Practical Law

GLOBAL GUIDE 2017
TAX ON TRANSACTIONS

Tax on corporate lending and bond issues in Ireland: overview

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TAX AUTHORITIES

1. What are the main authorities responsible for enforcing taxes on finance transactions in your jurisdiction?

The Office of the Revenue Commissioners (Revenue) is the main authority responsible for enforcing taxes on finance transactions in Ireland.

Pre-completion tax clearances

2. Is it possible or necessary to apply for tax clearances or obtain guidance from the tax authorities before completing a finance transaction?

Generally, tax clearances are not required from Revenue for finance transactions. However, Revenue may provide non-statutory clearances in the form of an opinion or confirmation of tax treatment (informal clearance) in advance of completing a finance transaction in certain circumstances if specifically requested in writing.

Formal and informal clearance

Revenue operates both formal and informal clearance systems.

Circumstances for obtaining clearance

Formal clearance. Exemptions from Irish withholding tax on interest paid to non-Irish resident lenders are available under Irish domestic legislation (*see Question 7*). Relief from withholding tax must therefore be claimed under a double tax treaty in limited circumstances only. However, in those circumstances, the non-resident lender must apply to Revenue for clearance to permit the borrower to pay interest free from withholding tax, or at a lower withholding tax rate available under the applicable double tax treaty.

Separately, pre-clearance from Revenue is also required to confirm that a project will qualify for relief if finance transactions involve funding of films or renewable energy projects, and is designed so that the investors are entitled to claim specific tax relief for investment in those industries.

Informal clearance. These applications are dealt with by the Large Cases Division (LCD), in the case of large businesses and financial institutions, and the taxpayer's local tax office or the Revenue Technical Service (RTS) for all other taxpayers (*see below, Procedure for obtaining clearance: Informal clearance*).

Mandatory or optional clearance?

Formal clearance. Revenue clearance is mandatory either:

- Where a non-resident lender is relying on a double tax treaty to receive interest free from withholding tax or at a reduced withholding tax rate.
- Where relief for investment in films or renewable energy projects is claimed.

Informal clearance. In these cases, it is optional to obtain an advance Revenue opinion or confirmation of tax treatment.

Procedure for obtaining clearance

Formal clearance. The application for relief under a double tax treaty must be made on a form IC6/IC7 to the International Claims Section. The tax authorities in the lender's jurisdiction of residence must certify that the lender is tax resident in that jurisdiction. The application must be accompanied by a copy of the loan agreement. Such applications are generally made after completion but in advance of the first interest payment date. The authorisations to receive interest free from withholding tax (or at a reduced rate, as the case may be) are normally effective for five years.

Informal clearance. An application for a Revenue opinion usually involves requesting confirmation of the application of a particular technical point.

In April 2017, Revenue issued guidelines outlining when LCD will provide opinions/confirmations on tax treatment to LCD taxpayers (Guidelines). The Guidelines formalise the procedure for obtaining opinions or confirmations and were issued to ensure these requests are dealt with as efficiently as possible. Confirmations should only be sought from LCD where all of the following conditions are satisfied:

- The issues are complex, unusual or uncertain and the taxpayer requires clarification of the tax treatment of the proposed transaction.
- Clarification of the issue is not already in the public domain.
- The request is specific to a named taxpayer and relates to an actual proposed (rather than hypothetical) transaction.
- All relevant information and facts have been provided to enable an opinion or confirmation to be given.

An opinion or confirmation will not be given if it appears that the transaction is in the nature of a tax avoidance transaction.

Revenue consider that opinions and confirmations issued by it are not binding and reserve the right to review the position once the transaction has been completed. An opinion or confirmation will be followed provided that both:

- All relevant information was disclosed to Revenue either at the time of the application or following a request for clarification by Revenue.
- The transaction implemented did not deviate from the transaction described in the application.

Opinions and confirmations issued by LCD will usually expire after five years, or such shorter period as may have been specified by Revenue when providing the opinion or confirmation. Where reliance is being placed on an opinion issued before 1 January 2012 for any transaction after 1 January 2017, a taxpayer must both:

- Supply evidence of the opinion or confirmation, in the form of a copy of a written communication that originated from Revenue.
- Lodge a full application for the renewal or extension of the opinion or confirmation with the Revenue's office dealing with the taxpayers' affairs.

Taxpayers should submit any requests for opinions or confirmations at least four weeks prior to the date of the proposed transaction.

Disclosure of finance transactions

3. Is it necessary to disclose the existence of any finance transactions to the tax authorities?

Circumstances where disclosure is required

Where a company elects to avail of Ireland's securitisation regime (*see Question 26*) it must notify the Revenue in the prescribed form. A company that is incorporated in Ireland on or after 1 January 2017 must notify Revenue within eight weeks of its acquisition of "qualifying assets" of its intention to be a "qualifying company" for the purpose of the Irish securitisation regime. A qualifying company must also provide additional information in relation to its shareholder(s) and activities such as:

- The type of transaction(s) entered into.
- Assets acquired and from whom.
- Details as to funding.
- Any other material transactions with parties under common control or ownership.

More generally, Ireland introduced a disclosure regime targeting tax avoidance transactions in 2010. The regime applies to any transactions, including finance transactions, where they meet all of the following tests:

- The transaction will, or might be expected to, enable a person to obtain a tax advantage.
- The tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the transaction.
- The transaction falls within one of the specified descriptions.

The concept of tax advantage is defined broadly and covers any advantage arising out of, or by reason of, a transaction relating to a reduction, deferral or avoidance of a charge to Irish tax, or any relief from, or refund of, Irish tax, or the avoidance of any obligation to deduct or account for Irish tax.

Whether obtaining a tax advantage should be considered the main benefit or one of the main benefits of a transaction is a matter that should be determined objectively by comparing the value of the expected tax advantage with the value of other financial benefits likely to arise under the transaction.

Various transactions fall within the specified descriptions, including:

- Transactions that the promoter or taxpayer may wish to keep confidential (either from Revenue or another promoter).
- Transactions for which a promoter could charge a contingent fee.
- Transactions that are mass-marketed and involve standardised documentation.
- Loss-creation transactions.
- Transactions that convert income to capital.
- Transactions that seek to gain a tax advantage through the use of a discretionary trust.

The specified descriptions are similar in nature to the hallmarks identified in the UK mandatory disclosure regime.

Manner and timing of disclosure

Generally, disclosure must be made by the promoter of the transaction (that is, the person involved in designing, marketing or implementing the transaction). However, in certain circumstances the taxpayers themselves must make the disclosure (that is, where the promoter is not based in Ireland, the promoter asserts legal privilege or the transaction is designed and implemented by the taxpayer in-house).

Disclosure must be made in writing by a promoter within five working days of the transaction being substantially designed (such that the promoter has a high degree of confidence in it) and made known or available to clients. In the case of a transaction that is specially designed for a client, the promoter must make disclosure within five working days of becoming aware that a step to implement the transaction has been taken. Finally, a transaction designed by a taxpayer in-house must be disclosed within 30 working days of when the first step to implement the transaction is taken.

Disclosure must include full details about the transaction, the taxpayer and the anticipated tax analysis. The promoter must also provide details of clients to whom disclosable transactions have been made available for implementation.

TAXES ON CORPORATE LENDING/BORROWING

Taxes potentially chargeable on amounts receivable

4. What are the main corporate taxes potentially chargeable on interest and other amounts receivable under a loan?

Corporation tax

Key characteristics. Companies that are resident for tax purposes in Ireland, and non-Irish resident companies that advance a loan in connection with a trade or business carried on in Ireland through a branch or agency, are chargeable to Irish corporation tax on the income received.

Calculation of tax. Corporation tax is charged on the profits earned and so deductions are generally available to the lender for the costs of financing incurred wholly and exclusively for the purposes of its lending trade, provided those costs are revenue in nature.

Triggering event. Corporation tax is chargeable in respect of each accounting period of a company and returns must be submitted nine months after the end of an accounting period (by the 23rd day of that month).

Corporation tax is paid in instalments. Companies within the charge to Irish corporation tax must make preliminary payments of their corporation tax liability. The amount(s) of preliminary tax to be paid and the required dates of payment are dependent on whether the company is classified as a small company or a large company for corporation tax purposes. A company is classified as a small company if its corporation tax liability in the previous 12-month accounting period did not exceed EUR200,000. Large companies must pay their corporation tax as follows:

- The first instalment (a payment of preliminary tax) is due on the 23rd day of the sixth calendar month in the relevant accounting period. The first instalment must be equal to 50% of the corporation tax liability for the previous accounting period or 45% of the total corporation tax liability for the relevant accounting period.

- The second instalment is payable on the 23rd day of the 11th month of the relevant accounting period. This second instalment of preliminary tax together with the first instalment must equal 90% of the corporation tax liability for the relevant accounting period.
- The balance of corporation tax is payable on the date the return is due (that is, the 23rd day of the ninth month after the end of the accounting period).

Applicable rate(s). Corporation tax is payable at 12.5% or 25% depending on the circumstances. The 12.5% rate applies where the income is considered to form part of the trading income of the taxpaying company (for example, a bank or group treasury company would in most cases treat interest earned on loans as part of its trading income). The 25% rate applies in all other cases.

Tax reliefs available for borrowing costs

5. What corporate tax reliefs are available for borrowing costs (including interest and other amounts payable under a loan)?

Interest relief

Key characteristics. As a general rule, a full deduction against taxable income is available in Ireland for interest and other financing costs incurred by an Irish borrower wholly and exclusively in the course of the borrower's trade, provided those costs are revenue in nature.

Triggering event. Deductions for interest are claimed in the annual corporation tax return (*see Question 4*). If the level of interest payable by the borrower exceeds the borrower's taxable profit from that trade in that particular accounting period so that the borrower incurs a loss, that trading loss may be used in the following order:

- After utilising any losses forward from a prior accounting period, the loss may be offset, in the first instance, against other trading profits of that accounting period.
- Next, it may be carried back and offset against the trading profits of the accounting period immediately preceding the loss-making accounting period.
- Any excess losses are then available for offset against other income of the loss-making accounting period, or if the company was then carrying on a trade, the previous accounting period. However, the loss must be adjusted to reflect the fact that the trade from which it arose is taxed at a lower rate (12.5%) than the profits against which it is offset (25%). Such loss relief is therefore available on a "value basis" (similar to a tax credit).
- Trading losses may be carried forward indefinitely and offset against future profits of the same trade.
- Trading losses may also be surrendered to other members of the Irish corporate tax group. Trading losses may be surrendered to a group company before they are offset against non-trading profits; the taxpayer has a choice in this respect. However, the claimant company must use all of its own trading losses (current year and carried forward) before availing of losses surrendered by another group company.

If the loss is incurred other than in the course of trade, it may be offset against other non-trading profits of the same type or it may be carried forward against future non-trading income of the same type.

Deductions for interest may be disallowed in certain circumstances, for example:

- If interest is paid to a non-resident company that is a 75% affiliate of the Irish borrower it may be re-characterised as a distribution and will no longer be treated as deductible.

  However, this rule is not applied in various circumstances, for example, when the interest is paid to a company resident for tax purposes in an EU member state, or on election to a company resident in a double tax treaty country provided that the interest is paid in the course of the borrower's trade, or in the case of yearly interest only, on election to a non-treaty resident company provided that the interest is paid in the course of the borrower's trade.
- If the interest paid is to any extent dependent on the results of the borrower's business or any part of the borrower's business, it will be re-characterised as a distribution and no deduction will be available for the interest (unless the borrower qualifies under Ireland's securitisation regime and certain conditions are satisfied) (*see Question 26*).
- If the interest paid represents more than a reasonable commercial rate of return for the principal borrowed, the amount by which the interest exceeds a reasonable commercial rate will be re-characterised as a distribution and will not be treated as deductible (unless the borrower qualifies under Ireland's securitisation regime and certain conditions are satisfied) (*see Question 26*).
- If interest is paid to a connected company on a loan used to acquire assets from another connected company, deductions for interest may be denied under anti-avoidance provisions.
- Where applicable, the Irish transfer pricing provisions may also be invoked to limit the deductions available for interest paid to associated companies, if interest payments exceed that which would be agreed between parties acting at arm's length.

Where interest may not be deducted in calculating trading profits and if the loan on which the interest arises satisfies certain criteria, the interest may be treated as a charge on income and deducted from the borrower company's total profits. To qualify, the following must be satisfied:

- The loan must be used by the borrower company to acquire the share capital of, or make a loan to, a:
  - trading company;
  - property rental company; or
  - holding company of a trading company or property rental company (the investee company).

  The Finance Bill 2017 proposes to extend the relief to interest paid in respect of loans made on or after 19 October 2017 where a loan is used to acquire or lend to a holding company which does not own shares in a trading or property rental company directly, but indirectly through one or more intermediate holding companies. The changes introduced have been implemented administratively by the Revenue Commissioners. The changes reflect and clarify the current administrative practice.
- The funds invested or advanced, as applicable, must be used in full by the investee company for specific business purposes.
- The borrower company must beneficially own or have the ability to control, directly or indirectly, more than 5% of the ordinary share capital of the investee company (and, where the funds advanced are used by a connected company, that connected company).
- The borrower company and the investee company must have at least one common director.

A number of relatively complex anti-avoidance provisions apply to deny relief for interest as a charge. The relief may be denied, for example:

- If the loan is made to the borrower company by a connected company and used to acquire shares in a connected company or from a connected company.

- If there is a recovery of capital by the borrower company (that is, the loan must not be repaid in any form, except by payment directly against the loan itself).
- If the interest is not actually paid.

Tax payable on the transfer of debt

6. What corporate, transfer, stamp or other taxes are payable on the transfer of a debt under a loan?

Corporation tax

If a lender is carrying on a trade of lending, corporation tax arises on any profit resulting from the transfer of a debt by the lender provided that the transaction is also revenue in nature. The rate of tax applicable is 12.5%. Whether a loan has been extended in the course of a trade is a question of fact to be determined on a case-by-case basis.

However, it is not always the case that the transfer of a debt will be treated as a revenue transaction. Where the transfer is taxable as a capital transaction, the current 33% rate (applicable to chargeable gains) applies. If a lender is not carrying on a trade of dealing in debts, no charge to corporation tax on chargeable gains arises if the lender is the original creditor, unless the debt is a "debt on a security".

The term "debt on a security" is not defined in legislation, but its meaning has been considered in a number of cases. In general terms, if a loan is marketable and may exceed its face value, or is convertible to equity, it will likely be treated as a debt on a security.

A loss arising on a disposal of a debt that was acquired by the person disposing of the debt from a connected party, who was also the original creditor, is not an allowable loss.

Stamp duty

The transfer of a contract debt owed by an Irish resident company falls within the charge to Irish stamp duty, because such a debt is regarded as property situated in Ireland for Irish stamp duty purposes. However, debt structured as loans are generally novated, where possible, rather than assigned. No charge to stamp duty arises on novations as they do not constitute a conveyance or transfer and so do not fall within the charge to Irish stamp duty.

If a loan cannot be novated, it should be possible in the vast majority of cases to avail of one of a number of exemptions.

An exemption from stamp duty applies to transfers of "loan capital" of a company or other body corporate. "Loan capital" is defined as "any debenture stock, bonds or funded debt, by whatever name known, or any capital raised which is borrowed or has the character of borrowed money, whether in the form of stock or in any other form". A debt qualifies as loan capital if all of the following apply:

- It is not convertible into stocks or marketable securities (other than loan capital) of an Irish registered company or into loan capital having such a right.
- It does not carry rights that generally attach to shares (for example, voting rights, rights to distributions of profits, and so on).
- It is issued for not less than 90% of its nominal value.
- The return is not linked to any share or marketable security indices.

A separate exemption from stamp duty is available where debt is transferred in the ordinary course of business of the vendor or the purchaser, provided the instrument of transfer does not relate to Irish land or buildings, or stocks or marketable securities of an Irish registered company (other than an Irish securitisation vehicle or an Irish investment undertaking).

The issue or transfer of debt securities issued by Irish securitisation vehicles are specifically exempted from the charge to Irish stamp duty provided the money raised by such debt securities is used in the course of the Irish securitisation vehicle's business (*see Question 26*).

If no exemption is available, the transfer of a contract debt owed by an Irish resident company gives rise to a charge to stamp duty. If the debt falls within the definition of stock or marketable securities and is not otherwise exempt, a transfer of the debt is charged to stamp duty at 1% of the consideration paid or the market value of the debt transferred (whichever is higher). In all other cases the rate applicable is 6% (increased from 2% in respect of instruments executed on or after 11 October 2017). The duty is generally levied on the transferee.

Withholding tax

7. Is there withholding tax on interest or any other payments under a loan?

When withholding tax applies

Income tax is deducted from payments of yearly interest which have an Irish source and are made to both Irish resident persons and non-Irish resident persons. Interest is considered to be yearly interest if the principal is outstanding (or is capable of being outstanding) for at least one year.

Applicable rate(s) of withholding tax

Income tax is deducted from yearly interest payments at the standard rate, currently 20%.

Exemptions from withholding tax

Interest may be paid free from withholding tax in a number of cases, including:

- Where the interest is paid on a quoted Eurobond. A security is treated as a quoted Eurobond if:
  - it is issued by a company;
  - it is quoted on a recognised stock exchange; and
  - it carries a right to interest.

  For the quoted Eurobond exemption to apply:
  - the paying agent must be outside Ireland;
  - where the paying agent is in Ireland, the quoted Eurobond must be held in a recognised clearing system; or
  - the persons who are the beneficial owners of the quoted Eurobond and who are beneficially entitled to the interest must not be resident for tax purposes in Ireland and must have made a declaration to that effect in the prescribed form.
- Where the interest is paid on a wholesale debt instrument provided certain conditions are met. The term "wholesale debt instrument" includes certain certificates of deposit issued by banks and certain types of commercial paper that mature within two years of issue.
- Where the interest is paid by an Irish securitisation vehicle and is paid to a person who is tax resident under the law of a "Relevant Territory" in that Relevant Territory (other than, in the case of a body corporate, where such interest is paid to the body corporate in connection with a trade or business carried on by it in Ireland through a branch or agency). Relevant Territory means:
  - an EU member state (other than Ireland);

- a jurisdiction with which Ireland has signed a double tax treaty that has the force of law; or
- a jurisdiction with which Ireland has agreed a double tax treaty which is awaiting ratification.

- Where the interest is paid by a body corporate in the ordinary course of its trade or business:
  - to a body corporate which, by virtue of the law of a Relevant Territory, is resident for the purposes of tax in that Relevant Territory and that Relevant Territory imposes a tax which corresponds to Irish corporation tax or income tax and which generally applies to interest receivable in that territory by bodies corporate from sources outside that territory (or where the Relevant Territory provides for a remittance basis of taxation, where the interest is payable into an account located in that Relevant Territory); or
  - to a body corporate where the interest is exempt from the charge to Irish income tax under the terms of a ratified double tax treaty, or would be so exempt if a double tax treaty that has been signed had the force of law when the interest was paid, provided, in each case, that such interest is not paid to the recipient body corporate in connection with a trade or business carried on in Ireland by it through a branch or agency.

While the immediately preceding exemption requires a lender to meet the conditions prescribed in the relevant double tax treaty entered into between Ireland and the jurisdiction of residence of the lender for the exemption to apply, the exemption itself is available as a matter of domestic law. Accordingly, no tax treaty relief forms must be completed and the tax authorities of the lender's jurisdiction of residence are not required to certify residence. A number of other exemptions exist for interest paid to Irish tax resident persons, such as banks, Irish regulated funds, Irish securitisation vehicles and certain Government agencies.

In addition to the exemptions listed above, an exemption from the obligation to withhold, or reduced rates of interest withholding tax, may be available under Ireland's extensive double tax treaty network (for example, where interest is paid to individuals or non-corporates). To avail of these exemptions, treaty relief claim forms must be filed with Revenue and the tax residence of the recipient must be certified by the tax authorities in their home jurisdiction.

For a comparative summary of withholding tax on interest, see table, *Withholding tax on interest on corporate debt, and the key exemptions* in this global guide.

Guarantees

8. Do any particular tax issues arise on the provision of a guarantee?

No particular tax issues arise on the provision of a guarantee by or to an Irish company. However, in the context of withholding tax, certain considerations may apply in respect of payments under a guarantee, as the nature of a guarantee payment is not entirely clear under Irish law. For example, payments under a guarantee may be regarded as taking their nature from the payment which they replace. Therefore, where the guarantee is in respect of a loan/advance, withholding tax considerations may apply to payments in respect of interest. While a payment under a guarantee in respect of a repayment of an advance should not attract a requirement to make a withholding or deduction for, or on account of, Irish tax (*see Question 7*), a payment under a guarantee in respect of interest on an advance may be treated as being a payment of interest and would therefore need to fall within one of the exemptions listed above to avoid a withholding or deduction for, or on account of, Irish tax. It is possible however that payments under a guarantee would be treated as being *sui generis* (that is, having their own nature) and not as taking their nature from the payment which they replace, in which case an obligation to withhold would only arise if such payments were annual payments with an Irish source.

RESTRUCTURING DEBT

Unpaid or deferred interest or capital

9. What is the tax treatment of the borrower and the lender if interest or capital is unpaid or deferred?

A borrower is generally entitled to a deduction for interest on an accruals basis and, accordingly, deferring an interest payment should not impact the timing of the deduction. However, in limited cases anti-avoidance provisions may impact the borrower's ability to claim a deduction, for example:

- If interest is payable to a connected party and the borrower accrues the interest as a trading expense but does not actually pay it to the lender, the borrower may only be entitled to a deduction for interest equal to the interest recognised by the lender for tax purposes. Any excess interest accrued in the borrower's accounts can be carried forward until the lender recognises the full amount of the interest for tax purposes (that is, if the interest is paid). The provisions do not apply where the lender is a company that is:
  - non-Irish resident; and
  - not controlled by Irish residents.

  Nor do the provisions apply in cases where the income is treated by the recipient as trading income (for example, if the lender is a bank or a treasury company) or would be so treated if the recipient was tax resident in Ireland.

- If interest is treated as a charge (that is, interest incurred by a company on funds borrowed, other than in the course of a trade, to acquire shares or to loan money to connected companies in certain circumstances), the interest must be paid for a deduction to be available for tax purposes (*see Question 5*).

Where a lender is carrying on a trade, interest income is generally only taken into account for tax purposes when it is recognised in the accounts. However, interest income that has been received in the course of a trade but not yet recognised in the lender's accounts (for example, pre-payments of interest) is subject to tax in the period in which it is received. Where the lender has not made the loan in the course of its trade, the interest income is subject to tax in the period in which it is actually received by a lender.

Generally, there are no Irish tax consequences for deferring payments of capital.

Debt write-off/release and debt for equity swap

10. What is the tax treatment of the borrower and lender if a loan is:

- **Written off or released (wholly or partly)?**
- **Replaced by shares in the borrower (debt for equity swap)?**

The write-off of a trading loan (for example, bank overdraft, interest on a working capital account or interest on a loan to purchase trading stock) may give rise to a taxable trading receipt for the borrower/recipient of the release. Where the loan is capital in nature, the write-off should not be taxable in the hands of the borrower.

If the loan that is written off was used to acquire a chargeable asset, on disposal of that asset the taxpayer will be required to take account of the debt written off when calculating any allowable loss. The provision limits the allowable expenditure so that the debt written off is not deductible in calculating chargeable gains. However, the restriction does not apply to convert a loss into a chargeable gain.

The release of loans made to property developers to acquire land will be treated as taxable income of the developer. This provision applies to individuals only. Losses recognised by the developer may be offset against the amount released.

Tax deductions are available against taxable income to creditors who extend credit in the course of trade for debts that are written off as irrecoverable (that is, bad debts). A lender should therefore receive a deduction for any loss arising as a result of its release of a loan.

However, no deduction for bad debts is available to a creditor who writes-off a loan if the loan was extended other than in the course of its trade. Accordingly, a mismatch may arise on the write-down of a loan borrowed in the course of trade (this gives rise to a taxable receipt for the borrower) but loaned other than in the course of trade (no deduction will be available for the write-down). This might be the case where an intra-group loan is made by a holding company to an operating subsidiary.

If a loan is replaced by shares, the loan should be treated as repaid rather than released and no taxable receipt should arise to the borrower.

FOREIGN ACCOUNT TAX COMPLIANCE ACT (FATCA)

11. Has your jurisdiction entered into an intergovernmental agreement (IGA) to implement FATCA, or does it intend to enter into an IGA to implement FATCA?

Ireland signed an IGA (Irish IGA) with the US on 21 December 2012. The Irish IGA takes the form of Model 1A. Under the legislation implementing the Irish IGA, Irish financial institutions (IFIs) which are not otherwise exempt are required to register with the US Internal Revenue Service (IRS), perform certain due diligence obligations and report information in respect of any US reportable accounts they maintain to the Revenue. An IFI which has no reportable accounts is required to submit a nil return to Revenue. While the reporting obligations under FATCA only apply to US reportable accounts, the application of FATCA is not determined by whether or not the IFI holds any US assets or has any US clients. Rather, the classification of an entity as a "financial institution" is determinative. Under the terms of the Irish IGA, the information collected by the Revenue is, in turn, provided to the IRS. The US has agreed to provide reciprocal information in respect of Irish reportable accounts held by US residents. As a general rule, FATCA withholding will not apply to IFIs provided they comply with their due diligence and reporting obligations under the Irish implementing legislation.

12. Have there been any particular difficulties in light of your jurisdiction's domestic legislation with implementing the FATCA requirements?

The Irish IGA requires Irish financial institutions (IFIs) to report details of their US reportable accounts to the Revenue (*see Question 11*). As a result, IFIs are not required to enter into agreements directly with the IRS. This has generally addressed data protection and confidentiality issues which could have arisen if IFIs were required to transfer personal data controlled by them directly to the US authorities.

There are also some divergences between the language used in the US legislation and the Irish legislation. For example, the US legislation requires certain foreign financial institutions to appoint a FATCA responsible officer. This concept is not included in the Irish legislation or in the Irish IGA. On registration with the IRS, IFIs are required to nominate responsible officers. Similarly the concept of expanded affiliated group has not been fully introduced in the Irish legislation but it is also relevant to the registration process. While these discrepancies initially caused some practical difficulties for IFIs seeking to register with the IRS, they have been addressed by the Revenue by way of published guidance.

13. Are there any provisions of your jurisdiction's IGA and/or domestic implementing legislation, if any, that are more onerous than the US FATCA requirements?

The Irish regulations provide that an Irish financial institution (IFI) should not be at a disadvantage from applying the Irish legislation implementing the IGA as compared to the position they would have been in if applying the US regulations. If an IFI identifies an element of the US regulations which it considers to be more favourable than the treatment under Irish law it should contact Revenue to discuss the issue.

BANK LEVIES

14. Are there any bank levies or similar taxes imposed specifically on financial institutions?

A levy on banks was introduced in the Finance (No 2) Act 2013 for 2014, 2015 and 2016. The levy applies to Irish and European banks and building societies that operated deposit interest retention tax (DIRT) in 2011. DIRT is a withholding tax on deposit interest credited to the accounts of Irish resident deposit holders. The Finance Act 2016 extended the bank levy (which was due to expire in 2016) by a further five years to 2021. The levy is charged at a rate of 59% on DIRT over specific base year periods. The base year for 2017/2018 is 2015, the base year for 2019/2020 will be 2017, and for 2021 the base year will be 2019.

Levies also apply to health insurers, credit/charge cards issued to persons with an Irish address and pension schemes. The levy on pension fund assets expired on 31 December 2015. However, those levies are beyond the scope of this article.

15. On what are any such levies or taxes charged?

The levy on banks is a form of stamp duty and, for the 2017/2018 calendar year, is calculated by reference to the amount of a relevant bank's 2015 DIRT liability.

16. At what rate(s) are the levies or taxes charged?

The bank levy is applied at a rate of 59%.

17. Are there any thresholds or exemptions?

If a relevant bank's DIRT liability in a specified base year did not exceed EUR100,000, the levy does not apply.

BOND ISSUES

18. For corporate taxation purposes, are bonds treated any differently from standard corporate loans?

Generally, bonds are treated in the same way as standard corporate loans for Irish tax purposes unless the bonds qualify as quoted Eurobonds or wholesale debt instruments, in which case, the withholding tax treatment may differ. In certain circumstances, interest on quoted Eurobonds and certain wholesale debt instruments may be paid free from withholding tax regardless of where the recipient is resident (*see Question 7*).

Separate to withholding for income tax, if an encashment agent located in Ireland receives interest on a quoted Eurobond on behalf of a noteholder, it will be required to withhold encashment tax (20%) on the onward payment of that interest. A full exemption from encashment tax is available if the beneficial owner of the interest is not tax resident in Ireland and has made a declaration to that effect in the appropriate form. In most cases where quoted Eurobonds are issued, non-Irish paying agents are appointed, therefore there is no need to withhold encashment tax or collect declarations of residence unless the notes are held in a clearing system and the interest is received by an Irish-based collection or receiving agent on behalf of a noteholder.

Taxes payable on the issue and/or transfer of a bond

19. What stamp, transfer or similar taxes are payable on the issue and/or transfer of a bond?

Stamp duty

No stamp duty applies on the issue of a bond.

The transfer of a bond issued by an Irish resident company falls within the charge to stamp duty in the same way as the transfer of a contract debt (*see Question 6*). However, bonds generally fall within the definition of a marketable security. Therefore, unless the transfer is otherwise exempt, the rate applicable is generally 1% of the consideration paid or the market value of the bond transferred (whichever is higher).

Corporation tax

Generally, the transfer of a bond is treated in the same way as the transfer of a debt (*see Question 6*).

Exemptions

20. Are any exemptions available?

Various stamp duty exemptions may apply to the transfer of a bond. For example:

- The loan capital exemption is available to avoid a charge to stamp duty arising on the transfer of a bond, provided all of the criteria are met (*see Question 6*).
- No charge to stamp duty arises on the transfer of a bond issued by an Irish securitisation vehicle, provided the money raised by such bond is used in the course of the Irish securitisation vehicle's business (*see Question 6*).
- No charge to stamp duty arises if the bond was transferred in the ordinary course of business of the vendor or purchaser, provided the instrument of transfer does not relate to Irish land or buildings, or stocks or marketable securities of an Irish registered company (other than an Irish securitisation vehicle or an Irish investment undertaking).

As bearer bonds issued by Irish companies are transferable by delivery and without any written instrument of transfer, such transfers do not generally give rise to a charge to Irish stamp duty.

PLANT AND MACHINERY LEASING

Claiming capital allowances/tax depreciation

21. What are the basic rules for enabling the lessor or lessee of plant and machinery to claim capital allowances/tax depreciation?

Capital allowances are available for capital expenditure incurred by a lessor on plant and machinery if both:

- The lessor leases the assets in the course of a trade consisting of, or including, the leasing of plant or machinery.
- The burden of wear and tear in respect of the asset falls directly on the lessor.

If the lessor is a non-trading lessor, capital allowances are available to the lessor provided all of the following apply:

- The lessee uses the leased asset in the course of its trade.
- The burden of wear and tear in respect of the asset falls directly on the lessor.
- A claim is made by the lessor to that effect within 24 months of the end of each relevant accounting period.

Capital allowances are available to a lessee in respect of plant or machinery leased by it if all of the following apply:

- The plant or machinery is let under a finance lease.
- The lessee carries on a trade.
- The lessee is required to maintain the plant or machinery and deliver those assets in good condition at the end of the lease.
- The burden of wear and tear in respect of those assets falls directly on the lessee.

Rate of capital allowances/tax depreciation

22. What is the rate of capital allowances/tax depreciation; does it depend on the type of assets?

Capital allowances are generally available for plant and machinery over an eight-year period on a straight line basis (giving rise to an annual deduction equal to 12.5% of the capital expenditure incurred on the asset).

Lessors of short life assets (assets with a predictable useful life of less than eight years) may tax the income received and deduct depreciation in accordance with accounting rules.

Lessees not carrying on business in the jurisdiction

23. Are there special rules for leasing to lessees that do not carry on business in your jurisdiction?

There are no special tax provisions regarding the treatment of rental payments received from non-Irish lessees. However, Ireland has an extensive tax treaty network (73 double tax treaties have been signed by Ireland, of which 72 are currently in effect). Under these treaties, foreign withholding tax on aircraft rental payments made to Irish lessors is generally reduced to nil provided certain conditions are satisfied. In cases where some foreign withholding tax is suffered on aircraft rental payments received (either because no double tax treaty exists with the lessee jurisdiction or in cases where the rate of withholding tax is reduced under an applicable treaty but not eliminated) a credit is available in Ireland for the foreign tax suffered against the Irish tax payable on the rental income received, but only where the lessor is carrying on a trade.

Taxation of rentals

24. How are rentals taxed?

If the lessor leases the plant and machinery in the course of a trade which consists of, or includes, the leasing of plant or machinery, the rental income is treated as trading income and the profits arising from that trade (after deducting allowable expenses and capital allowances) are taxed at the 12.5% rate.

If the leasing activity is passive only and not sufficient to be treated as a trading activity, the taxable profit is taxed at 25%.

If the level of capital allowances claimed results in a lessor incurring a loss for tax purposes, that loss will be ring-fenced and may only be offset against other leasing income. Similarly, if the lessor is a member of an Irish corporation tax group, losses from a leasing business may only be surrendered to a group member that also carries on a leasing trade and offset against the profits of that trade.

The class of assets that Irish securitisation vehicles can hold, manage or lease was extended to include plant and machinery (with effect from 21 January 2011). In cases where a securitisation vehicle holds, manages or leases plant and machinery, it is taxed at the 25% rate. However, a full deduction is available for profit participating interest payable by the entity provided all the conditions are satisfied. Accordingly, the Irish tax suffered is likely to be minimal where the vehicle is funded with profit participating debt (*see Question 26*).

Rulings and clearances

25. Is a ruling or clearance necessary or common?

Rulings and/or clearances are generally not required for leasing transactions. However, confirmation of a particular tax treatment can generally be obtained, if required given the nature of the transaction (*see Question 2*).

SECURITISATION

26. Briefly explain the key features of the tax regime applicable to securitisations, including details of any specific tax rules that apply or issues that arise in relation to securitisations.

The Irish securitisation regime provides for favourable tax treatment for Irish tax resident companies engaged in the holding or managing of certain qualifying assets (that is, financial assets, commodities, and plant and machinery). These companies are referred to as qualifying companies.

The taxable profits of a qualifying company are calculated on the same basis as a trading company and so expenses which are revenue in nature and incurred wholly and exclusively for the purposes of the business of the qualifying company (such as interest) may be deducted. Qualifying companies are permitted to deduct interest paid on profit participating debt, provided certain conditions are satisfied. It is therefore usually the case that minimal profit is retained by the qualifying company, resulting in a nominal charge to Irish tax.

There are a number of conditions that must be satisfied for a qualifying company to avail of the favourable tax regime, including:

- It must be resident for tax purposes in Ireland.
- It may only hold and/or manage qualifying assets in Ireland (including, in the case of plant and machinery, leasing that plant and machinery) and must carry on no other business, other than activities ancillary to that business.
- The market value of the first assets acquired by it, or in respect of which legally enforceable arrangements are entered into by it, which arrangements themselves constitute qualifying assets, cannot be less than EUR10 million on the date such assets are first acquired or such legally enforceable arrangements are entered into.
- A company which is incorporated on or after 1 January 2017 must notify Revenue in the prescribed form (Form S.110) of its intention to be a qualifying company within eight weeks of its acquisition of qualifying assets.
- It must not enter into any transaction or arrangement otherwise than by way of a bargain made at arm's length (other than transactions under which certain qualifying profit dependent interest payments are made).

Deductions available to qualifying companies for profit participating interest are disallowed under section 110(4A) of the Taxes Consolidation Act 1997 (anti-avoidance rules), except in the following circumstances:

- The interest is paid to an Irish tax resident person or, if not so resident, a person who is otherwise within the charge to Irish corporation tax in respect of that interest.
- The interest is paid to certain pension funds or other tax exempt bodies that are resident in a Relevant Territory under the laws of that Relevant Territory (*see Question 7*).
- Under the laws of a Relevant Territory, the interest is subject to a tax (without any reduction computed by reference to the amount of the interest) and that tax corresponds to Irish corporation tax or income tax and applies generally to profits, income or gains received in that territory by persons from sources outside that territory.
- A person that has suffered Irish withholding tax at source on the interest payment.

The anti-avoidance rules generally do not apply to transactions where the debt is issued as a quoted Eurobond or wholesale debt instrument and the investors are third party persons otherwise unconnected with (through the sale of assets or holding of shares or voting power) the securitisation company.

The Finance Act 2016 amended the tax treatment of qualifying companies to restrict the tax deductibility of profit participating or excessive interest payable by a qualifying company on secured loans and similar assets which derive their value, or the greater part of their value, from Irish real estate. This change applies in respect of profits earned after 6 September 2016. From this date, a deduction in respect of interest payable on a profit participating loan is restricted in respect of the profits arising from such assets to an amount of interest that would represent no more than a reasonable commercial return payable on a non-profit participating loan/debt instrument. Certain transactions are excluded from the interest restriction, namely:

- Collateralised loan obligations (CLO) transactions.
- Commercial mortgage-backed securities/residential mortgage-backed securities (CMBS/RMBS) transactions.
- Loan origination and sub-participation transactions (as defined).

In addition, interest payable to certain "excluded persons" is not subject to the restriction. These persons include Irish residents, EU/EEA pension funds and certain EU/EEA nationals/ residents.

As a result of these changes, securitisation companies which purchased loans secured on Irish property at a discount could now be subject to Irish corporation tax at the rate of 25% on a significant part of the gains realised on those investments.

The Finance Bill 2017 proposes a further amendment to the securitisation regime to expand the type of Irish real estate profits to which the interest restriction set out above is to apply. Shares that derive their value, or the greater part of their value, directly or indirectly, from land in Ireland are now to be included in the definition of "specified property business". Therefore, if a qualifying company holds the shares in an Irish property company, the profits derived from those shares will be subject to the restriction so that, subject to certain exceptions, a deduction for profit participating interest in respect of interest paid on or after 19 October 2017 will be limited to interest that would represent no more than a reasonable commercial return. The exemptions for CLO transactions, CMBS/RMBS transactions, loan origination and sub-participations (as defined) should continue to apply so that if, for example, a qualifying company engaged in loan origination or a CLO transaction were to hold shares in a company holding Irish land as part of that business, the interest restriction should not apply.

Transactions entered into by qualifying companies unrelated to Irish real estate are not affected by the interest restriction.

At the time of writing, the Finance Bill 2017 has not been finalised or enacted and the amendments proposed may be subject to change.

REFORM

27. Please summarise any proposals for reform that will impact on the taxation of finance transactions.

BEPS

The Organisation for Economic Co-operation and Development (OECD) released its final base erosion and profit shifting (BEPS) reports for reform of the international tax system to tackle tax avoidance on 5 October 2015 (Final Reports). The Final Reports provide a comprehensive framework of international standards and recommendations to address the concerns identified by the OECD in their 15 point Action Plan of July 2013. Particularly relevant to finance transaction include:

- Action 4 Interest Deductions.
- Action 6 Treaty Benefits.
- Action 7 Permanent Establishment.
- Action 8 Transfer Pricing.
- Action 13 Country by Country Reporting.

Work is ongoing in respect of the BEPS actions at both a national level in terms of potential changes to domestic tax rules, implementing standardised reporting and so on, and on a global level in terms of the Multilateral Instrument which will implement several of the BEPS proposals through the amendment of tax treaties.

Ireland publicly endorsed the BEPS project, has legislated for country-by-country reporting in domestic legislation and introduced a Knowledge Development Box (KDB) as the first IP box that complies with the OECD's new standards. Ireland is committed to the principle of adopting a co-ordinated approach, rather than adopting unilateral measures, to address abuses highlighted by BEPS. The signing of the Multilateral Instrument in June 2017 is a further endorsement of Ireland's commitment to implement the measures set out in the BEPS project.

Multilateral Instrument

On 7 June 2017, 68 jurisdictions gathered at the OECD headquarters in Paris for the signing of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Multilateral Instrument). Nine further jurisdictions expressed their intention to sign and there are currently 71 signatories to the convention.

The Multilateral Instrument has been designed to implement the treaty-related measures arising from the BEPS project. Minimum standard changes to the functioning of existing double tax treaties in the areas of treaty abuse, mutual agreement procedures and treaty preambles, will be implemented through the Multilateral Instrument. Depending on the reservations and notifications made by each party, optional changes to modify tax treaties may be implemented in respect of:

- Permanent establishments.
- Transparent entities.
- Residence tie breakers.
- Minimum shareholding periods.
- Capital gains from immovable property.

The Multilateral Instrument does not override, nor is it a substitute for, existing bilateral or multilateral tax conventions that are in place. Instead, the Multilateral Instrument supplements and modifies those agreements with a series of BEPS-related provisions, most of which each signatory can opt into or out of, in whole or in part. Given the flexibility of the Multilateral Instrument, treaties will be modified according to a jurisdiction's tax policy preferences and in line with their domestic approach to implementing BEPS.

For the Multilateral Instrument to take effect, individual signatories will need to ratify the convention in line with their domestic constitutional arrangements. Firstly, the convention must be ratified by at least five jurisdictions before it enters into force. A period of three months after the date of ratification by the fifth state must then elapse. The Multilateral Instrument will enter into force for those first five jurisdictions at the start of the subsequent calendar month. A three-month period will also apply for all other jurisdictions which subsequently ratify the convention.

The Multilateral Instrument can enter into effect for a specific double tax treaty only after the three-month period has expired for both parties to the treaty. It is expected that Ireland will ratify the Multilateral Instrument during the course of 2018.

EU Anti-Tax Avoidance Package

The Anti-Tax Avoidance Package is part of the EU Commission's agenda for fairer, simpler and more effective corporate taxation in the EU. As part of the package, Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATAD) was formally adopted by the Council of the EU on 12 July 2016 and contains several anti-abuse measures that all EU member states must apply against common forms of aggressive tax planning. The ATAD contains actions in three areas which are already covered by BEPS (hybrid mismatches, interest restrictions and controlled foreign companies (CFCs) and contains an additional two measures which are not (exit taxation and a general anti-avoidance rule (GAAR)).

While the ATAD provides for a general implementation date of 1 January 2019, certain derogations apply and the precise timing and manner in which the ATAD will be implemented in Ireland remains unclear. Measures such as the hybrid mismatch and the GAAR provisions should not have an impact on finance transactions based on Ireland's current tax regime. The interest limitation provisions, exit tax and CFC changes are likely to have an impact on Irish companies once the ATAD is implemented in Ireland, although the precise impact cannot be assessed until domestic implementing legislation is released. Similar to a number of EU member states, Ireland is claiming a derogation in respect of the interest limitation rules to seek to delay the implementation in Ireland to up to 1 January 2024.

The ATAD was amended on 21 February 2017 (ATAD 2) to provide for minimum standards for counteracting hybrid mismatches involving EU member states and third countries. The ATAD 2 requires EU member states to either deny deduction of payments, expenses or losses or include payments as taxable income, in the case of hybrid mismatches. The ATAD 2 must be implemented in EU member states' national laws and regulations by 31 December 2019 and is to apply as of 1 January 2020, except in respect of reverse hybrid mismatches for which implementation can be postponed to 31 December 2021, and will apply as of 1 January 2022. A reverse hybrid entity, for example, is one which is treated as transparent in the jurisdiction in which it was originally formed or created and as non-transparent by another jurisdiction.

ONLINE RESOURCES

Houses of the Oireachtas

W *www.oireachtas.ie*

Description. Official website of Irish National Parliament (Oireachtas). Primary legislation (including Finance Acts) is published here.

Office of the Revenue Commissioners

W *www.revenue.ie*

Description. Official website of the Office of the Revenue Commissioners. Official guidance of the Revenue Commissioners and Ireland's double tax treaties are published here.

Department of Finance

W *www.finance.gov.ie*

Description. Official website of the Irish Department of Finance. Finance Bills and Government publications regarding Ireland's tax policy are published here.

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