InDisputes Series: USD 518m expense not deductible

Tax advice referred to as evidence against taxpayer

Ireland's tax court recently ruled that a USD 518m expense incurred by a multi-national company ("**MNC**") was not deductible for Irish tax purposes, resulting in the MNC having a material Irish tax liability. The court concluded the expense was of a capital nature which formed part of the purchase price for shares, so was not deductible as a conventional trading expense. The Irish Revenue Commissioners referred to tax advice from the MNC's tax advisors as evidence against the MNC in proceedings.

Broadly, the MNC agreed to assume USD 988m of pre-existing intra-group debt obligations of a target entity it acquired by share acquisition. The MNC repaid some of those obligations and incurred a USD 518m early prepayment expense. The purchase price for the target entity was reduced by the amount of obligations repaid by the MNC, including the USD 518m early prepayment expense. The tax court concluded that the early prepayment expense formed part of purchase price consideration, so could not be deducted as a normal business expense. It was not relevant that the target entity (which carried on a trade) may have deducted the early prepayment expense if it had paid the amount itself.

It is notable that tax advice provided to the MNC by its tax advisors was available in evidence and was referred to by the Irish Revenue Commissioners during the course of proceedings in support of their position. The materials available in evidence included:

- step papers noting uncertainty as to the tax treatment of the prepayment charge; and
- emails highlighting advisors being 'particularly concerned' about the charge and noting that it could be a 'major issue' for the MNC.

It is not clear how the taxpayer's advice came to be available in evidence before the Irish tax court. It is generally possible for a taxpayer to resist the production of advice to the Irish tax authorities where it is confidential in nature or protected by legal professional privilege. The advice in question would not appear to have been protected by legal professional privilege.

The case highlights that taxpayers facing uncertain, complicated and difficult tax issues should manage confidential correspondence with tax advisors carefully and ensure that they consider the potential for any written advice (emails or papers) to be produced in evidence in future litigation. Careful thought should be given to the extent a taxpayer should offer their tax advice in evidence in support of their position or rely on legal protections to ensure that advice is not produced.

Taxpayers should also be alert to the fact that written advice which potentially undermines a tax filing position could, if seen by a tax authority, result in allegations that the taxpayer acted carelessly or negligently in filing their tax returns. This can expose taxpayers to penalties.

Taxpayers should always consider the benefit of legal professional privilege (and other legal rights which protect confidential advice) early in the management of uncertain tax issues, as adversarial engagement with tax authorities or litigation are always possible outcomes of tax uncertainty.

Contacts

Catherine O'Meara
Partner
E: catherine.omeara@matheson.com
T: +353 1 232 2106

Kevin Smith
Partner
E: kevin.smith@matheson.com
T: +353 1 232 2045

Anna Crowley
Senior Associate
E: anna.crowley@matheson.com
T: +353 1 232 2657

Colm Brussels
Associate
E: colm.brussels@matheson.com
T: +353 1 232 2102