was given at the hearing by two witnesses on behalf of the taxpayer to provide factual context and explain the documentary evidence. The Appeal Commissioner was persuaded by the evidence to conclude that 'the permanent removal of the debt by means of the loan waiver gave rise to an enduring capital benefit in the Appellant's treasury trade… Once the loan was waived, the net assets increased, that is capital.' The accounting treatment did not determine the tax treatment. It was not profits of the trade on the application of tax law. It was determined that the taxpayer had been overcharged to corporation tax by reason of the amended assessments. This was not appealed by the Revenue Commissioners.

In Determination 81TACD2022 the issue was whether a group holding company was engaged in an economic activity with an entitlement to deduct VAT on a supply of management services from a subsidiary. The tax amount was €45,037,282. The dispute centred on the manner in which the business was conducted by the taxpayer. Oral evidence was given at the hearing by four witnesses on behalf of the taxpayer to provide factual context and explain the documentary evidence. The Appeal Commissioner was persuaded by the evidence to conclude that 'the Appellant was not just a passive holding company but was instead at all material times actively engaged and directly and indirectly involved in the management of its subsidiaries and sub- subsidiaries… and was wholly engaged in economic activity at all times material'. It was determined that the taxpayer had been overcharged to value-added tax by reason of the amended assessments. This has been appealed to the High Court by the Revenue Commissioners.

Section 110

Can you explain the purpose of the "double trade" test and how it works. In your response, can you also outline recent guidance under Section 110: entitlement to treatment.

Colm Stringer, Manager, Corporate Tax, Financial Services, Deloitte: Since the inception of Section 110 TCA 1997,

Colm Stringer

Irish tax law has provided that the profits / gains of a Section 110 company should be "computed in accordance with the provisions applicable to Case I". However, throughout various other provisions, these are viewed as applicable to Case I whilst others are viewed as applicable to a "trade". As a result, there had been some confusion over whether provisions expressed as applying to a "trade" are applicable to a Section 110 company. Therefore, Revenue's Tax & Duty Manual, Part 04-09-01 was updated to include Revenue's position that "trade" and "Case I" are generally used synonymously throughout the Tax Acts and that companies should ensure a consistent approach is used in calculating taxable profits.

However, there are examples of provisions that apply a "double trade" test. For example, Section 452(2)(a)(ii) TCA 1997, which allows a trading company to elect to not treat interest payments paid in circumstances that are described in S.130(2)(d)(iv) TCA 1997 as a distribution, refers to "a trading expense in computing the amount of the company's income from the trade". Therefore, whilst "Case I" and "trade" may be viewed synonymously, a Qualifying Section 110 company would also need to support the position that the payment itself was trading in nature. It would not be sufficient to rely on the "Case I" basis alone to meet this "double trade" test.

For example, this would be relevant whereby a Section 110 company pays interest to a 75% non-Irish parent / sister company such that the interest payment may be viewed as a distribution and the Section 110 company typically makes a Section 452 election to disapply this treatment. Section 110 companies affected by this Revenue update may need to consider restructuring options to address this matter. Otherwise, there may be a risk that a deduction for interest paid by the Section 110 company to its 75% parent / sister company would not be available, resulting in an increased tax charge.

Review: Tax in 2022

Looking back at 2022 from a corporate taxation perspective what would you say have been the most significant Irish and international developments?

Mark Barrow, Manager, Corporate & International Tax, Deloitte: It really is an exciting time to be involved in the world of taxation at the moment! The global tax landscape is constantly changing and not a week goes by where there isn't a development. From an international perspective, the global tax landscape has transformed radically on foot of the implementation of the OECD Base Erosion and Profit Shifting (BEPS) Project with the stated aim of reforming international tax rules and ensuring that multinational enterprises pay a fair share of tax wherever they

operate. This was achieved through an avalanche of changes in areas such as transfer pricing, the introduction of

Mark Barrow

Anti Hybrid Rules and to limit base erosion by way of excessive interest deductions (introduced in Ireland in the form of the interest limitation rules). Looking at 2022, there is clearly one development which stands out in both an Irish and an international context – the Introduction of a global minimum level of tax for large multinational groups, which was agreed internationally on 12 December 2022.

The introduction of a global minimum tax rate of 15% forms part of the OECD's two pillar BEPS 2.0 action plan – also known as The Global Anti-Base Erosion (GloBE) rules. The primary aim of the proposed global minimum rate is to ensure that large companies pay a certain minimum level of tax. Under the GloBE rules, a minimum 15% effective rate of corporation tax will apply to Multinational Groups with a turnover in excess of €750 million (Pillar Two). Any entity within scope that has an effective tax rate below the minimum rate will be subject to a 'top up' tax. As part of Budget 2023, Ireland committed to the implementation of the OECD's two pillar action plan and work is currently ongoing to develop the ingredients for this new system. The calculation of the effective tax rate will be cumbersome and will add an additional layer to the corporation tax compliance process for entities within scope. Whilst this will not affect every corporate tax payer in Ireland, it does impact the largest tax payers. That said, even at 15% our tax rate will remain one of the lowest in Europe.

Pillar Two does not stop there! The final element known as the Subject to Tax Rule (STTR) is also on the horizon. The STTR will operate as tax treaty override position and apply a minimum 9% tax to payments such as interest and royalties. Another seismic shift in the Irish tax landscape, given Ireland's wide treaty network!

Transfer Pricing

The Revenue Commissioners have updated their guidance on Transfer Pricing. Can you explain the changes and implications for taxpayers?

Lavannia, Manager, Tax and Legal - Transfer Pricing, Deloitte: Tax and Duty Manual Part 35A-01-01 (the TDM), which provides guidance on Ireland's transfer pricing (TP) legislation, was updated in

Lavannia

December 2022 to reflect amendments to the Irish TP rules introduced by Finance Act (FA) 2021 and FA 2022.

FA 2021 substantially revised the exemption from Irish TP for certain domestic arrangements, contained in section 835E of Taxes Consolidation Act 1997, which was initially introduced in FA 2019.

The TDM provides clarity on the operation of the revised exemption, including several examples to demonstrate the application of the exemption in common arrangements e.g., interest-free loans, holding company structures and rental transactions. In particular, it clarifies that consideration is not required for the exemption to apply, eliminating the potentially onerous requirement under the original rules to impute nominal consideration on transactions to avail of the exemption. However, it should be noted that where the parties have agreed that some level of consideration (which may be less than arm's length) applies to the transaction, such consideration must be paid in the relevant chargeable period, or the immediate accounting period that follows, for the exemption to apply. In addition, while the revised section 835E applies to chargeable periods commencing on or after 1 January 2022, the TDM clarifies that Revenue is willing to accept the application of the revised exemption for prior periods.

The updated legislation and guidance will provide welcome relief to taxpayers and advisors alike, who had flagged difficulties in interpreting and applying the exemption. Taxpayers with domestic transactions should review these arrangements in the context of the updated legislation and guidance to determine the impact of same e.g., nominal consideration, if previously imputed, may no longer be required. Alternatively, where some measure of consideration is in place (which is less than an arm's length consideration), taxpayers should ensure it is paid in the relevant accounting period or in the following accounting period rather than allowing balances to build up over time, to avail of the exemption.

Furthermore, the TDM was amended to update references to the OECD Transfer Pricing Guidelines to the 2022 version of the OECD Transfer Pricing Guidelines, as well as to reflect the Code of Practice for Revenue Compliance Interventions, which came into effect on 1 May 2022.

FA 2022 amended section 835D TCA97 to refer to the 2022 OECD Transfer Pricing Guidelines, instead of the 2017 version, for chargeable periods commencing on or after 1 January 2023. The 2022 OECD Transfer Pricing Guidelines consolidates the 2017 OECD Transfer Pricing Guidelines, guidance on the profit split method, application of the approach to hard-to-value intangibles and guidance on financial transactions into a single publication. However, this should not impact taxpayers significantly as the supplementary guidance clarified principles in the 2017 OECD Transfer Pricing Guidelines, rather than setting out new principles, and were already considered best practice by Irish Revenue previously. However, as noted in the TDM, section 835D now allows future OECD guidance to be brought into Irish legislation by ministerial

order. Taxpayers should monitor TP developments by the OECD as these could be mandated in Irish legislation quicker than expected as a result.

Finally, taxpayers with Irish branches should be aware that FA21 extends the scope of Irish TP to branches through the introduction of the Authorised OECD Approach. Whilst not covered in this TDM, TDM Part 02-02-04a provides guidance on these changes, and taxpayers with Irish branches should take note as there are associated mandatory documentation requirements and significant penalties for non-compliance.

Digitalisation and VAT

As part of its response to the digitalisation of the economy the EU Commission has issued proposals to change the EU VAT system. What are the key points in the Commission's proposals?

John Stewart, Director, Tax and Legal, VAT, Deloitte: The proposals will have a significant impact on businesses that trade cross border and

John Stewart

cover three broad areas – the Platform Economy, EU VAT Registration and Digital Reporting Requirement. We have provided high level comments on some of the key changes.

Platform Economy: From 2025, platforms/ marketplaces will generally become liable for the VAT due on supplies of goods facilitated by them. This means that the obligation to account for VAT on sales of goods made via platforms will switch from the supplier to the platform.

Also platforms that facilitate short term holiday accommodation by an accommodation provider that is not VAT registered will become liable to account for the VAT on the accommodation. Currently those suppliers do not charge VAT so this change should lead to an increase in the price of that accommodation. Similar rules will apply to the supply of transport services by non-VAT registered persons with the difference that it will only apply to passenger transport services that are liable to VAT which is not the case in Ireland.

VAT Registration: Currently businesses may have to register for VAT in each individual EU Member State that they sell to. The proposal from the EU Commission expands the capacity for businesses to operate across the EU with a single EU VAT registration. This is welcome news for businesses operating and should reduce both administration and compliance costs for businesses operating across the EU.

Digital Reporting: Starting in 2024, businesses will have to issue VAT invoices electronically in a structured format. Also within 2 days of issuing a VAT invoice businesses will have to transmit certain invoice details to a national portal. This near real time reporting of transaction will be a great resource for Revenue in the collection and management of VAT.

Businesses will have to review their processes and systems well in advance of the changes to ensure that they will be fully complaint with the new legislation.

Capital Acquisitions Tax

There has been updates on the guidance around business relief with regards to Capital Acquisitions Tax. Can you outline the changed guidance and how it affects tax payers?

Mary O'Toole, Assistant Manager, Tax and Legal - Private Clients, Deloitte: Section 101 of the Capital Acquisitions Tax Consolidation Act 2003 provides for a clawback of business relief from capital acquisitions tax (CAT). The relief will be withdrawn where within 6 years commencing on the date of the gift/ inheritance:

- the property on which the relief is claimed ceases to qualify as relevant business property (by reason other than bankruptcy or the bona fide winding up of the business on the grounds of insolvency)
- the property on which the relief is claimed is sold, redeemed, or compulsorily acquired and is not replaced within a year by other relevant business property (the relevant business property which replaces the property sold, redeemed or compulsorily acquired cannot be quoted shares or securities)

Mary O'Toole

Revenue's guidance on Business Relief (Capital Acquisitions Tax Manual Part 12) was updated in December 2022 at section 12.7 to include reference to section 101(2)(b)(ii) CATCA which provides that a clawback of business relief will not occur where the person claiming the relief dies before the event which would otherwise trigger a clawback. While this is a new addition to the guidance, s101(2)(b)(ii) itself formed part of the original act from 2003. The update to the guidance simply removes any ambiguity for the taxpayer. The below example illustrates an instance where s101(2)(b)(ii) applies.

In 2021, Kate takes a gift of business property from her mother. The gift qualifies as relevant business property and as such Kate claims business relief on the gift. Eight months later Kate passes away. Kate's entire estate – including the business property - passes to her husband Anthony. Anthony is not chargeable to CAT on the inheritance (gifts and inheritances between spouses are exempt from CAT). In 2022 Anthony sells the relevant business property. Despite the fact that the property is sold within 6 years of the date of the gift to Kate from her mother, there is no clawback of the relief claimed by Kate in 2021. This is because Kate died before the event which would otherwise trigger the clawback i.e., before the property was sold.