

Solicitors
70 Sir John Rogerson's Quay
Dublin 2 Ireland

T +353 1 232 2000
F +353 1 232 3333
W www.matheson.com
DX 2 Dublin

Matheson

Tax Policy Division
Department of Finance
14-16 Upper Merrion Street
Dublin 2
By Email taxpolicy@finance.gov.ie

Our Ref

Your Ref

21 August 2015

Dear Sir or Madam

Tax Treatment of Expenses of Travel and Subsistence for Employees and Office Holders

Matheson is an Irish law firm and our primary focus is on serving the Irish legal and tax needs of international companies and financial institutions doing business in Ireland. Our clients include over half of the Fortune 100 companies. We also advise seven of the top ten global technology companies and over half of the world's 50 largest banks. We are headquartered in Dublin and also have offices in London, New York and Palo Alto. More than 600 people work across our four offices, including 75 partners and tax principals and over 350 legal and tax professionals.

Matheson welcomes the opportunity to comment on the current law and practice in relation to the tax treatment of expenses of travel and subsistence. We have limited our comments to the treatment of expenses incurred by non-executive directors.

In summary:

- as a policy matter, the appointment of non-executive directors to the boards of Irish companies should be encouraged;
- taxing expenses of travel and subsistence incurred by non-executive directors is unduly penal and will discourage the appointment of such directors to the boards of Irish companies;
- it should be clarified that the reimbursement of expenses incurred by non-executive directors who attend board meetings in Ireland does not give rise to a charge to Irish tax.

Dublin

London

New York

Palo Alto

Managing Partner: Liam Quirke - Chairman: Michael Jackson - Partners: Brian Buggy, Chris Quinn, Tim Scanlon, Helen Kelly, Sharon Daly, Ruth Hunter, Tony O'Grady, Paraic Madigan, Michael O'Connor, Tara Doyle, Anne-Marie Bohan, Patrick Spicer, Turlough Galvin, Patrick Molloy, George Brady, Brid Munnally, Robert O'Shea, Joseph Beashel, Deirdre-Ann Barr, Cara O'Hagan, Dualta Counihan, Niall Horgan, Deirdre Dunne, Alistair Payne, Fergus Bolster, Christian Donagh, Bryan Dunne, Libby Garvey, Shane Hogan, Peter O'Brien, John O'Connor, Thomas Hayes, Nicola Dunleavy, Julie Murphy-O'Connor, Mark O'Sullivan, Alan Connell, Brian Doran, John Gill, Alan Chiswick, Joe Duffy, Pat English, Carina Lawlor, Shay Lydon, Aidan Fahy, Niamh Counihan, Gerry Thornton, Liam Collica, Darren Maher, Michael Byrne, Philip Lovegrove, Rebecca Ryan, Aiden Kelly, Eanna Mellett, Catherine O'Meara, Elizabeth Grace, Deirdre Cummins, Alan Keating, Peter McKeever, Alma Campion, Brendan Colgan, Gina Conheady, Garret Farrelly, Michael Finn, Rhona Henry, April McClements, Gráinne Dever. - Tax Principals: Greg Lockhart, John Kelly, Catherine Galvin - Head of London Office: Stanley Watson. Head of U.S. Offices: John Ryan - Of Counsel: William Prentice, Paul Glenfield, Patrick Sweetman. - Consultants: Don McAleese, Stuart Margetson, Anthony Walsh, Roderic Ennor.

1 Current position

As it currently stands, the tax treatment of expenses incurred by non-executive directors is governed by section 114 of the Taxes Consolidation Act 1997 (“TCA”) and case law. Section 114 TCA is quite general in nature and so taxpayers rely heavily on case law in determining the appropriate tax treatment.

It can be difficult to reconcile some of the existing case law as some of the decisions appear to conflict and / or are distinguished from one another on quite fine points. In addition, it can be difficult to apply many of the cases (most of which are more than 30 years old) to fact patterns that frequently arise for non-executive directors. For example, the case law requires identification of a person’s ‘normal place of work’. While this test is relatively straightforward when applied to employees and executive directors, it is not appropriate for non-executive directors. This has led to much uncertainty for taxpayers in the treatment of expenses incurred by non-executive directors.

We therefore welcome the review of the current law and practice and anticipate that one of the key outcomes of the review will be to eliminate the existing uncertainty.

2 Non-executive directors

It is often the case that persons not involved in the day-to-day business of an Irish company will be appointed as director. This is generally because of some special expertise or experience that person has. Typically, non-executive directors will be appointed in the following cases:

- **To the boards of Irish holding companies of multinational companies (MNCs):** While the day-to-day business of Irish holding companies of MNCs will be managed by Irish resident directors, independent non-executive directors are also appointed to the boards of Irish companies. This is in accordance with the UK Corporate Governance Code, the Irish Corporate Governance Annex and other international corporate governance standards which recommend the appointment of non-executive directors. These directors enhance the independence of the boards and are generally considered to benefit the shareholders and the company from a corporate governance perspective. Often those non-executive directors act as non-executive directors for other MNCs and / or have valuable experience in the same industry. If the Irish holding company to which the directors are appointed is the holding company of a MNC, the non-executive directors are likely to be non-Irish residents. Non-executive directors appointed in this way may be paid for their appointment to the board (although this is not always the case) and expenses incurred (eg, travel and subsistence) are reimbursed by the Irish company.
- **By investment managers / promoters to the boards of Irish investment funds:** In December 2011, the Irish Funds Industry Association developed a Corporate Governance Code for Collective Investment Schemes and Management Companies (the “Code”). The Code strongly recommends that at least one director of every Irish fund should be an employee, partner or director of the promoter or investment manager. Although the Code is described as voluntary, the Central Bank of Ireland was involved in its development and Irish funds that opt not to apply part of the Code must set out the reasons why in their Directors’ Report. Accordingly, it is now the case that the vast majority of Irish funds appoint a representative of the investment

manager or the promoter to act as a director. It is usually the case that the investment manager / promoter is located outside Ireland and that the relevant director is non-Irish resident. Such appointments enhance the expertise of the Irish board and are very positive for the Irish funds industry. Representatives of investment managers / promoters appointed in this way do not usually receive additional remuneration for their appointment to the board but expenses incurred (eg, travel and subsistence) are generally reimbursed by the Irish fund.

- **By Irish listed and headquartered companies:** As noted above, the UK Corporate Governance Code and the Irish Corporate Governance Annex require non-executive directors to be appointed to the boards of Irish listed companies. In the case of Irish listed and headquartered companies, it is more likely that Irish residents will be appointed as non-executive directors. Non-executive directors appointed in this way may be paid for their appointment to the board (although this is not always the case) and expenses incurred (eg travel and subsistence) are reimbursed by the Irish company.

3 Proposed tax treatment of expenses

The attendance of non-executive directors at board meetings in Ireland is an integral part of their role as director. From a policy perspective, the participation of non-executive directors in the board meetings of Irish companies and investment funds is beneficial for those Irish companies and funds and should be encouraged.

We recommend that the law is clarified to confirm that all non-executive directors may be reimbursed for travel and subsistence expenses without incurring any charge to tax. To treat reimbursed travel and subsistence expenses incurred by such directors as taxable receipts would be unnecessarily penal. It would require the director to personally meet a portion of the business cost imposed or would increase the cost for companies of engaging such directors. That position is unjustifiable. It likely would discourage individuals with valuable expertise from taking up appointments on Irish boards. Directors who have incurred legitimate expenses in discharging their duties should be entitled to full reimbursement without incurring a charge to tax. Given the existing uncertainty, the law should be clarified to confirm this treatment.

Should you wish to discuss any of the comments raised in this letter, please do not hesitate to contact us.

Yours faithfully

Sent by email, bears no signature

MATHESON