Walkers Tax Take:
EU State Aid decision: Apple and Ireland

What happened yesterday?
The European Commission issued a negative decision against Ireland in the Apple State Aid case and instructed Ireland to recover up to €13bn plus interest of alleged State Aid from Apple for the years 2003 to 2014. The case is a competition law case with the EU Commission asserting that Ireland gave State Aid in the form of selective tax benefits to two Apple companies leading to a distortion of competition within the EU.

Ireland wants the €13bn, correct?
No. Throughout the two year investigation Ireland has consistently refuted the allegation that State Aid was provided to Apple. In the immediate aftermath of the announcement of the EU Commission’s decision, Ireland’s Minister for Finance, Michael Noonan made it clear that he disagrees profoundly with the decision and that he will seek Cabinet approval to appeal the decision to the European Courts. He also stated: “the full amount of tax was paid in this case and no State aid was provided. Ireland did not give favourable tax treatment to Apple. Ireland does not do deals with taxpayers.”

Transparency, certainty and consistency are at the core of Ireland’s corporate tax regime. Unlike many other jurisdictions, Ireland does not have a general tax ruling system. As a common law jurisdiction our tax rules are based on comprehensive statutory rules as determined and applied by caselaw.

Ireland’s tax residence and territoriality rules are, and were during the period in question, clear. While Ireland taxes Irish resident companies on their worldwide profits, the two companies at issue in the Apple case were not Irish tax resident but only operated in Ireland through an Irish branch. As a result, only those profits attributable to their Irish branch were within the charge to Irish tax. The EU Commission, however, is effectively directing Ireland to set aside that principle and tax these non-resident companies on their worldwide profits.

It is Ireland’s money, correct?
Not in the opinion of the Irish Revenue Commissioners. The EU Commission has effectively admitted that, stating that if other countries were to require Apple to pay more tax on the profits of the two Apple companies at issue over the same period under their national tax rules, this would reduce the amount to be recovered by Ireland. In other words, if other countries aren’t going to tax those profits then Ireland should. Ireland is an active participant in the OECD’s BEPS project, however, it is unwilling to be the EU Commission’s proxy for addressing mismatches in different countries’ tax rules.

The EU Commission also commented that the amount of unpaid taxes to be recovered by Ireland would also be reduced if the US authorities were to require Apple to pay larger amounts of money to its US parent company during the period to finance research and development efforts. In this regard, the EU Commission is expressly acknowledging that the profits at issue may have been taxable in another jurisdiction. This contradiction in the decision is not lost on the Irish Government and will be a key element in an appeal against the decision.
This decision highlights shortcomings in Ireland’s tax regime, correct?
No. In its announcement the EU Commission has expressly stated that “this decision does not call into question Ireland’s general tax system or its corporate tax rate.” No fine or penalty is being imposed on Ireland.

But according to the EU Commission Ireland gave Apple an effective corporate tax rate of 1% on its European profits in 2003, reducing to 0.005% in 2014. Is this not correct?
That is the EU Commission’s contention, but the profits against which those rates have been calculated were not within the charge to Irish tax. Apple have since disputed the figures quoted by the EU Commission stating that these were “extremely misleading and deceptive” and that it has paid $400 million in taxes in Ireland in 2014 – considerably more than the EU Commission figures would suggest.

What does this mean for Ireland’s tax regime?
In short, nothing. No change is required to Ireland’s tax rules as a result of this decision and it has no impact on Ireland’s 12.5% corporation tax rate.

What’s next?
Ireland’s Minister for Finance and Apple have both said they intend to appeal the decision.
Apple issued a Customer Letter in light of the decision stating that “over the years, we received guidance from Irish tax authorities on how to comply correctly with Irish tax law - the same kind of guidance available to any company doing business there” and emphasised that it was “committed to Ireland and planning to continue to invest there”. The US government has labelled the decision as “unfair, contrary to well-established legal principles” stating that the move will “undermine foreign investment” and accusing the EU of attempting to become a “supra national tax authority”.
The appeal process could take as long as three or four years. The technical grounds that will form the basis of the appeal will become clearer when the detailed decision is published.

Key Contacts
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