The Transfer Pricing Law Review

Fifth Edition

Editors

Steve Edge and Dominic Robertson

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THE TRANSFER PRICING LAW REVIEW

FIFTH EDITION

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PREFACE

It has been a great pleasure to edit this fifth edition of *The Transfer Pricing Law Review*. This publication aims to give readers a high-level overview of the principal transfer pricing rules in each country covered in the *Review*. Each chapter summarises the country's substantive transfer pricing rules, explains how a transfer pricing dispute is handled, from initial scrutiny through to litigation or settlement, and discusses the interaction between transfer pricing and other parts of the tax code (such as withholding taxes, customs duties, and attempts to prevent double taxation).

Other than Brazil, all the countries covered in this *Review* apply an arm's-length standard and adhere, at least to some extent, to the Organisation for Economic Co-operation and Development Transfer Pricing Guidelines (the OECD Guidelines); and Brazil itself is considering aligning its TP rules with the OECD norm. However, as the chapters make clear, there remains significant divergence, both in countries' interpretation of the arm's-length standard (e.g., the transactions it applies to, the pricing methods preferred and whether secondary adjustments are imposed) and in the administration of the rules (e.g., the documentation requirements imposed, and the availability of APAs). Transfer pricing practitioners, therefore, cannot simply assume that the OECD Guidelines contain all the answers but must in fact engage with their detailed application within each country.

Given their economic importance, transfer pricing rules will be high on the corporate tax agenda (and the broader political agenda) for many years to come, and they are continuing to evolve at a rapid pace. Over the next few years, we expect the following to be among the main areas of focus.

First, the transfer pricing impact of the covid-19 pandemic still needs to be worked out by many countries, though the OECD should be commended for publishing clear guidance on this within a few months of the start of the pandemic. At this time last year, many advisers were arguing (in our view, rather optimistically) that companies that were rewarded on cost-plus or the transactional net margin method bases as routine service providers should, as a result of the pandemic, bear a share of the 'system losses' in groups that had been pushed into heavy loss-making positions by lockdowns or travel restrictions. The OECD guidance has largely rejected that approach, arguing that the existing arm's-length principle and the OECD guidelines remain fit for purpose during the pandemic. In particular, the guidance warns tax authorities to be sceptical of claims that a routine service provider should bear a share of residual losses, and notes (rightly, in our view) that this argument – if accepted – would likely require that entity to share in residual profits in happier times. Looking further forward, the experience from the 2008 financial crisis suggests that, in the medium term, the need for tax revenues is likely to push tax authorities towards a more assertive approach in transfer pricing cases.

Second, a number of countries may see disputes over the extent to which transfer pricing can be used to recharacterise transactions, rather than merely to adjust the pricing of transactions. For example, the German courts have recently held that transfer pricing rules are not limited to pricing adjustments alone; and Ireland has introduced rules that enable the Irish Revenue to impose a 'substance over form' principle. In contrast, the Canadian courts ruled, in the *Cameco* case last year, that TP recharacterisation was permitted only where the underlying transactions were 'commercially irrational'.

Third, many countries are strengthening the requirements for contemporaneous transfer pricing documentation, either aligning with the OECD master file or local file model (as in Israel), or potentially going beyond this (as the UK has proposed).

Finally, the OECD/G20 project to address the tax consequences of digitalisation continues to work towards agreeing a solution in 2021, which has become more likely following the arrival of the Biden administration in January 2021. Immediately before this preface was written, the G7 finance ministers confirmed that they have agreed to a global minimum tax rate of at least 15 per cent; and, more significantly for transfer pricing purposes, a pivot away from the arm's-length standard for large and highly profitable multinationals, under which a portion of their profits (above a 10 per cent hurdle rate) would automatically be reallocated to market jurisdictions. This is, of course, a radical shift away from the traditional arm's-length standard, but it is worth emphasising that the arm's-length principle will continue to play a crucial role for large businesses and tax authorities. This is, first, because it will take several years for the reallocation rule to become embedded in national laws and double tax treaties; and, more enduringly, because the arm's-length standard will continue to apply (1) to the vast majority of businesses that fall outside the reallocation rule, either because of size or profit margins; and (2) to the majority of the profits of those businesses that are subject to the reallocation rule. Clearly, there is much more detail to come on these changes, and we look forward to seeing this discussed in depth in the next edition of the *Review*.

We would like to thank the authors of all the country chapters for their comprehensive and illuminating analysis of each country's transfer pricing rules; and the publishing team at Law Business Research for their diligence and enthusiasm in commissioning, coordinating and compiling this *Review*.

Steve Edge and Dominic Robertson
Slaughter and May
London
June 2021

Chapter 8

IRELAND

Joe Duffy and Catherine O'Meara[1]

I OVERVIEW

Formal transfer pricing legislation was introduced in Ireland for the first time through the Finance Act 2010 for accounting periods commencing on or after 1 January 2011 in respect of transactions, the terms of which were agreed on or after 1 July 2010. Ireland's transfer pricing legislation is set out in Part 35A of the Taxes Consolidation Act 1997 (TCA).[2] The Irish transfer pricing legislation was substantially updated in the Finance Act 2019,[3] with effect from 1 January 2020.

Before the introduction of transfer pricing legislation in 2010, there were limited circumstances in which an 'arm's-length' or 'market-value' rule applied in Irish tax legislation. However, there was certainly some familiarity with the concept. For example, capital gains tax rules always required the imposition of market value on certain transactions undertaken otherwise by means of a bargain and arm's length;[4] interest in excess of a 'reasonable commercial return' may be reclassified as a distribution;[5] and, historically, income or losses qualifying for the (no longer applicable) 10 per cent corporation tax rate for manufacturing operations were calculated as they would for 'independent parties dealing at arm's length'.[6]

The transfer pricing legislation introduced in 2010 certainly broadened the scope of application of transfer pricing in Irish tax legislation, and the changes in the Finance Act 2019 further broadened the scope. As might be expected, where the transfer pricing rules apply, an arm's-length amount should be substituted for the actual consideration in computing taxable profits. The arm's-length amount is the consideration that independent parties would have agreed in relation to the arrangement in question.[7] The transfer pricing legislation applies equally to domestic and international arrangements but does not apply to small and medium-sized enterprises, pending implementation by Ministerial Order that will extend the scope to medium-sized enterprises.[8]

Irish tax legislation requires that the profits or gains of a trade carried on by a company must be computed in accordance with generally accepted accounting practice subject to any

1 Joe Duffy and Catherine O'Meara are partners at Matheson.
2 Taxes Consolidation Act 1997 (as amended up to Finance Act 2019).
3 Section 27 Finance Act 2019.
4 Section 547 TCA.
5 Section 130 TCA.
6 Section 453 TCA. Deleted by Finance Act 2012 Section 54.
7 Section 835C TCA.
8 Section 835E TCA.

adjustment required or authorised by law.[9] Therefore, Irish transfer pricing legislation may result in an adjustment to the accounting profits for tax purposes. Where a transaction is undertaken at undervalue this may be a deemed distribution by the company for Company Law purposes, and if the company does not have distributable reserves this may be an unlawful distribution by the company.

The Finance Act 2019 substantially reformed the Irish transfer pricing legislation introduced in the Finance Act 2010, and addressed the various shortcomings in the legislation that had been identified as part of an independent review. The key reforms introduced in section 27 of the Finance Act 2019 can be summarised as follows.

First, transactions the terms of which were agreed before 1 July 2010 are no longer 'grandfathered' or excluded from Irish transfer pricing legislation. Practically, the expectation of the Irish Revenue Commissioners (Irish Revenue) was that the grandfathering of transactions predating 1 July 2010 would have been lost through the passage of time, where actual trading relationships change, even though contractual terms may not. Nevertheless, this will mean that taxpayers must prepare supporting transfer pricing documentation for previously excluded transactions.

Second, the transfer pricing legislation now applies to non-trading transactions as well as trading transactions. Previously, the transfer pricing legislation only applied to profits or losses arising from the relevant activities that were taxed at the 12.5 per cent rate of corporation tax as the profits of a trade or profession.[10] Now, non-trading transactions that would be subject to the 25 per cent corporation tax rate may be subject to the arm's-length requirement. This is particularly relevant where an Irish company has granted an interest-free loan or royalty-free licence other than in the course of a trading activity. Now, the interest or royalty charged must be arm's length and supported by relevant documentation. There was some concern about possible negative tax arbitrage in respect of non-trade loans between Irish companies where interest income would be taxable at 25 per cent and interest paid as part of a trade would be deductible at 12.5 per cent. However, the Finance Act 2019 provides for an exclusion from the transfer pricing legislation in such Ireland-to-Ireland transactions where both parties are within the charge to Irish tax and neither company is a Section 110 TCA company. Nevertheless, there are limits to the scope of the exclusion, as highlighted in the Finance Act 2020,[11] so particular care must be taken on the application of the exclusion to intercompany loans or receivables between Irish companies. It is not a blanket exemption on all transactions and must be considered on a case-by-case basis. Further guidance is expected in coming months to address some of the uncertainty on the scope of this exemption.

Third, the transfer pricing legislation has been extended to capital transactions (including assets and intangible assets) where the market value of the assets or capital expenditure is greater than €25 million. There are a number of exemptions to the application to capital transactions, in particular where the disposal is treated for the purposes of Irish tax legislation as being at no gain, no loss (e.g., group transaction or reorganisation relief). It is arguable that this change is not significant given that Irish tax legislation did previously provide for an open market value rule on capital transactions between connected persons. However, this requirement is seen as particularly relevant to taxpayers ensuring there is adequate documentary evidence prepared in accordance with OECD guidelines.

9 Section 76A TCA.

10 Section 835C TCA.

11 Section 15 Finance Act 2020.

Fourth, the 2017 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2017 OECD Transfer Pricing Guidelines) have been explicitly referenced so that the Irish transfer pricing legislation must be interpreted in so far as is practicable in a manner that is consistent with the 2017 OECD Transfer Pricing Guidelines as supplemented by:

a the Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles;[12]

b the Revised Guidance on the Application of the Transactional Profit Split Method;[13] and

c such additional guidance, published by the OECD on or after the date of the passing of the Finance Act 2019, as may be designated by the Minister for Finance.

This means that as from 1 January 2020 due consideration must be given to development, enhancement, maintenance, protection and exploitation (DEMPE) functionality in pricing intangibles transactions between Irish taxpayers and associated companies resident in non-tax treaty partner countries. Previously the 2017 OECD Transfer Pricing Guidelines were only relevant as an interpretation aid to the arm's-length principle under Ireland's double tax treaties.

Fifth, Irish transfer pricing is now more prescriptive regarding the form of transfer pricing documentation and the timing for production of such documentation. Specifically, there is now an obligation to prepare a master file and a local file in accordance with Annex I and Annex II of the 2017 OECD Transfer Pricing Guidelines where the requisite financial thresholds are exceeded and such documentation must be prepared at the time at which the corporation tax return is due to be filed. Furthermore, specific penalties have been introduced for failure to provide the necessary documentation when requested.

Sixth, the transfer pricing legislation previously excluded small and medium-sized enterprises. Going forward, only small enterprises will be excluded (less than 50 employees and annual turnover/assets of less than €10 million). However, commencement of this provision is subject to Ministerial Order and in the meantime medium-sized, as well as small, enterprises remain exempt.

Seventh, the transfer pricing legislation now includes explicit 'substance over form' provisions whereby Irish Revenue may consider the substance of a transaction where the substance differs from what has been agreed in writing. In addition, Irish Revenue are expressly permitted to recharacterise transactions entered into by associated enterprises if such transaction would not have been entered into by parties acting at arm's length.

II FILING REQUIREMENTS

Prior to the Finance Act 2019, there was very little legislation detailing the documentation requirements for transfer pricing purposes. Irish Revenue had issued guidance on the expectations regarding transfer pricing documentation,[14] which endorsed (though did not make binding) the EU Council code of conduct entitled 'EU Transfer Pricing Documentation' and Chapter V of the OECD Transfer Pricing Guidelines as representing good practice.

12 BEPS Actions 8–10, OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris – approved on 4 June 2018 by the group known as the Inclusive Framework on Base Erosion and Profit Shifting.

13 Inclusive Framework on BEPS: Actions 8–10, ibid.

14 Transfer Pricing Documentation Obligations Part 35a-01-02, August 2017.

However, there is now an obligation that valid transfer pricing documentation should comprise such records as may reasonably be required to support the pricing, and should include:

a a master file (in accordance with Annex I of Chapter V of the 2017 OECD Transfer Pricing Guidelines) where the taxpayer is part of a multinational group with revenues in excess of €250 million; and

b a local file (in accordance with Annex II of Chapter V of the 2017 OECD Transfer Pricing Guidelines) where the taxpayer is part of a multinational group with revenues in excess of €50 million.[15]

There is now an obligation that the transfer pricing documentation be prepared by the time the taxpayer is obliged to deliver its corporation tax return for the period (typically the 21st day of the ninth month following the accounting period end). Furthermore, the documentation must be provided to Irish Revenue within 30 days of a request being made.

There are new transfer pricing penalty provisions for failure to comply with the documentation requirements, though timely preparation and delivery (upon request) of reasonable transfer pricing documentation should protect a taxpayer from penalties even if a transfer pricing adjustment is subsequently made.

Ireland has introduced legislation to implement country-by-country reporting requirements.[16] The Irish country-by-country reporting closely mirrors the OECD model legislation and relies on it for certain definitions. It should be noted that there are some differences between the OECD model legislation and the Irish country-by-country reporting legislation. Primarily in relation to options to appoint a surrogate parent entity or EU designated entity to provide the country-by-country report on behalf of the multinational group. Where there is a conflict, the Irish legislation takes precedence. Currently, there is no Irish legislation in respect of public country-by-country reporting, though this is an area of interest to the European Commission and ultimately may be introduced as an EU directive.

III PRESENTING THE CASE

i Pricing methods

As mentioned above, the Irish transfer pricing legislation states that in computing the taxable profits and losses of a taxpayer, the legislation shall be interpreted to 'ensure, as far as practicable, consistency' with the 2017 OECD Transfer Pricing Guidelines. The Irish transfer pricing rules do not prescribe any preferred transfer pricing methodology or methodologies. Provided the methodology is appropriate in the circumstances and adheres to general OECD principles, it should be acceptable. Therefore the identification of the most appropriate transfer pricing method, either traditional transaction methods (CUP, resale price and cost-plus) or a transactional profit method (transactional net margin and transactional profit split), and the application of that method should be in accordance with the 2017 OECD Transfer Pricing Guidelines.

Irish Revenue have previously published guidance on a simplified approach in respect of low-value intra-group services.[17] These guidelines have effectively been replaced by Section

15 Section 835G as amended by Section 27 Finance Act 2019.

16 Section 891H TCA and Taxes (Country-by-Country Reporting) Regulations 2016.

17 Guidelines on Low Value Intra-Group Services, Part 35A-01-03, March 2018.

D Chapter VII of the 2017 OECD Transfer Pricing Guidelines, although, in effect, the outcome is the same as before. In summary, where a cost-based method is determined to be the most appropriate transfer pricing method for determining an arm's-length price for low-value intra-group services, Irish Revenue are prepared to accept a markup of 5 per cent of the relevant cost base without the a requirement for a benchmarking study where the requirements of Section D Chapter VII are satisfied. First, each year the multinational should calculate a pool of all costs incurred by all members of the group in performing each category of low-value-adding intra-group services. Second, costs incurred that benefit one other group member only are excluded. Third, costs are allocated among the pool under an appropriate allocation key in accordance with the benefit received by that group member. The appropriate markup of 5 per cent is applied to the relevant cost.

Low-value intra-group services are services performed by entities within a multinational group for other entities within the same group and are typically administrative, routine and supportive services that are ancillary to the main business and do not involve valuable intangibles or risk for the service provider. In accordance with OECD Guidelines, Irish Revenue are prepared to accept a markup of 5 per cent of the cost base without a requirement for a benchmarking study to be carried out by the taxpayer to support this rate.

However, supporting documentation is required and must include the following information:

a a description of the services provided or received;
b the identity of the recipient or provider of the service;
c an explanation of why the services are considered to be low-value services;
d the rationale for the provision or receipt of the services;
e a description of the benefits of each category of services;
f an explanation and justification of the cost identification and allocation key chosen;
g confirmation of the markup applied;
h written contracts, and any amendments to the same, for the provision of services;
i calculations of the final fee charged showing the calculation of the cost base, the application of the allocation key to that cost base and the application of the markup to the apportioned cost base;
j confirmation that shareholder costs and duplicate costs have been excluded from the cost base; and
k confirmation that no markup has been applied to pass-through costs.

ii Authority scrutiny and evidence gathering

On transfer pricing matters, Irish Revenue do not typically engage in dawn raids. The taxpayer will be provided with reasonable notice of an upcoming visit or intention to initiate an audit. This is typically followed by a series of written request for further information or explanations. This may be supplemented by requests for meetings with representatives of the taxpayer and interviews with relevant persons employed by the taxpayer. Expert witnesses do not typically form part of the pre-litigation transfer pricing discussion.

While Irish Revenue will seek to understand the taxpayer's business and obtain an overview of its global business, in the normal course of events the primary focus is typically on the direct intra-group relationships to which the Irish resident taxpayer is a party. Irish Revenue do not typically consider arrangements to which the Irish taxpayer is not a party or seek to allocate profit share per jurisdiction throughout a multinational group.

However, as mentioned above, the Finance Act 2019 introduced 'substance over form' provisions whereby Irish Revenue will seek to identify the actual commercial and financial arrangements between the associated entities. Irish Revenue will then consider the transfer pricing on the actual identified arrangement if it differs from the documented legal form. Furthermore, they may even disregard the actual arrangement if it is not an arrangement that third parties would enter into.

Irish Revenue may also serve notice on a financial institution and other third parties to make books, records or other documents available for inspection, if they contain information relating to a tax liability of a taxpayer, even if the taxpayer is not known to the officer but is identifiable by other means. The officer authorised must have reasonable grounds to believe that the financial institution or other third party is likely to have information relating to this liability.

Irish Revenue are a strong advocate for international cooperation on tax matters. Ireland has entered into a more than 70 double-taxation treaties and numerous tax information exchange agreements under which Irish Revenue cooperate with foreign authorities in the exchange of tax information. Irish Revenue have information exchange obligations arising from Ireland's membership of the European Union and the OECD, both of which involve automatic exchange of information relating to cross-border tax rulings and advance pricing agreements.

IV INTANGIBLE ASSETS

As mentioned above, the Finance Act 2019 extended the Irish transfer pricing legislation to transactions involving capital assets, including intangible assets. In addition, the Act requires that the Irish transfer pricing rules are interpreted in so far as is practicable in a manner that is consistent with the 2017 OECD Transfer Pricing Guidelines as supplemented by the Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles. Therefore, Chapter VI of the 2017 OECD Guidelines should be considered carefully in all transactions involving the acquisition or disposal of intangible assets and on royalty and other licence fee payments in respect of the use of intangibles.

V SETTLEMENTS

There is no publicly available information on transfer pricing settlements concluded with Irish Revenue. However, in practice it is clear that Irish Revenue place great importance on reaching settlements that can be supported by appropriate evidence and are based on OECD principles. Under Irish Revenue's internal quality assurance programme, a selection of audits and ultimately settlements are monitored to ensure quality.

A taxpayer may make a voluntary disclosure of an underpayment of tax before an audit has commenced to benefit from reduced penalties. Once an audit has commenced, and through the appeals process, the opportunity to settle remains open, though the level of penalty mitigation may be reduced.

Once a settlement is agreed, the outstanding tax plus interest and penalties is paid and the audit is closed. In certain circumstances, where significant penalties are imposed as part of the settlement, Irish Revenue are obliged to publish the name and address of the taxpayer along with the default amount and applicable tax head.[18]

As Irish Revenue will endeavour to conclude a transfer pricing settlement based on OECD principles, they will generally accept a similar methodology going forward as long as the facts and circumstances have not changed. While a settlement discussion may be broadened and extended into a bilateral advance pricing agreement Irish Revenue will no longer agree to a unilateral advance pricing agreement in any circumstances.

VI INVESTIGATIONS

Irish Revenue maintain scrutiny on the transfer pricing matters within the framework of the existing tax compliance infrastructure with support from a team of economists. Separately, Irish Revenue's competent authority team manage international transfer pricing disputes and bilateral or multilateral advance pricing agreements. Irish Revenue have published guidance on its approach to transfer pricing investigations.[19]

Upon the introduction of the transfer pricing legislation in 2010, it was recognised that there was not a significant level of experience or understanding of the transfer pricing policies of multinationals operating in Ireland. Therefore within the context of monitoring transfer pricing compliance, in November 2012 Irish Revenue initiated a system of transfer pricing compliance reviews.[20] This comprised a non-audit intervention whereby the tax inspector would make a request for information on the transfer pricing policy within a multinational group. The information requested would include:

a the group structure;
b details of transactions by type and associated companies involved;
c pricing and transfer pricing methodology for each type of transaction;
d the functions, assets and risks of parties;
e a list of documentation available or reviewed; and
f the basis for establishing how the arm's-length standard is satisfied.

This initial non-audit intervention could lead to a more traditional audit. Over time, as experience has grown, transfer pricing audits are more common and are handled in a similar manner to audits under other tax heads. Irish Revenue have noted that the deployment of its resources will take into account risk factors and, therefore, it is unlikely that transactions between persons that involve no overall loss of revenue will be targeted.

An authorised officer can require a taxpayer to deliver, or to make available for inspection, books, records and other documents (including transfer pricing documents) or to furnish information relevant to the taxpayer's tax liability under the legislation. Following the Finance Act 2019, upon request the taxpayer must deliver supporting transfer pricing documentation

18 Section 1086 TCA.
19 Monitoring Compliance with Transfer Pricing Rules, Part 35A-01-01, June 2018.
20 See Revenue Operational Manual 35A-01-01.

(including a master file and local file where applicable) within 30 days. An authorised officer can also apply to the High Court for an order directing the person concerned to comply with the officer's requirements in respect of books, records and other information.[21]

The statute of limitations for raising an assessment is four years from the end of the accounting period in which the relevant tax return is delivered.[22] This typically means the accounting period remains open for audit for five years from the end of the accounting period in question.

Once an assessment is raised the taxpayer has 30 days to lodge an appeal to the assessment in writing. The case then moves forward to the Tax Appeals Commissioners for determination. Further appeal on points of law may be made to the High Court, Court of Appeal and ultimately the Supreme Court through the regular court system. It is worth noting that settlement negotiations can continue during the period following the issuing of an assessment and lodging an appeal.

VII LITIGATION

i Procedure

To make an appeal to an assessment the taxpayer must submit a formal notice of appeal to the Tax Appeals Commission, along with a copy of the notice of assessment or the letter of notification containing the decision to be appealed. The notice of assessment or the letter of notification will state the time limit for making an appeal but it is generally 30 days from the date on the notice of assessment or the letter or notification.

For the Tax Appeal Commissioner to accept the appeal, the taxpayer must have submitted a tax return and paid the amount of tax declared on the return. It is not necessary to pay the tax assessed by Irish Revenue in the notice of assessment. If this condition is not satisfied, Irish Revenue may object to the leave to appeal and will notify the taxpayer of the objection. While Irish Revenue can object to the acceptance of the appeal, it is a matter for the Tax Appeals Commission to accept or refuse to accept the appeal.

Most appeals end up being settled by an agreement between taxpayers and Irish Revenue rather than being decided by the Tax Appeals Commission. The appeal to the Tax Appeals Commission will remain open for the duration of any discussions with Irish Revenue. However, the Tax Appeals Commission may decide to proceed with the appeal if it thinks that it is unlikely to be settled by agreement or it is unlikely to be settled within a reasonable period.

Most appeals that end up with the Tax Appeals Commission are decided following an oral hearing before an Appeal Commissioner. A hearing involves the Appeal Commissioner listening to arguments and evidence presented by the taxpayer and an Irish Revenue official. Both parties may be represented by a tax adviser or lawyer. Before an oral hearing takes place, the Tax Appeals Commission may ask the taxpayer or Irish Revenue to provide additional information about the matter being appealed. The Tax Appeals Commission can decide not to have an oral hearing but, instead, to make a decision based on written material provided by the taxpayer and Irish Revenue. This is more likely to happen where the matter being appealed is straightforward.

21 Part 38 TCA.

22 Part 41A TCA.

During a Tax Appeal Commissioners hearing expert witnesses may be called, the number of witnesses depending on the complexity of the matter at hand. Where expert evidence of a technical nature is likely to be adduced by the parties, the Tax Appeal Commissioners may give a direction that any experts intended to be called by the parties to give evidence at the hearing of the appeal meet in advance of the hearing and prepare an agreed statement detailing those areas in which the experts are in agreement and those areas on which the experts differ.

Whether your appeal is decided with or without an oral hearing, the taxpayer is given a detailed written decision that explains why the Appeal Commissioner made the decision. All decisions are published on the Commission's website[23] but do not identify the particular taxpayer involved. To date, there have been no transfer pricing decisions published.

Either party may appeal a decision of the Appeal Commissioners to the High Court on a point of law but this is not a complete re-hearing of the appeal. Therefore, the ability to appeal will depend on the decision made by the Appeal Commissioner and the reasons given for making that decision.

ii Recent cases

There has been no case law or Tax Appeals Commissioners decision on Ireland's transfer pricing legislation, although there are cases awaiting hearing. In a case that pre-dated the transfer pricing legislation, *Belville Holdings v. Cronin*,[24] the High Court considered whether a parent company was obliged to charge for services provided to subsidiaries in circumstances where it was otherwise incurring losses as a result of expenses incurred. The High Court held that the parent company should be obliged to charge expenses incurred managing its subsidiaries but only to bring the transaction within the realm of being a *bona fide* transaction in the ordinary course of business.

VIII SECONDARY ADJUSTMENT AND PENALTIES

Irish Revenue are not entitled to impose secondary adjustments under transfer pricing legislation where those adjustments do not relate to an understatement of profits.

The Finance Act 2019 provides for specific transfer pricing related penalties. There is a penalty of €4,000 for a failure to deliver transfer pricing documentation within 30 days where requested by Irish Revenue. The penalty is increased to €25,000 (plus €100 for each day) for multinationals with global revenues in excess of €50 million. In addition, normal taxation and penalty provisions will apply. Therefore both fixed and tax-geared penalties may apply. The applicable tax-geared penalty can be as much as 100 per cent of the underpaid tax. Irish Revenue are prepared to mitigate penalties to an amount as low as 3 per cent of the underpaid tax. The applicable percentage will depend on whether there has been a qualifying disclosure, it is a first offence, it is careless behaviour or deliberate behaviour and whether consequences are significant.[25]

Where the taxpayer does not agree on the liability to a penalty then it is a matter for the court to determine whether that person is liable to a penalty.

23 www.taxappeals.ie.

24 III ITR 340.

25 See Code of Practice for Revenue Audit and other Compliance Interventions, February 2017.

IX BROADER TAXATION ISSUES

i Diverted profits tax, digital sales tax and other supplementary measures

Ireland has not introduced a diverted profits tax or other measures to supplement transfer pricing rules.

The European Commission issued a decision on 30 August 2016 that two tax rulings granted to Apple in Ireland constituted state aid. Ireland and Apple appealed this decision and on 15 July 2020, the General Court of the European Union annulled the decision of the European Commission in finding that Ireland had not granted state aid. However, even though during the years covered by the decision Ireland did not have transfer pricing rules in domestic law, the General Court confirmed that the European Commission could consider the conformity of tax rulings with an arm's-length principle under EU law. The European Commission have appealed the finding of the General Court.

ii Tax challenges arising from digitalisation

Ireland has been an active participant in tax reform discussions throughout the BEPS process. Regarding the OECD Secretariat proposals under Pillar One and Pillar Two, Ireland has adopted a pragmatic and principled approach. The Irish Minister for Finance is broadly supportive of a collective solution under Pillar One, even though a realignment of taxing rights under the Unified Approach (or a variant thereof) is likely to see a reduction in Irish corporation tax receipts. It is acknowledged that the absence of agreement does not result in the status quo but rather in a variety of unilateral taxing measures and inevitable EU proposals. A balanced global solution to the realignment of taxing rights is likely to provide greater certainty to business and to Ireland in the medium term. The Minister for Finance has expressed some reservations on the GloBE proposal under Pillar Two as going beyond what is needed to address the tax challenges of digitalisation. Nevertheless, Ireland continues to adopt a pragmatic approach given that in the absence of agreement through the Inclusive Framework, proposals on both a realignment of taxing rights and a minimum taxation are likely at EU level.

iii Transfer pricing implications of covid-19

Irish Revenue have not issued explicit guidance on the transfer pricing implications of the covid-19 pandemic. However, practical experience shows that they will look to apply the OECD guidance issued in December 2020.

iv Double taxation

To avoid double taxation on transfer pricing matters, taxpayers may request mutual agreement procedure assistance under the terms of the relevant double-tax treaty or the EU Arbitration Convention. In addition, taxpayers have access to the EU Tax Dispute Resolution Directive[26] for complaints submitted on or after 1 July 2019 in relation to a question in dispute that involves income or capital earned in a tax year commencing on or after 1 January 2018.

The legal basis for a mutual agreement procedure request falls under the equivalent of Article 25 of the OECD's Model Tax Convention on Income and on Capital in the relevant double-tax treaty. In international transfer pricing matters, it is typically advisable for each

26 2017/1852 of 10 October 2017.

affected taxpayer to make a separate request for mutual agreement procedure assistance to the competent authority of the country in which it is resident. Under the multilateral instrument agreed as part of the BEPS process Ireland has opted to allow a taxpayer approach the competent authority of either jurisdiction. The mutual agreement procedure request must be submitted in writing within the time limit applicable in the relevant double-tax treaty (typically three years, but may vary by treaty) or the EU Arbitration Convention (three years from the first notification of the action that results or is likely to result in double taxation). The time period typically begins from the date of the first tax assessment notice or equivalent.

The minimum information to be provided as part of a mutual agreement procedure request under a double-tax treaty includes details of the relevant tax periods, the nature of the action and the names and addresses of the relevant parties. For a valid request under the EU Arbitration Convention, the request should also include details of the relevant facts, copies of assessments, details of litigation commenced and an explanation of why the principles of the EU Arbitration Convention have not been observed.[27]

Double taxation can also be avoided by means of settling an advance pricing agreement. Importantly, Irish Revenue are prepared to conclude a multilateral or bilateral advance pricing agreement with double-tax treaty partner jurisdictions. Irish Revenue will not conclude unilateral pricing agreements. Irish Revenue have issued detailed guidelines on the processes for advance pricing agreements.

A request for a mutual agreement procedure can be distinguished from a request for a correlative adjustment where a foreign associated taxpayer has settled a case unilaterally with its foreign tax administration with regard to a transaction with its Irish associated taxpayer, and the associated Irish taxpayer subsequently makes a claim to Irish Revenue for a correlative adjustment. Irish Revenue will consider the appropriateness of such claims and will only allow a correlative adjustment to the profits of the Irish taxpayer to the extent that it considers the adjustment to be at arm's length.

Double taxation may be unavoidable in a situation where a non-negotiable tax settlement has been agreed in one jurisdiction and Irish Revenue do not consider the settlement reached to reflect an arm's-length position.

v Consequential impact for other taxes

Where a transfer pricing adjustment is simply booked as an adjustment to taxable profits and there is no adjustment to the actual price charged and invoiced as between the associated entities, then there should be no VAT impact. Where the adjustment is charged and invoiced, then VAT returns should be amended as appropriate. The VAT recovery consequences will then depend on the VAT profile of the entity in question.

For customs purposes, the price paid or payable is taken as the transaction value for customs purposes. Thus, a transfer pricing adjustment that results in a change in the price paid may be relevant to any market valuation used as part of customs reporting. In light of the recent decision of the European Court of Justice in *Hamamatsu Photonics Deutschland*,[28] the impact of pricing adjustments on the customs valuation declared on the importation of the goods is unclear. Irish Revenue have not published guidance or otherwise commented on the decision to date.

27 See Tax and Duty Manual Part 35-02-08.

28 C-529/16.

X OUTLOOK AND CONCLUSIONS

The Irish transfer pricing rules were only introduced in 2010, but following the BEPS process, a comprehensive review of Ireland's corporation tax code by an independent expert and extensive public consultation, the transfer pricing rules were significantly updated in the Finance Act 2019. Irish Revenue now have the legislative framework of a modern transfer pricing regime and has recognised transfer pricing as an important tool for raising tax revenues and defending the existing Irish tax base. We have seen a significant increase in transfer pricing controversy over recent months and can expect this to continue to escalate in coming years.

It is hoped that new transfer pricing guidelines will be issued shortly to provide more clarity on some particular areas of concern within the Irish transfer pricing rules, particularly the scope of the exemption from transfer pricing for transactions between Irish companies.

As regards legislative changes, it is expected that the OECD Transfer Pricing Guidance on Financial Transactions issued in 2020 will be incorporated into Irish law before the end of 2021. In the meantime, however, these guidelines are accepted as representing best practice in terms of application of the arm's-length principle to financial transactions. The Department of Finance is currently engaged in a public consultation on the introduction of the Authorised OECD Approach to the attribution of profits to branches of non-resident companies. Legislation is expected before the end of 2021.

Furthermore, as in many other jurisdictions and as outlined above, focus remains on tax developments at an international level through the OECD and Inclusive Framework and within the EU. Ireland continues to participate actively within both organisations recognising the benefits of a multilateral solution.

Appendix 1

ABOUT THE AUTHORS

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Joe Duffy is a partner in the tax group at Matheson. Joe has 20 years' experience in corporate tax law and advises on international restructurings, mergers and acquisitions, tax controversy, and transfer pricing. Joe's clients include many of the leading multinational corporations established in Ireland, primarily in the pharmaceutical, technology, industrial and service sectors.

Joe speaks regularly on international tax matters in Ireland and abroad. He has also written extensively on international tax matters. Joe has been an active contributor to Irish and OECD tax policy directly and through industry bodies for many years and is an officer on the International Bar Association Taxes Committee. Joe is the only Irish tax adviser ranked as a Who's Who Thought Leader in Tax Controversy for 2019.

Joe is a qualified solicitor, chartered accountant and tax adviser in Ireland, and has qualified as an attorney in New York. Joe previously worked in a Big Four accountancy practice and as in-house tax counsel for a US multinational.

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Catherine O'Meara is a partner in the tax department at Matheson. Catherine has over 10 years' experience advising multinational corporations doing business in Ireland on Irish corporate tax.

Catherine has a particular interest in transfer pricing, competent authority matters and business restructurings, and also has extensive experience in structuring inward investment projects, mergers and acquisitions and corporate reorganisations. Catherine's clients include many of the leading multinational corporations established in Ireland, primarily in the pharmaceutical, healthcare, ICT and consumer brand sectors.

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