Ireland

Joe Duffy and Barry McGettrick

IMPORTANCE OF TRANSFER PRICING FOR MULTINATIONAL COMPANIES OPERATING WITHIN THE COUNTRY

Formal transfer pricing legislation was introduced in Ireland for the first time in 2010. The transfer pricing regime applies for accounting periods commencing on or after 1 January 2011, for transactions the terms of which were agreed on or after 1 July 2010.

Whilst Ireland's transfer pricing rules are therefore still relatively new, transfer pricing is becoming an increasing important issue to consider for multinationals operating in Ireland.

Broadly speaking, Ireland's transfer pricing rules require domestic and international transactions between associated persons undertaken in the course of trading activities to be entered into at arm's length. Where an arrangement between associated entities is made otherwise than at arm's length, an adjustment may be made to the Irish company profits. An adjustment is only made where income is understated or expenses are overstated. The transfer pricing legislation specifically provides that the transfer pricing rules should be construed in accordance with the 2010 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the **'OECD Guidelines'**).

The Irish tax authorities (the '**Revenue Commissioners**') have publicly stated that they would prefer a collaborative approach to transfer pricing. In this context, in November 2012, the Revenue Commissioners announced that transfer pricing compliance reviews ('**TPCRs**') would form the cornerstone of monitoring compliance with Ireland's transfer pricing rules. To date the TPCR process has run quite smoothly and taxpayers see it as a good opportunity to assist the Revenue Commissioners in understanding the taxpayer's business outside the pressure of a formal tax audit.

In October 2014, the Irish Department of Finance published '*Competing in a Changing World: A Road Map for Ireland's Tax Competitiveness*'. This publication followed a public consultation on Ireland's approach to the OECD base erosion and profit shifting ('**BEPS**') project. One of the key goals identified by the Department of Finance is the necessity for Ireland to increase its competent authority resources to defend transfer pricing disputes. The Irish authorities specifically acknowledge that international transfer pricing disputes are likely to increase in number over the coming years and that Ireland needs to be ready to defend its tax base. Accordingly, Ireland has pledged to strengthen the capabilities of its transfer pricing competent authority by assigning new resources to the Revenue Commissioners to meet this growing priority need.

REGULATORY FRAMEWORK

[A] Legal Authority

[1] Legislation

The Irish transfer pricing legislation is contained in Part 35A of the Taxes Consolidation Act 1997 (‘**TCA**’).

[a] Circumstances in Which the Transfer Pricing Rules Apply

Ireland’s transfer pricing rules apply in the following circumstances:

(i) There must be an ‘*arrangement*’ involving the supply and acquisition of goods, services, money or intangible assets.[1]

(ii) The supplier and acquirer must be “*associated*” at the time of the supply and acquisition. The circumstances in which two persons are associated is explored in further detail below.

(iii) The profits, gains or losses arising from the relevant activities are in respect of ‘*trading*’ activities.[2] ‘Trading’ is defined in Irish legislation as including ‘*every trade, manufacture, adventure or concern in the nature of a trade*’. This is a key unique characteristic of the Irish transfer pricing rules.

(iv) For Irish capital gains tax purposes, transactions between connected persons are deemed to be otherwise than as a bargain at arm’s length and are therefore deemed to be for a consideration equal to the market value.[3]

1. Section 835C TCA.

2. Section 835C TCA.

3. Section 547 TCA.

[b] *Consequences of the Application of the Transfer Pricing Rules*

The consequences of the application of the transfer pricing rules are as follows:

(i) Where an arrangement between associated entities is made otherwise than at arm's length, an adjustment may be made where the Irish company has understated income or overstated expenses. '*Arm's length amount*' is defined as the amount of the consideration that independent parties would have agreed in relation to the arrangement had those independent parties entered into that arrangement.[4]

(ii) The relevant person to which the transfer pricing rules apply must have available such records as may be reasonably required for the purpose of determining whether the trading profits have been computed on an arm's length basis in accordance with the transfer pricing rules.[5]

[c] *Interpretation of the Irish Transfer Pricing Rules*

Irish transfer pricing legislation specifically provides that the transfer pricing rules are to be construed in such a way as to ensure, as far as possible, consistency with the OECD Guidelines so far as they relate to trading transactions.[6] Given that the OECD Guidelines are effectively incorporated into the Irish legislation, the TCA does not go into any detail about how to apply the arm's-length test, what transfer pricing methods to employ or what comparables can or should be utilized. The Irish transfer pricing legislation is primarily concerned with defining the extent of application of the legislation.

[d] *Important Concepts*

Some of the key concepts are:

[i] Arrangement

An 'arrangement' is defined broadly in section 835C TCA to mean '*any agreement or arrangement of any kind (whether or not it is, or is intended to be, legally enforceable)*'. It includes arrangements in respect of money.

[ii] Association

4. Section 835C TCA.

5. Section 835F TCA.

6. Section 835D TCA.

The Irish transfer pricing legislation only applies where parties to a transaction are 'associated'. The basic test for association is set out in section 835B TCA which states that two persons are associated where at the time of the making or imposition of the actual provision:

(i) one of the affected persons was directly or indirectly participating in the management, control or capital of the other; or

(ii) the same person or persons was or were directly or indirectly participating in the management, control or capital of each of the affected persons.

This wording effectively mirrors the wording of the Associated Enterprises article[7] of the OECD Model Tax Convention. The broad effect is that the arm's-length principle has to be applied to provisions between two persons where one of those persons controls the other person, or they are under common control by another person or persons.

[iii] Control

Control is an essential element of the test for 'association'. The legislation specifies at section 835A TCA that control is to be read in accordance with a general definition of control for tax purposes, which is set out in section 11 TCA.

(a) Company

In the case of a company, control is the ability of a person to direct that the affairs of the company are conducted in accordance with the wishes of that person. This ability may be evidenced by the person's holding of shares or possession of voting rights in the company or any other company or by the existence of any powers conferred by the articles of association or other document regulating the company or any other company.

A person will be treated as controlled by an individual if the individual together with relatives of that individual control it. For this purpose, relative means husband, wife, ancestor, lineal descendant, brother or sister.

(b) Partnership

In the case of a partnership, control is the right to a share of more than 50% of the assets, or of more than 50% of the income, of the partnership.

[iv] Trading

7. Article 9 of the OECD Model Tax Convention.

The Irish transfer pricing rules only applies to trading transactions. Irish legislation does not contain a useful definition of 'trade'. Generally, to be trading, the Irish company should be engaged in the key profit-making commercial activity and should have the necessary people resources in Ireland with the requisite skill and expertise to perform that activity.[8] Whilst certain activities may be outsourced or subcontracted to third parties; the directors must be involved in managing the commercial activity and strategic direction of the company.

In the majority of cases, there will be little doubt about whether a company's activities constitute trading activities. Guidance as to what constitutes 'trading' is derived from case law and by reference to a set of rules known as the Badges of Trade. The Badges of Trade rules were drawn up in 1955 by the UK Royal Commission on the Taxation of Profits and Income and have been approved by Irish courts. The Badges of Trade, and matters to be considered in determining whether a particular activity constitutes a trade, include the following: (i) Subject matter; (ii) Length of ownership; (iii) Frequency of transactions; (iv) Supplementary work; (v) Circumstances for sale; and (vi) Motive for transaction.

These issues have been considered extensively in the courts. In *IRC v Livingston,*[9] the taxpayers acquired a cargo vessel and sold it at a profit and were held to be trading on the basis that even though it was an isolated transaction, substantial work was undertaken with a view to a subsequent disposal. In the UK High Court case of *Noddy Subsidiary Rights Company Limited v CIR*,[10] a company was formed to exploit the name and image rights of a character from a children's book. It was held that, in certain circumstances, the exploitation of these rights could constitute a trade. In this case, considerable weight was placed in the evidence on the high degree of activity associated with trying to promote the brand in question, seeking out and evaluating licensees and dealing with third parties. In *IRC v Fraser,*[11] the taxpayer bought and sold a large quantity of whiskey and was held to be trading on the basis that the whiskey acquired was more than he could personally use. In *Leach v Pogson*[12], over the course of four years, the taxpayer set up and disposed of twenty-nine driving schools and was held to be trading.

The Revenue Commissioners have issued a guidance note on the classification of activities as trading which states that they may be prepared to express a view as to whether a particular transaction or operation amounts to a trade or will qualify for the 12.5% rate. In arriving at a decision, the

8. This is based on relevant case law in the area as well as the Revenue Guidance on the Classification of Activities as Trading (19 Aug. 2010); available at: http://www.revenue.ie.

9. 11 TC 538.

10. 43 TC 458.

11. 24 TC 498.

12. 40 TC 585.

Revenue Commissioners endorse the *Noddy* case referred to above and have stated that the key considerations in their view are:

– Is there any commercial rationale for the type of situation proposed?

– Is there any real value added in Ireland?

– Are there employees in Ireland with sufficient levels of skills to indicate that the company is actively carrying on a trade?

The Revenue Commissioners have also published details of cases submitted and opinions issued in the period from December 2002 to December 2013 on the classification of activities as trading activities.[13] The Revenue Commissioners have stated that opinions on the classification of activities as trading are arrived at with reference to the specific facts and circumstances of each case. The key issues in the decision-making process are the activity, authority and skill levels within the company.

[v] Domestic Transactions

The Irish transfer pricing rules and arm's-length test apply to domestic trading transactions and cross-border transactions alike.

[vi] Exemptions from the Transfer Pricing Rules

(a) Small- or Medium-Sized Enterprises Exemption

Arrangements concluded within small or medium sized enterprises ('**SME**s') are excluded from the scope of Ireland's transfer pricing rules.

The definition of SME for the purpose of Irish transfer pricing legislation is closely based on the definition of enterprises which fall within the category of micro, small and medium-sized enterprises as defined in the Annex to the European Commission Recommendation of 6 May 2003.[14]

In order to qualify as an SME, the group must meet both the following conditions:

(1) it has fewer than 250 employees; and

13. Revenue Guidance on the Classification of Activities as Trading (19 Aug. 2010); available at: http://www.revenue.ie.

14. Recommendation 2003/361/EC of 6 May 2003 (OJ L124, 20 May 2003, p. 36), available at http://ec.europa.eu/enterprise/policies/sme/files/sme_definition/sme_user_guide_en.pdf.

(2) either (or both) its turnover is less than EUR 50 million or its assets are less than EUR 43 million.

The thresholds are measured on the basis of the size of the group of which the enterprise forms a part, rather than the size of the Irish taxpayer enterprise itself. The European Commission definition specifies which other companies and entities must be taken into account to calculate size.

The exemption for SMEs is set out in section 835E TCA. Where the exemption applies, the enterprise is not subject to the Irish transfer pricing rules.

(b) Grandfathered Transactions

Arrangements which were agreed before 1 July 2010 and remain unchanged are not subject to Irish transfer pricing rules.[15] The view of the Revenue Commissioners, although not published officially, is that for an arrangement to remain grandfathered the arrangement existing as at 1 July 2010 should be able to 'deliver the terms' of the ongoing arrangement. For example, a licence agreement entered into before 1 July 2010 which provides 'such arms' length rate as the parties shall determine' is unlikely to be grandfathered. However, a licence agreement entered into before 1 July 2010 which states the royalty to be '10% of sales' should be grandfathered.

The arrangements to be grandfathered need not be documented.

(c) Section 110 Securitization SPVs

Section 110 TCA contains a specific legislative requirement that the transactions entered into by a qualifying special purpose vehicle ('**SPV**') should be by way of bargain at arm's length except in respect of profit participating loan notes ('**PPLs**') issued by a qualifying company. Accordingly, certain transactions or arrangements entered into by section 110 TCA SPVs are exempt from Irish transfer pricing rules.

Interest paid on PPLs (i.e., interest which is dependent on a company's results)[16] is generally reclassified as a distribution and is not tax deductible. For example, an Irish company (IreCo) borrows from a group finance company (FinCo) at an interest rate of Euribor plus 3% plus an amount equal to 2% of IreCo's pre-tax profits. Because the interest payable by IreCo to FinCo includes an element which varies with the profits of IreCo the combined interest and profit share element is treated as a distribution. The notable exception is for securities issued in the course of securitization transactions to which section 110 TCA applies. Where the conditions of section 110 TCA are satisfied, then

15. Section 42 of Finance Act 2010.

16. Section 130(2)(d)(iii) TCA.

interest paid by the securitization SPV will be fully tax deductible, including where the interest is paid on PPLs.

A qualifying SPV must be resident in Ireland for tax purposes. It must acquire financial assets or enter into swaps or other legally enforceable financial arrangements with a market value of at least EUR 10 million, although this financial threshold only applies to the first transaction entered into by the SPV. The SPV may acquire, hold or manage any of the following financial assets (either directly or indirectly, for example, through a partnership):

– Shares, bonds and other securities	– Hire purchase contracts
– Futures, options, swaps, derivatives and similar instruments	– Bills of exchange, commercial paper, promissory notes and all other kinds of negotiable or transferable instruments
– Invoices and all types of receivables	– Carbon offsets
– Obligations evidencing debt (including loans and deposits)	– Contracts for insurance and contracts for reinsurance
– Leases and loan and lease portfolios	– Commodities which are dealt in on a recognized commodity exchange
– Acceptance credits and all other documents of title relating to the movement of goods	– Plant and machinery

Profits arising from the activities of a qualifying SPV are chargeable to corporation tax as if the SPV was a trading company.[17] This is very important as it ensures that a tax deduction is available for any interest expense incurred by the SPV. Depending on where the investors are located and how the SPV is funded, it is usually the case that the SPV is tax neutral and does not cause additional tax leakage. A combination of the treatment of the SPVs as similar to trading companies for the purpose of calculating their tax liability and the availability of an interest deduction for payments of interest (including interest on PPLs) ensures that the SPV is both profit neutral and tax neutral. Although the

17. Section 110(2) TCA.

SPV must notify the Revenue Commissioners of its intention to qualify under section 110 TCA, no special rulings or authorizations are required in Ireland for the SPV to achieve this tax-neutral status.

[2] Non-Statutory Guidance/Reference/Authority

The main form of non-statutory guidance is the Revenue Commissioners own internal manuals and published guidance notes. Published Revenue Commissioners guidance covers areas such as an overview of the legislation, their interpretation of the legislation, the documentation requirements, the TPCR process and information on the Advance Pricing Agreement ('**APA**') process and correlative adjustments.

[a] The Revenue Commissioners' Tax and Duty Manuals

The Revenue Commissioners' Tax and Duty manuals contain an overview of the approach of the Revenue Commissioners to monitoring compliance with Irish transfer pricing legislation and details of the TPCR process.[18]

The manuals also contain technical guidance for tax inspectors. Under Freedom of Information Act 1997 principles, these manuals are made available publicly, online, although the Revenue Commissioners do exercise the right to redact limited portions of the manuals, censoring comments that are of a sensitive nature. Transfer pricing is dealt with in the manual on income tax, capital gains tax and corporation tax.

The Revenue Commissioners' manuals are not binding on taxpayers, but it can be expected that the Revenue Commissioners will normally apply the interpretations and policies set out in the manuals.

[b] The Revenue Commissioners' Notes for Guidance on Legislation

In addition to the Revenue Commissioners' Freedom of Information manuals, the Revenue Commissioners have also published Notes for Guidance on Part 35A TCA which summarize the relevant legislative provisions and the Revenue Commissioners' interpretation of the legislation in an easy to read format.[19]

[c] The Revenue Commissioners' Tax Briefings

The Revenue Commissioners have published a tax briefing[20] with guidance on the documentation requirements that need to be met in the context of compliance with Irish transfer pricing rules. Given

18. www.revenue.ie/en/about/foi/s16/income-tax.../35a-01-01.pdf.

19. www.revenue.ie/en/practitioner/law/notes-for-guidance/tca/part35a.pdf.

20. Tax briefing 7 Jun. 2010 www.revenue.ie/en/practitioner/tax-briefing/archive/2010/no-072010.html.

the absence of any specific standard form for transfer pricing documentation in the legislation, this tax briefing provides practical guidance on the relevant form and content of documentation that needs to be maintained in order to demonstrate a company's compliance with the transfer pricing rules.

[d] The Revenue Commissioners' Guidance on APAs

Finally, the Revenue Commissioners have also published guidance[21] on requests for APAs and how the correlative adjustment process works. The guidance sets out where a request for an APA should be lodged and the information that should be included in the APA request. It also provides an outline of the information that needs to be submitted with a claim for a correlative adjustment to enable the Revenue Commissioners to examine the merits of a particular claim.

[B] Relationship to OECD Guidelines

The OECD Guidelines are tantamount to Irish law by virtue of the fact that Irish tax legislation states that the transfer pricing rules are to be construed in such a way as to ensure, as far as practicable, consistency with the OECD Guidelines.[22] The OECD Guidelines are therefore effectively part of the Irish legislation. Specifically, Irish legislation refers to the following guidelines:[23]

– guidelines approved on 13 July 1995 by the Council of the OECD as its Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, supplemented by:

  (i) the report on intangible property and services noted by the Council of the OECD on 11 April 1996;

  (ii) the report on cost contribution arrangements noted by the Council of the OECD on 24 July 1997;

  (iii) modified by updates approved by the Council of the OECD on 16 July 2009 and 22 July 2010 and by revision approved by the Council of the OECD on 22 July 2010.

New and revised versions of the OECD Guidelines are incorporated into Irish law by Ministerial Order.

21. www.revenue.ie/en/business/oecd-country-profiles.pdf.

22. Section 835D TCA.

23. Section 835D(1) TCA.

Consequently, Irish law does provide any specific detail about how to apply the arm's-length principle.

[C] Transfer Pricing Penalty Framework

Ireland has no specific penalty regime for transfer pricing matters. Instead, the general tax legislation[24] and the Code of Practice for Revenue Audit[25] will be applicable.

[1] Tax-Geared Penalties

Where a penalty arises, the amount of the penalty due is generally computed by the Revenue Commissioners' auditor, agreed with the taxpayer and paid. Where the taxpayer and the Revenue Commissioners do not reach agreement on the amount of the penalty or where an agreed penalty is not paid, the penalty due will be determined by a court.

The applicable penalty is a tax-geared penalty, as set out in the TCA[26] and can vary depending on: (i) the category of default giving rise to the penalty, (ii) whether the taxpayer has made voluntary qualifying disclosure in respect of the underpayment of tax and (iii) whether the taxpayer co-operates during the course of the audit.

The relevant categories of default are: (a) deliberate behaviour; (b) careless behaviour with significant consequences; or (c) careless behaviour without significant consequences.

(a) Deliberate Behaviour Penalties

Deliberate behaviour is not defined in the TCA and is, therefore, given its normal meaning. In general, deliberate behaviour involves either a breach of a tax obligation with indicators consistent with intent on the part of the taxpayer or a breach that cannot be explained solely by carelessness. For deliberate behaviour penalties to apply, the auditor is satisfied: (i) that the facts of the case are consistent with intent to default, or (ii) alternatively, that the taxpayer's actions or omissions were likely to result in a tax default and those actions or omissions cannot be explained solely by carelessness.

(b) Careless Behaviour Penalties

24. Part 47 TCA.

25. www.revenue.ie/en/practitioner/code-of-practice-revenue-audit.pdf.

26. Section 1077E TCA.

Taxpayers must exercise care in fulfilling their tax obligations. Careless behaviour is a lack of due care rendering tax liabilities returned by the taxpayer, or repayment claims made, incorrect. Careless behaviour is distinguished from deliberate behaviour by the absence of indicators, in the facts and circumstances of the default, which are consistent with intent.

'Carelessly' is defined in the TCA as meaning the 'failure to take reasonable care'. The test of reasonable care is 'whether a taxpayer of ordinary skill and knowledge, properly advised, would have foreseen as a reasonable probability or likelihood the prospect that an act (or omission) would cause a tax underpayment, having regard to all the circumstances'. The taxpayer cannot devolve the responsibility of making a correct return to an agent. If all relevant matters have not been brought to the attention of the agent, the taxpayer has not taken due care.

Where there is careless behaviour, the penalty to apply depends on whether that careless behaviour gave rise to significant consequences.

(i) Careless behaviour with significant consequences is distinguished from careless behaviour without significant consequences by reference to the size of the shortfall relative to the correct tax liability concerned.

(ii) Significant consequences: this phrase is not defined in the TCA but is used to describe the statutory penalty applicable where the tax underpaid exceeds 15% of the tax correctly payable. The 15% test is to be applied separately to each tax type and period in respect of which a return or statement of liability is required to be made by the taxpayer. In the case of a reduction in a repayment made (if any) compared with the repayment claimed, if the reduction exceeds 15% of the amount of the repayment claimed by the taxpayer a penalty in the category of careless behaviour with significant consequences will apply if the incorrect claim arose from a lack of due care by the taxpayer.

For penalties imposed on or after 24 December 2008, the following table sets out the level of mitigated penalties imposed:

Qualifying Disclosure	*Category of Default*	*Cooperation*	
		Prompted	*Unprompted*
All qualifying disclosures in this category	Careless behaviour without significant consequences	10%	3%
First qualifying disclosure in these categories	Careless behaviour with significant consequences	20%	5%
	Deliberate behaviour	50%	10%
Second qualifying disclosure in these categories	Careless behaviour with significant consequences	30%	20%
	Deliberate behaviour	75%	55%
Third or subsequent qualifying disclosure in these categories	Careless behaviour with significant consequences	40%	40%
	Deliberate behaviour	100%	100%
NO QUALIFYING DISCLOSURE	**CATEGORY OF DEFAULT**	**NO CO-OPERATION**	**CO-OPERATION ONLY**
All defaults where there is no qualifying disclosure	Careless behaviour without significant consequences	20%	15%
	Careless behaviour with significant consequences	40%	30%
	Deliberate behaviour	100%	75%

[2] Penalty for Lack of Proper Records

In addition to the specific tax-geared penalties outlined above, a fixed penalty of EUR 3,000 can also be imposed for failure to keep ‘proper records’. In the context of transfer pricing, the Revenue Commissioners generally consider a taxpayer to have defaulted in respect of the obligation to maintain proper records if the taxpayer does not have a transfer pricing report setting out a reasoned argument as to why it considered its transfer pricing to meet the arm's-length test.

DETERMINING THE APPROPRIATE INTERCOMPANY PRICE

[A] Method Selection

Neither the Irish transfer pricing legislation nor the Revenue Commissioners' manuals comment on the selection of transfer pricing method. However, that said, the OECD Guidelines are effectively incorporated into Irish law and, generally speaking, the Revenue Commissioners abide by the OECD approach, which is to say that there is no explicit hierarchy of methods which a taxpayer is obliged to apply, and the overall objective is to choose the method that allows the most reliable application of the arm's-length test. Accordingly, each of the following five transfer pricing methods set out in the OECD Guidelines are acceptable in Ireland:

(i) Comparable Uncontrolled Price Method ('**CUP**')

(ii) Transactional Net Margin Method ('**TNMM**')

(iii) Cost Plus Method ('**CPM**')

(iv) Resale Price Method ('**RPM**')

(v) Profit Split Method ('**PSM**')

A taxpayer cannot simply choose whichever of the five methods supports its preferred transfer price. If another method would more reliably apply the arm's-length test for the transaction under examination and that other method suggests that the actual transfer price is wrong, the Revenue Commissioners are likely to expect that other method to be applied.

[1] Particular Views of the Irish Tax Authorities on the OECD Methods

As noted above, the Revenue Commissioners accept each of the five OECD methods but have not published any specific commentary on their views as to each of the five methods. Therefore any transfer pricing method that is selected and applied in accordance with the OECD Guidelines should be acceptable from an Irish transfer pricing perspective. In accordance with the OECD Guidelines, the taxpayer should select the methodology that is most appropriate for the particular transaction.

[B] Comparables Selection

Similar to the position with regard to the selection of transfer pricing method, the Irish transfer pricing legislation does not contain any specific commentary about the selection of comparables.

The Revenue Commissioners have not published guidelines on the evaluation of comparables and there is no stipulation that the comparability analysis be confined to Irish or European comparables. However, the principles outlined in Chapters I and III of the OECD Guidelines clearly will be relevant. The Revenue Commissioners typically adopt a pragmatic approach in evaluating comparables. Generally, Irish tax legislation and the Revenue Commissioners place considerable emphasis on the commerciality of transactions and whether they are of a *bona fide* nature. Accordingly, in ascertaining the appropriateness of the comparables identified, results which do not apparently make commercial sense (e.g., when there is a substantial deviation from other results) should be investigated further.

Some or all of the following factors will be relevant in selecting a comparable transaction:

(i) The economically relevant characteristics should be similar. Material differences between the compared transactions and enterprises should be taken into account.

(ii) None of the differences (if any) between the situations being compared should materially affect the condition being examined in the methodology.

(iii) Reasonably accurate adjustments should be made to eliminate the effect of any differences.

(iv) Understand and compare attributes of transactions or enterprises that would affect conditions in arm's-length transactions.

(v) Relevant attributes include:

- the characteristics of the property or services transferred;
- the functions performed by the parties (taking into account assets used and risks assumed);
- the contractual terms;
- the economic circumstances of the parties; and

– the business strategies pursued by the parties.

[C] Interquartile Range

The Irish transfer pricing legislation does not contain any specific commentary about the use of the interquartile range. There is no requirement in the OECD Guidelines that an interquartile range must be used.

However, the OECD Guidelines do provide that the use of an interquartile range may enhance the reliability of a range in which non-qualifying defects remain as a result of the limitations in available information on the comparables used.

Some of the factors to be considered when looking at an interquartile range include:

(i) The interquartile range is most appropriate where all the comparables being used are more or less equally valid and there is no reason why the tested company is any better performance-wise than those comparable companies.

(ii) Using the interquartile range can cause problems by discarding some of the more accurate comparables which fall within the full range but outside the interquartile range. This problem arises when some of the companies in the reported list are less reliable comparables than others.

DEVELOPING SUPPORT FOR ACTUAL PRICING

[A] Transfer Pricing Documentation Requirements

Companies are obliged under section 835F TCA to have available such records as may reasonably be required for the purposes of determining whether the trading income of the company has been computed on an arm's-length basis. Whilst the legislation is not prescriptive as to the form that such documentation must take, the Revenue Commissioners have provided some guidance on the documentation requirements.[27]

Broadly speaking, the guidance on transfer pricing documentation requirements provides as follows:

27. Tax Briefing 07/2010.

(i) There is no uniform required form of transfer pricing documentation. However, the EU Council Code of Conduct on Transfer Pricing Documentation[28] and Chapter V of the OECD Guidelines are considered good practice.

(ii) Whilst the documentation should be available at the time the relevant tax return is made, best practice would dictate that the documentation is prepared contemporaneous with the transaction in question.

(iii) Suitable documentation may already be held by another group company (e.g., the counterpart to the transaction).

(iv) The extent of documentation required will depend on the facts. As a rule of thumb, the cost and administrative burden of preparing documentation should be commensurate with the risk involved. For example, it would be expected that extremely complex and high-value transactions would generally require more detailed analysis and related documentation than simple, easily understood and comparable, high-volume transactions.

(v) The quality of the documentation will be a key factor in determining whether any adjustment made on foot of an audit should be regarded as correcting an innocent error or as being a technical adjustment. The quality of the documentation will depend on its suitability for purpose. Again, for unusually complex high-value transactions the benchmark for what represents quality documentation will be higher.

(vi) At a minimum the transfer pricing documentation should identify:

(1) the associated persons for the purposes of the legislation;

(2) the nature and terms of transactions within the scope of the legislation;

(3) the method or methods by which the pricing of transactions were arrived at, including any study of comparables and any functional analysis undertaken;

28. OJ No. C176, 28.07.2006, p. 1.

(4) how that method has resulted in arm's-length pricing (this will usually include an analysis of market data or other information on third-party comparables);

(5) any budgets, forecasts or other papers containing information relied on in arriving at arm's-length terms; and

(6) the terms of relevant transactions with both third parties and associates.

[1] Time at Which Documentation Should Exist

Records and documentation must be maintained in a timely manner on a continuous and consistent basis. A taxpayer should be able to provide evidence to demonstrate that it has made a reasonable effort to apply the arm's-length test in its tax return. Therefore, documentation should be available at the time the relevant tax return is made although it is best practice that the documentation is prepared contemporaneously with the transaction in question. This approach assists in better quality records due to the fact that the transfer pricing documents will have been prepared directly following completion of the transfer pricing analysis for the transaction in question.

A taxpayer is not obliged to submit transfer pricing documentation unless requested to do so by the Revenue Commissioners. However the taxpayer is obliged to retain and have available for inspection sufficient documentation and records to demonstrate the taxpayer's compliance with the transfer pricing rules. The records must be prepared in a timely manner and must demonstrate that the taxpayer's relevant income has been computed in accordance with the transfer pricing rules. The records should be prepared in English or Irish in written form or by means of any electronic, photographic or other process permitted for accounting records. The records must be retained for a period of at least six years after the completion of the relevant transaction to which they relate.

[B] Relationship between Fulfilling Documentation Requirements and Protection from Adjustments

There is no way for Irish taxpayers to obtain absolute protection from transfer pricing adjustments other than through an APA. However, a taxpayer can minimize the risk of suffering a transfer pricing adjustment by taking and documenting a diligent approach to applying the arm's-length test. Such a taxpayer has a lower risk of being selected for audit following a TPCR and therefore is at lower risk of suffering an adjustment on audit.

[C] Sufficiency of Compliance Reports for Purposes of Applying Penalties

A comprehensive and robust system of document and record retention will strengthen a taxpayer's position in its dealings with the Revenue Commissioners. The quality of the documentation maintained will be a key factor in determining whether an adjustment on audit should be regarded as correcting an innocent error or as being a technical adjustment. For example, a record of the transfer pricing analysis that was carried out should be sufficient to illustrate that reasonable care has been taken and should therefore mitigate tax geared penalties in the event of an adjustment resulting in an underpayment.

However, maintaining documentation is no guarantee that penalties will not be applied. For example, where a taxpayer has not taken sufficient care to apply the arm's-length test properly, penalties might be applied even if the taxpayer has extensive and comprehensive documentation.

HOT TOPICS/SPECIAL CONSIDERATIONS IN IRISH TRANSFER PRICING

[A] Hot Topics

[1] Transfer Pricing Compliance Reviews

The Revenue Commissioners have adopted a collaborative approach to transfer pricing. The Revenue Commissioners announced in November 2012 that TPCRs would form the cornerstone of monitoring compliance with the transfer pricing rules. The TPCR process is designed to optimize utilization of scarce human resources in the Revenue Commissioners. Taxpayers are selected on a risk assessment basis to conduct a self-review on their transfer pricing for a specified period. Following notification of their selection, taxpayers have three months to conduct the self-review and to provide a report to the Revenue Commissioners. The TPCR is considered to be a substantial compliance check in its own right and is not normally the precursor to a tax audit, albeit an audit may follow. To date the TPCR process has run quite smoothly and is seen as a good opportunity to assist the Revenue Commissioners in understanding the taxpayer's business outside the pressure of an audit.

[2] Increased Competent Authority Resources

In October 2014, the Irish Department of Finance published '*Competing in a Changing World: A Road Map for Ireland's Tax Competitiveness*'. This publication followed a public consultation on Ireland's approach to the OECD BEPS project.

One of the key goals identified by the Department of Finance is the necessity for Ireland to increase competent authority resources to defend transfer pricing disputes. The Department of Finance foresees international transfer pricing disputes as likely to grow in number in the coming years and they acknowledge that Ireland must be ready to defend its tax base. Therefore Ireland has pledged to strengthen the capabilities of its transfer pricing competent authority by assigning new resources to the Revenue Commissioners to meet this priority need.

[B] Thin Capitalization/Lending/Guarantees/Leasing

[1] Thin Capitalization

There are no specific thin capitalization rules in Ireland or requirements for a minimum debt-equity ratio. The transfer pricing rules are quite new and as yet the Revenue Commissioners have not sought to use the transfer pricing rules to challenge the capitalization of an Irish company. Nevertheless, Irish tax legislation[29] does seek to limit or deny a tax deduction for certain interest payments to related parties where the securities are related to or convertible into shares, are profit participating or the interest represents more than a reasonable commercial rate.

While Irish tax legislation does not prescribe minimum equity requirements, interest may be reclassified as a distribution and a tax deduction disallowed or limited where interest is paid on securities which are:

(i) Securities issued otherwise than for new consideration or are convertible directly or indirectly into shares.[30]

(ii) Securities where the interest paid is to any extent dependent on the company's results or is at more than a reasonable commercial rate (in the latter case the excess interest over the reasonable commercial rate is a distribution).[31] This provision does not apply to certain securities issued by securitization companies to which section 110 TCA applies.[32]

29. Section 130 TCA.

30. Section 130(2)(d)(i) & (ii) TCA.

31. Section 130(2)(d)(iii) TCA.

32. Section 110(4) TCA.

(iii) Securities issued by an Irish company and held by a non-resident related company.[33] However, there are extensive exemptions to this provision where the interest is paid to a related company in an EU Member State or a double tax treaty partner country, or by certain Irish resident finance companies and the interest represents a reasonable commercial rate.[34]

[2] Lending

[a] Interest

The transfer pricing rules ensure that an arm's-length interest rate is charged subject to the proviso that an adjustment will only be made where the Irish company has understated income or overstated expenses.[35] Similarly, inter-company interest is limited to a reasonable commercial rate.[36] Once the transfer pricing rules apply, there are no safe harbours.

The Revenue Commissioners have not published specific guidance on how to determine an appropriate arm's-length interest rate or a reasonable commercial return. The transfer pricing rules state that 'for the purposes of this section the "arm's length amount" for an arrangement is the amount of the consideration that independent parties would have agreed for the arrangement had those independent parties entered into that arrangement'.[37]

Typically, the Revenue Commissioners will apply an OECD principled approach to transfer pricing matters. An arm's-length interest rate can be determined by performing an appropriate comparability analysis. The typical process outlined in Chapter III of the OECD Guidelines should be appropriate. The issues that are particularly important in the context of interest include:

– considering the period to be covered (term);

– understanding the taxpayer's circumstances (industry, risk profile, etc);

– understanding the transactional and functional analysis;

– identifying internal or external comparables; and

33. Section 130(2)(d)(iv) TCA.

34. Sections 130(2B) and 452 TCA.

35. Part 35A TCA.

36. Section 130 TCA.

37. Section 835C(3) TCA.

– application of the CUP method & comparability adjustments.

[b] Cash Pooling

The Revenue Commissioners have not published specific guidance on the transfer pricing aspects of cash pooling arrangements. The transfer pricing rules will only apply to an Irish company as cash pool leader when the Irish company is considered to be engaged in a trade in Ireland. If the Irish company has not reached a threshold whereby it is considered to be engaged in a trade, then the Irish company need not charge an arm's-length interest rate.

The Revenue Commissioners have issued opinions on whether a cash pooling operation can constitute a trade. Some of the circumstances where trading status was confirmed in the context of cash pooling operations include:

– Where activities will be carried on by persons with appropriate skills and expertise and the real strategic business decisions will be made by the company.

– Where the company will be actively involved in negotiating and arranging loans for other group companies and also cash pooling and currency management for the group.

– Where the company will enter into a substantial number of treasury transactions, will employ highly skilled and specialized staff to operate and manage the group cash pooling arrangement, negotiate new debt facilities with third parties as well as intergroup loan agreements and managed the foreign exchange exposure of the group.

When the transfer pricing rules apply they will require that an Irish cash pool leader receives an arm's-length remuneration for its services, subject to the proviso that no adjustment will be made when the Irish company receives an overstated income. The Revenue Commissioners should follow the OECD Guidelines in determining the appropriate arm's-length fee. This means that the Revenue Commissioners would consider all relevant facts and circumstances including the functions performed, assets owned and risks assumed by the Irish company. Often, this analysis will determine whether the cash pool leader is operating in an entrepreneurial fashion as an internal bank or rather as a mere service provider or somewhere in between. In addition, it will determine whether the cash pool leader should earn a profit based on the spread on loans in and out or would simply earn a markup on costs incurred.

The Revenue Commissioners should follow the OECD Guidelines in determining the allocation of the cash pool benefit and seek to determine where that benefit would rest in comparable third-party arrangements. Put simply, this means that the cash pool benefit should be allocated in accordance with the functions performed, assets held and risks assumed by the respective parties in the cash pooling arrangement. For example, in cases when the cash pooling is a notional pooling rather than a physical pooling of cash, it may be that pool members perform more day-to-day functions and therefore could expect to share in a greater proportion of the cash pool benefit.

[3] Guarantees

The Revenue Commissioners have not published specific guidance on the transfer pricing aspects of guarantee fees and there is little in the way of established practice in Ireland. An Irish company would only be obliged to charge a guarantee fee under the transfer pricing rules when the Irish company was engaged in a trade that included the provision of guarantees.

The Revenue Commissioners have not issued any opinions specifically addressing whether the provision of guarantees can constitute a trade. However, the key questions to be considered would be whether the Irish company had entered into the guarantee as part of its wider financial trade, the number and frequency of guarantees entered into by the Irish company, whether the Irish company itself negotiates and concludes the guarantee agreements, the level of activity associated with managing the guarantees and whether the Irish company has the personnel of necessary skill and experience to manage the guarantees.

When an Irish company pays a guarantee fee in the course of its trade, the transfer pricing rules and general rules as to deductibility of expenses[38] will seek to ensure that the guarantee fee charged is not excessive by disallowing a tax deduction for the portion that is excessive. However, no adjustment will be made when the Irish company is paying less than an arm’s-length guarantee fee. The general rules on the deductibility of expenses deny a deduction for an expense that is not ‘wholly and exclusively’ incurred for the purposes of a trade.[39] In practice, companies would seek to demonstrate that a guarantee fee is ‘wholly and exclusively’ for the purposes of a trade on the basis that it reflects an arm’s-length guarantee fee.

There is no legislation or guidance from the Revenue Commissioners setting out how the arm’s-length guarantee fee should be determined. An arm’s-length guarantee fee can be determined by performing an appropriate comparability analysis in accordance with OECD principles. Some of the particular matters to be considered in performing this analysis in respect of a guarantee arrangement are as follows:

38. Section 81 TCA.

39. Section 81(2) TCA.

– The guarantee fee will vary depending on risk of default and therefore the company's business plan and wider industry, economic, competitive and regulatory factors will impact on the risk level inherent in the guarantee.

– Consider the specific terms of the guarantee and underlying loan including the sum guaranteed, recourse under guarantee, purpose of loan, maturity, security provided and currency.

– The implicit support that a company may receive by reason of being part of a larger group is certainly a relevant factor in performing a comparability analysis. However, while it may constitute a real benefit for that particular company, it is not a benefit that necessarily must be priced. The OECD Guidelines do not consider an intra-group service to have been provided when a company obtains a higher credit rating attributable solely to being part of a larger concern.[40]

[4] Leasing

The Revenue Commissioners have not published specific guidance on the transfer pricing aspects of leasing arrangements. The transfer pricing rules will only apply to an Irish company providing leasing services when the Irish company is considered to be engaged in a leasing trade in Ireland.

The Revenue Commissioners have however published opinions on whether particular leasing operations constitute a trade. Some of the factors which are relevant in determining trading status in the context of leasing operations include:

– A company established to purchase and on lease aircraft to a specific customer was not found to be trading on the basis that the company was not involved in the negotiation or decision-making process nor would it be looking for new business.

– A company established to take over the operation of leases negotiated by its foreign-based parent company was not found to be trading on the basis that the company was established to sublease from its parent and was not involved in the negotiations of the leases. The company had one nominee director, no staff or management structure and its registered office appeared to be unoccupied and did not have a phone connection.

40. See OECD Guidelines para. 7.13.

- A company established to hold and lease aircraft was found to be trading on the basis that the company, through its Board of Directors, would be actively involved in the negotiations of the terms of the leases and will also be responsible for all decisions regarding the management of the leasing business and the remarketing of the aircraft at the end of the lease period.

There is no legislation or guidance from the Revenue Commissioners regarding how to establish an arm's-length leasing fee. Therefore, a comparability analysis in accordance with Chapter III of the OECD Guidelines similar to that outlined in the table above should be performed. Some of the particular matters to be considered in performing this analysis in respect of leasing arrangements are as follows:

- The type of leasing arrangement: An operating lease or a finance lease and the type of asset in question (i.e., big-ticket international aircraft leasing or domestic equipment leasing).

- There is no specific legislation dealing with the legal aspects of leasing in Ireland; therefore, the particular contractual terms are critical, in particular payment terms, time frame, allocation of risk, maintenance responsibility.

- Quantum of deposit or other security provided by lessee.

When an Irish company incurs leasing fees in the course of its trade, the transfer pricing rules and general rules as to deductibility of expenses[41] will seek to ensure that the fee charged is not excessive by disallowing a tax deduction for the portion that is excessive. However, no adjustment will be made when the Irish company is paying a less than arm's-length fee. The general rules on the deductibility of expenses deny a deduction for an expense that is not 'wholly and exclusively' incurred for the purposes of a trade.[42] In practice, companies would seek to demonstrate that a leasing fee is 'wholly and exclusively' for the purposes of a trade on the basis that it reflects an arm's-length fee. An arm's-length fee can be determined by performing an appropriate comparability analysis in accordance with OECD principles as discussed above.

41. Section 81 TCA.

42. Section 81(2) TCA.

[C] Interest-Free Loans

Where the Irish company has not reached a threshold where it is considered to be engaged in a trade including the making of loans, then the Irish company need not charge an arm's-length interest rate. The Irish transfer pricing rules do not impose an arm's-length interest rate on an inter-company loan where an Irish company is not engaged in a trade involving the making of loans. This means that from an Irish tax perspective, an Irish company can make interest-free loans to group companies where that Irish company is not engaged in sufficient activity so as to constitute a trade.

Therefore, to determine the application of the transfer pricing rules, the key question for Irish companies providing intercompany loans will often be whether the Irish company is considered to be engaged in a trade which includes the making of loans. The Revenue Commissioners have considered the meaning of a trade in a number of instances for intra-group finance operations. The key factors indicating a trade will include the number of loans entered into by the Irish company, whether the Irish company itself negotiates and concludes the loan agreements, the level of activity associated with managing the loans and whether the Irish company has the personnel of necessary skill and experience to manage the loans.

The Revenue Commissioners have issued several opinions in the context of group finance or treasury operations. It is clear from these opinions that the Revenue Commissioners place considerable emphasis on the number of employees when considering whether an activity is to be regarded as trading. Some of the factors which generally support a finding of trading status in the context of corporate treasury or group financing activities include:

(i) The Irish company is actively involved in sourcing and negotiating the loan arrangement.

(ii) The Irish company makes the decision to make the loan (rather than it being made elsewhere in the group).

(iii) The profits are generated by the Irish company's activities.

(iv) The Irish company actively manages the surplus cash of the group and its currency risk and will be responsible for negotiating and managing external debt requirements.

(v) The day-to-day operations are managed in Ireland by staff with appropriate skills.

(vi) The Irish company will actively manage intra-group financing transactions, will be responsible for any required hedging of foreign/interest rate risks and will be able to independently make daily investing/ borrowing/intercompany funding decisions.

Where an Irish company is paying interest on an intercompany loan in the course of its trade, the transfer pricing rules and general rules as to deductibility of expenses[43] will seek to ensure that the interest rate charged is not excessive by limiting the tax deduction for the portion that is excessive. However, no adjustment will be made where the Irish company is paying a less than arm's-length interest rate. The general rules on the deductibility of expenses deny a deduction for an expense that is not 'wholly and exclusively' incurred for the purposes of a trade. In practice, companies would seek to demonstrate that an interest payment is 'wholly and exclusively' for the purposes of a trade on the basis that it reflects an arm's-length interest rate.

[D] Management Services

In Ireland, it is quite common for management or head office services to be provided to or received by an Irish group company. This is particularly the case for multinationals. The Revenue Commissioners have not published any specific guidance on their approach to this issue in the context of transfer pricing. Ireland's approach is in accordance with general OECD principles. Separately, under Irish domestic rules, a company is only entitled to take a tax deduction for an expense which is revenue (as opposed to capital) in nature and is wholly and exclusively incurred for the purposes of its trade. Action 10 of the BEPS Action Plan makes proposals for the replacement and updating of the OECD Guidelines in the context of intra-group services.

LOCAL COUNTRY ADMINISTRATIVE PRACTICES

[A] Availability of Advance Pricing Agreements

Ireland actively participates in bilateral and multilateral APAs. generally, Ireland will not conclude unilateral APAs. There are no specific Irish legislative provisions dealing with APAs and Ireland will generally address APA requests under the same procedure as a mutual agreement procedure ('**MAP**').

Therefore bilateral APAs are agreed in accordance with the MAP article of the relevant double taxation treaty. For all bilateral APAs, the Revenue Commissioners adhere to the detailed guidelines for concluding APAs which are contained in 'Annex to Chapter IV: Advance Pricing Arrangements' of the OECD Guidelines. All bilateral APAs are negotiated on the basis of identifying an arm's-length

43. Section 81 TCA.

remuneration for the transactions covered by the APA and in each case the transfer pricing method applied will be in accordance with one of the methodologies contained in Chapter II of the OECD Guidelines.

In addition, when negotiating a bilateral APA with an EU Member State, the Revenue Commissioners will adhere to the best practices for the conduct of APA procedures which are set out in the Guidelines for Advance Pricing Agreements within the EU which have been published by the EU Joint Transfer Pricing Forum.

The main features of the Irish approach to APAs are as follows:

(a) It will typically take eighteen to twenty-four months to conclude a bilateral APA.

(b) Typically, APAs cover three to five years, but a longer period may be considered depending on the characteristics of the transaction covered by the APA. Rollbacks are available.

(c) There are no restrictions on the types of related party transactions or issues that can be covered by APAs.

(d) The APA programme is of growing importance in recent years although the total number of APAs in force at the end of 2014 was only ten.

(e) APA negotiations are typically handled by the competent authority team who will agree double tax cases to be settled under a double tax agreement. This is a separate team to the Revenue Commissioners' case officer assigned to that taxpayer.

The advantages and disadvantages of obtaining an APA with the Revenue Commissioners are similar to most countries.

[B] Access to Competent Authority

There is no formal procedure to initiate Irish participation in a MAP. In practice, the process starts with an informal expression of interest by the taxpayer. A meeting is held at which the taxpayer describes the transactions and trading relationships and explains why the situation is so complex that an APA is appropriate. The Revenue Commissioners will normally indicate at this stage whether they would be inclined to accept a formal application into the APA programme.

The procedure for making an APA request is also relatively informal. The taxpayer must apply to the Revenue Commissioners in writing setting out the details of its case. The APA request must:

– be in writing;

– quote the legal basis for the APA (i.e., the relevant Article in Ireland's double taxation treaties/agreements;

– explain why an APA is considered necessary;

– explain the issues involved (attaching relevant background documentation);

– set out what the requester considers to be the correct outcome (attaching any documents, case law, etc, backing up the requester's view).

The Irish competent authority should receive the same information as the other competent authority(ies).

Typically, competent authority procedures take several years to complete, and can be onerous for the taxpayer (as well as tax authorities).

[C] Other Items

[1] Transfer Pricing Enquiries

The TPCR is the cornerstone of the Revenue Commissioners monitoring of compliance with the transfer pricing rules. TPCRs are not formal audits and adjustments may be agreed upon under the TPCR without the imposition of any penalties. If the Revenue Commissioners are satisfied with the results of the TPCR, a letter confirming that they have no further enquiries will be issued, giving taxpayers comfort that their transfer pricing policy for that period has been accepted by the Revenue Commissioners. Where the Revenue Commissioners are not satisfied with the level of information received, or with the transfer pricing, TPCRs may be escalated to more formal audits (with the related risk of penalties). However, the Revenue Commissioners considers the TPCR to be a substantial compliance check in its own right and not normally a precursor to a transfer pricing audit. While the TPCR process is in its infancy, the approach to date, in respect of the TPCRs, has been cooperative and open.

The report to the Revenue Commissioners under the TPCR should provide the following information:

(i) the group structure;

(ii) details of transactions by type and associated companies involved;

(iii) pricing and transfer pricing methodology for each type of transaction;

(iv) the functions, assets and risks of parties;

(v) a list of documentation available/reviewed; and

(vi) the basis for establishing how the arm's-length standard is satisfied.

The information does not have to be provided in a particular format and the Revenue Commissioners have confirmed that where a transfer pricing study or report already exists, that study will suffice, provided it contains the information listed above.

[2] Risk Assessment

Taxpayers are selected for TPCRs on a risk assessment basis to conduct a self-review on their transfer pricing for a specified period. Taxpayers have three months to conduct the self-review and to provide a report to the Revenue Commissioners.

Following a TPCR, the Revenue Commissioners may proceed to issue the taxpayer with a transfer pricing audit notification letter. A transfer pricing audit is conducted in the same manner as a regular corporation tax audit. The tax audit and appeal procedure can be summarized as follows:

(i) Cases are selected for audit by the Revenue Commissioners primarily on a risk assessment basis though some random audits are conducted. In addition a full Revenue Commissioners audit may escalate from the conduct of a TPCR.

(ii) Typically, the Revenue Commissioners will provide twenty-one days' notice of an audit setting out the scope and nature of the audit.

(iii) Following notification of the audit the taxpayer is still entitled to file a prompted qualifying disclosure of any underpayment of taxes which can ultimately result in a mitigation of penalties.

(iv) Following the audit the Revenue Commissioners may issue a notice of assessment to corporation tax setting out the underpayment of tax together with interest and penalties payable by the taxpayer.

(v) The taxpayer must lodge an appeal to an assessment within thirty days. Appeals are heard by the Appeal Commissioners.

(vi) If the Appeal Commissioners determine the appeal the matter may be reheard before the Circuit Court and ultimately appealed to the High Court and Supreme Court.

(vii) If the Appeal Commissioners dismiss the appeal the taxpayer can only appeal to the High Court or Supreme Court if he considers that having regard to the available evidence the dismissal of the appeal was unreasonable.

Based on the findings of the audit, the Revenue Commissioners may decide to issue an assessment seeking an adjustment in respect of the relevant tax period. Generally, the Revenue Commissioners must issue such an assessment within five years after the end of the tax period to which the adjustment relates, provided the taxpayer has filed a tax return for the period that contains a full and true disclosure of all material facts.

The Revenue Commissioners generally adopt a pragmatic approach to resolving transfer pricing disputes whereby a taxpayer can engage in discussion and negotiation with the Revenue Commissioners throughout the course of an audit and appeals process.

SIGNIFICANT TRANSFER PRICING LITIGATION

As Ireland has only recently introduced transfer pricing rules there are no litigated Irish transfer pricing cases. Furthermore, the Revenue Commissioners are currently trying to position transfer pricing as a collaborative rather than confrontational matter and therefore transfer pricing litigation is not seen as a policy priority right now.

Whilst there are no litigated cases on Ireland's transfer pricing rules, it should be noted that decisions of foreign courts can be of persuasive authority in Ireland and can be followed at the option of the Irish courts. Decisions of other common law countries are frequently cited and adopted by the Irish courts, particularly where there is no Irish case law governing the issue in question. Given the origins of the Irish legal system and the similarities between the Irish and English tax systems, English decisions are the most commonly cited foreign decisions in Ireland. The Irish courts, however, are fully entitled to ignore the foreign case law.

[A] Current Cases

There are no transfer pricing cases currently before the Irish courts.

[B] Historical Cases of Note

There are no litigated Irish transfer pricing cases following the introduction of transfer pricing legislation with effect from accounting periods commencing on or after 1 January 2011. However, Belville Holdings v. Cronin[44], a High Court case that predates the introduction of the transfer pricing legislation, is often quoted as supporting the proposition of a general transfer pricing rule in Irish law outside the transfer pricing legislation. Here, the taxpayer was a holding company that also carried on the trade of managing and financing its subsidiaries. The holding company recharged only a part of its operating expenses to the subsidiaries thereby generating a trading loss which it sought to set off against dividends received by its subsidiaries. The High Court held that, effectively, a charge should be made by the holding company for the service it provided and the charge should be an amount to bring the transaction within the realm of being a bona fide transaction in the ordinary course of business. The court did not give any view as to what the appropriate charge should be and it is not certain how widely the *Belville* case can be interpreted. A broad interpretation of *Belville* could be used to support the notion that an Irish parent company should be obliged to charge subsidiaries for services rendered (including possibly the provision of a guarantee). However, it is not certain that the application of *Belville* could extend beyond trading transactions (and therefore would not extend beyond the Irish transfer pricing legislation) and it is not certain that *Belville* requires an 'arm's-length charge' (rather it requires a charge to bring it 'within the realm of being a bona fide transaction').

COUNTRY-SPECIFIC PLANNING OPPORTUNITIES

In an Irish context, the key issue for most multinational enterprises is access to the 12.5% rate of corporation tax. The 12.5% corporate tax rate applies to profits from trading activities. Broadly speaking, a company will be trading in Ireland where an active business is conducted in Ireland in circumstances where employees with the necessary skills and expertise are carrying on the profit making activities of the business.

Given that access to Ireland's 12.5% rate of corporation tax is substance based, Ireland is fully aligned with the OECD Guidelines and recent developments under the BEPS project. Through the BEPS project, the OECD is recommending new international tax standards to ensure the coherence of corporate income tax at an international level. These recommendations include a move to better align rights to tax with economic activity by aligning profit with substance and value creation.

44. III ITR 340.

AUTHORS’ BIOGRAPHIES

Joe Duffy

Joe Duffy is a partner in the Tax Group at Matheson. He specializes in international tax matters with particular focus on transfer pricing and intangible property structuring. He also advises on structuring inward investment projects and corporate reorganizations, as well as mergers and acquisitions. His extensive experience in international tax and transfer pricing matters includes time spent as in-house tax counsel in a large multinational software company. Joe advises a wide range of international clients primarily in the ICT, life sciences, services, manufacturing and consumer brand sectors.

Joe speaks regularly on international tax matters focusing particularly on transfer pricing and the Irish tax aspects of intangible property ownership and development. As well as being admitted to the Roll of Solicitors in Ireland, Joe has qualified as an attorney in New York, a chartered accountant and a chartered tax advisor of the Irish Taxation Institute.

Barry McGettrick

Barry McGettrick is a senior associate in the Tax Group at Matheson. He specializes in international tax matters. He also advises on structuring inward investment projects and corporate reorganizations, as well as mergers and acquisitions. Barry advises a portfolio of international clients primarily in the ICT, life sciences, manufacturing and retail sectors.

Barry speaks and writes regularly on international tax matters. As well as being admitted to the roll of solicitors in Ireland, Barry is admitted as a solicitor in England & Wales (non-practising), is a qualified financial advisor and is a chartered tax advisor of the Irish Taxation Institute.

LIST OF ABBREVIATIONS

APA	Advance Pricing Agreement
BEPS	Base Erosion and Profit Shifting
CPM	Cost Plus Method
CUP	Comparable Uncontrolled Price
CUT	Comparable Uncontrolled Transaction
EU	European Union
EUR	Euro
MAP	Mutual Assistance Procedure
OECD	Organisation for Economic Co-operation and Development
PE	Permanent Establishment
PPL	Profit Participating Loan
PSM	Profit Split Method
RPM	Resale Price Method
SME	Small or Medium-sized Enterprise
SPV	Special Purpose Vehicle
TCA	Taxes Consolidation Act 1997
TNMM	Transactional Net Margin Method
TPCR	Transfer Pricing Compliance Review