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Ireland: Finance Bill 2017 - Stamp Duty Update

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Irish Non-Residential Property: 6% Stamp Duty Rate Extended

Budget 2018 increased stamp duty on Irish non-residential property transactions from 2% to 6% in respect of instruments executed on or after 11 October 2017. The first draft of Finance Bill 2017 published on 19 October 2017 provided for this increase as well as certain transitional measures.

The final version of Finance Bill 2017 which was passed on 13 December 2017 and is due to be signed into law shortly, seeks to extend the 6% stamp duty charge to transfers of shares or interests in companies, funds or partnerships, that derive more than 50% of their value from Irish non-residential property. A late recommendation through the Seanad (Upper House), the measure seeks to prevent circumventing the increased stamp duty charge on non-residential property transactions by effecting the transfer through a sale of shares or partnership interests where lower stamp duty (1% stamp duty on transfers of Irish shares) or no stamp duty (transfers of non-Irish shares) may have applied.

When does the change apply?

The new stamp duty charge is to apply to instruments executed on or after 6 December 2017, subject to transitional relief for instruments executed before 1 March 2018 pursuant to a binding contract entered into before 6 December 2017.

Conditions

The new stamp duty charge is to be imposed where the following conditions apply:

1. There is a change in the person(s) having direct or indirect control of a company, fund or partnership that derives more than 50% of its value from Irish non-residential property (the "target"); and
2. "*it would be reasonable to consider*" that the property concerned:
   (a) was acquired by the target with the sole or main object of realising a gain from its disposal;
   (b) was or is being developed by the target with the sole or main object of realising a gain from its disposal when developed; or
   (c) was held as trading stock by the target.

Minority transfers excluded

The requirement for a purchaser to acquire control of a target means that transfers of minority holdings should not be caught by the new rules. "Control" for these purposes would be expected to include acquiring more than 50% of the shares or voting power in a company. Transfers in parts by connected persons or persons acting in concert are to be treated as a single transfer so that the minority holdings exclusion cannot be availed of to avoid the new stamp duty charge.

"Reasonable to consider"

Where controlling interests are being acquired, the second condition will require considerable analysis to conclude that the rules do not apply. The second condition means that a purchaser may need to consider the objects of the target in determining whether the new rules apply and in particular whether a reasonable person would "consider" that the property had been acquired by the target or was or is being developed with the sole or main object of realising a gain from its disposal, or was held as trading stock. "Reasonable to consider" is a low bar and looks to what a reasonable person would "consider" rather than necessarily conclude or believe.

While there will be clear cases where the second condition has not been met (for example, the sale of a manufacturing company where the factory is on valuable land should be excluded), the default position for sales of companies holding Irish non-residential property is that the 6% rate is likely to apply. At a minimum the stamp duty change is likely to result in a purchaser of a property holding company requiring certain confirmations from the seller/target if it is to assert that the new rules do not apply, and will increase execution costs and uncertainty.

In addition, as the charge is not restricted to transfers of Irish entities, Irish stamp duty may now apply on transfers of shares in non-Irish incorporated companies, foreign funds or foreign partnerships which hold Irish commercial property meaning foreign advisers as well as Irish advisers need to be aware of the new rules.

Anti-avoidance provisions are also included to prevent arrangements to distort value from being effective to bring a transfer outside of the new charge.

Residential development relief

Consistent with the Government's efforts to increase the supply of residential property, if a transfer comes within the new rules and 6% stamp duty is paid, but the target then develops the property for residential purposes within 30 months of acquisition, the purchaser may be able to avail of a refund of up to two thirds of the stamp duty paid.

Finance Bill 2017 is expected to be signed into law shortly.*

Contacts

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*Finance Act 2017 was signed into law on 25 December 2017.