Holding Companies in Ireland

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Contents

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Ireland has become a destination of choice for holding companies due to its capital gains participation exemption, generous foreign tax credit system, membership of the EU, ever expanding double tax treaty ("**DTT**") network (72 signed, with 70 in effect), lack of controlled foreign companies legislation, thin capitalisation rules and the general ability to pay dividends free of withholding tax. The ability of US companies migrating to Ireland to continue to use US generally accepted accounting practice ("**GAAP**"), the broadening of the application of the 12.5% rate to foreign dividends received from companies based in non EU/DTT countries and the simplification of the administrative requirements which must be satisfied in order for an Irish company to pay a dividend to a non-resident company free of withholding tax can be seen as continuing evidence of the Irish Government's commitment to attracting holding companies to Ireland.

It is for some or all of the above reasons that many of the world's leading multinational companies have, and continue to, establish holding companies in Ireland.

The Irish tax issues associated with establishing an Irish holding company are reviewed below under the following headings:

- Establishment of an Irish holding company;
- Taxation of an Irish holding company;
- Disposal of shares in an Irish holding company;
- Ceasing operations in Ireland; and
- Tax treaty network.

Establishment of an Irish holding company

A holding company incorporated in Ireland must take one of the forms provided for by Irish company law. The most commonly used structures are a private limited liability company or a private unlimited liability company. There are no minimum equity requirements for an Irish private company.

<u>Financial Statements</u>

Financial statements must be prepared in accordance with GAAP in Ireland and with Irish corporate law comprised in the Companies Act 2014 (the "**2014 Act**"). The 2014 Act came into effect on 1 June 2015 with certain aspects affecting financial statements being deferred and taking effect only in relation to financial years beginning on or after 1 June 2015.

Section 279 of the 2014 Act replaces the equivalent provision in the Companies (Miscellaneous Provisions) Act, 2009, and permits, in limited cases, certain parent undertakings to use US GAAP in preparing their accounts and was implemented to assist companies migrating to Ireland.

The ability to use US GAAP is available to parent companies incorporated in Ireland where their securities are not traded on a regulated market in the EEA. The company's securities must be registered with or subject to reporting to the US Securities and Exchange Commission ("**SEC**") and the company must not have incurred on 4 July 2012 an obligation to file accounts with the Registrar of Companies, or, alternatively it must have, on or after 23 December 2009 (but prior to 4 July 2012) used US GAAP in the preparation of its accounts.

The Minister may also approve the use of other internationally recognised accounting standards in similar arrangements. The arrangements were originally to apply for a maximum of four financial years after the undertaking's incorporation in Ireland and to expire on 31 December 2015 however the four year cap has been removed and the period extended to 31 December 2020.

Tax Residency

Companies incorporated on or after 1 January 2015

By virtue of recently revised Irish corporate tax residency rules, companies incorporated in Ireland on or after 1 January 2015 will be regarded as Irish tax resident unless the company in question is, by virtue of a DTT between Ireland and another country, regarded as resident in a country other than Ireland (and thus not Irish tax resident).

The residence of a company under a DTT normally depends on the location of central management and control. As such, it is also possible to establish an Irish tax resident holding company which is incorporated in another country. There is no statutory definition of central management and control however one factor that the Irish courts generally place considerable emphasis on when determining the location of central management and control is where the board of directors meetings are held.

Companies incorporated before 1 January 2015

For companies incorporated before 1 January 2015 the revised residency rules will not come into effect until 1 January 2021 (except in limited circumstances). The "old" residency rules will apply in the intervening period and state that i) a company which has its central management and control in Ireland is resident in Ireland irrespective of where it is incorporated and ii) a company which does not have its central management and control in Ireland but which is incorporated in Ireland is resident in Ireland except where:-

- the company or a related company carries on a trade in Ireland, and either the company is ultimately controlled by persons resident in EU Member States or in countries with which Ireland has a DTT, or the company or a related company are quoted companies on a recognised Stock Exchange in the EU or in a DTT country under a DTT between Ireland and that country. However where an Irish incorporated company is managed and controlled in a relevant territory (other than Ireland), but is not considered resident in that relevant territory (e.g. as not incorporated there), then that company will be resident in Ireland.

  or

- the company is regarded as not resident in Ireland under a DTT between Ireland and another country.

Taxation of an Irish holding company

General Taxation Regime

Ireland has an extremely favourable corporation tax rate of 12.5% on profits earned in the course of an active business (a trade) and in this regard Irish intermediate holding companies are often established to further enhance the substance of existing operations in Ireland. Passive income earned by a company is taxed at a rate of 25% and capital gains not qualifying for any relief/exemption are subject to tax at 33%.

Capital Gains Tax Participation Exemption on Disposal of Shares

A disposal of shares in a subsidiary company by an Irish holding company will be exempt from Irish capital gains tax provided the following conditions are met;

- The holding company must have directly or indirectly held at least 5% of the ordinary share capital (and have been beneficially entitled at least 5% of the profits available for distribution and assets available on a winding up) for a continuous 12 month period and the disposal must take place during or within 2 years after the date of meeting the aforementioned holding requirement. Therefore if a disposal is made which brings the shareholding below 5% the remaining shareholding will still qualify for the participation exemption provided the remaining shares are disposed of within 2 years.

- A company whose shares are being disposed of must be tax resident in a country with which Ireland has concluded a DTT (or in a country with which Ireland has signed but not yet ratified a DTT) or an EU Member State. Ireland has signed comprehensive DTTs with 72 countries, of which 70 are in effect. A complete list of these countries is set out in Appendix 1 and can also be found at www.revenue.ie/en/practitioner/law/tax-treaties.html.

- At the time of disposal, either (i) the target company is a trading company or (ii) the holding company and each of its 5% subsidiaries, and the target company and each of its 5% subsidiaries, together form a trading group (i.e. wholly or mainly of the carrying on of a trade or trades).

The Irish Revenue Commissioners ("**Revenue**") have issued guidance in relation to the "wholly or mainly" test. The guidance confirms that "wholly or mainly" means greater than 50%. It also outlines that the primary tests to determine whether a company or group is wholly or mainly trading are the proportion of net trading profits and the proportion of net trading assets, though other factors may be taken into account.

In determining whether a holding company satisfies the holding requirement, a company that is a member of a 51% group will be treated as holding any shares that the other members of the group hold and as being entitled to any rights that those other group members are entitled. Therefore an Irish resident company may be exempt from capital gains tax on a disposal of shares even if it does not directly hold a 5% holding so long as the company is a member of a 51% group and that group has a combined holding of 5% or more.

The exemption may apply to a disposal of assets related to shares, such as options and convertible debt, but will not apply to the disposal of either shares or related assets that derive the greater part of their value from Irish real property or Irish situated minerals or mining rights or on the disposal of shares that derive their value or the greater part of their value from exploration and exploitation rights of the sea bed and subsoil in the State or the Continental Shelf.

In determining whether the exemption conditions are met, it should be noted that:

- The holding company need not hold its entire shareholding for the minimum holding period of 12 months; the disposal of shares will be exempt provided it holds 5% of the shares for that period.

- The holding company is not required to dispose of its entire shareholding to obtain the participation exemption; once the prescribed holding requirements as outlined above are met, the gain arising on any piecemeal disposal will be exempt.

- In the case of stocklending and repo transactions, the period during which the shares have been temporarily lent or sold will be regarded as a period of ownership of the original holder for the purposes of determining the holding period.

- On liquidation, a liability to capital gains tax may arise on the disposal of assets by the liquidator, however gains or losses that arise on liquidation are deemed to be gains or losses of the company. In this regard, the exemption from capital gains tax on a disposal should also apply (once the necessary conditions are met) to disposals in the context of the liquidation provided the company is wholly or mainly carrying on a trade up to the point of liquidation.

- Finally, it should be noted that once the relevant company is satisfied that it qualifies for the participation exemption on capital gains (i.e. it meets the above criteria); no prior Revenue clearance is required for the participation exemption to apply.

Taxation of Dividend Income

Where a dividend is paid to an Irish tax resident company by an Irish tax resident company, the recipient company is generally not chargeable to either income tax or corporation tax in respect of that dividend. The rationale being, that there is no deduction available for dividends paid by Irish resident companies and therefore the profits out of which the dividend is paid has already been subject to Irish tax. Such dividends are considered franked investment income of the recipient Irish tax resident company.

Dividends paid by a company located in the EU or by a company resident in a country with which Ireland has concluded a DTT (or in a country with which Ireland has signed but not yet ratified a DTT) or by a company which is resident in a country that has ratified the Convention on Mutual Administrative Assistance in Tax Matters[1] (“**Qualifying Companies**”) to an Irish company may be liable to Irish tax in the following manner:

Dividends paid out of the “trading profits” of Qualifying Companies are chargeable to corporation tax at the rate of 12.5% (as opposed to 25%). In the majority of cases the application of the 12.5% rate of corporation tax and double tax relief should ensure that no further Irish tax arises on such dividends.

[1] As at 8 April 2015 the Convention on Mutual Administrative Assistance in Tax Matters had over 98 ratified member countries including Argentina, Brazil, Colombia, Costa Rica, Ghana and Tunisia (countries with which Ireland does not currently have either a signed or ratified DTT).

The 12.5% rate will also apply where the dividend is paid out of dividends received by the foreign company from the trading profits of its subsidiaries.

If only part of the dividend derives from “trading profits” then the requisite part of the dividend will be liable to be taxable at 12.5% with the balance taxable at 25%.

Simplified rules have been introduced for identifying the underlying profits out of which dividends are regarded as being paid for the purpose of determining the tax rate to be applied to those dividends. Where 75% or more of the profits of the dividend paying company are trading profits of that company or dividends received by it out of trading profits of lower tier companies that are Qualifying Companies and the trading assets of the dividend paying company constitute more than 75% of the aggregate value of all of its assets, all of the dividend will be subject to tax at the 12.5% rate (even though a percentage of the dividends is not derived from trading profits).

“Portfolio Dividends” (i.e. dividends arising on holdings of 5% or less) received by a holding company will also be taxed at the 12.5% rate. In this scenario it is not necessary for the dividend to be paid out of “trading profits”.

In recent years Irish tax legislation has broadened the application of the 12.5% rate to dividends paid out of trading profits of companies based in non EU/DTT countries provided that the payer company is listed, or is a 75% direct or indirect subsidiary of a company that is listed on a recognised stock exchange either in Ireland or an EU/DTT country or other stock exchange approved by the Irish Minister for Finance.

Credit Relief for Underlying Tax/ Pooling Unrelieved Foreign Tax Credits

Credit relief should be available for foreign taxes on dividends received by an Irish company. The credit is for both foreign withholding taxes and foreign tax on the underlying profits out of which a dividend has been paid. Ireland also operates a generous tax credit “pooling” regime. Excess foreign tax credits can be carried forward indefinitely. The foreign tax credit pooling regime can in many cases result in an effective exemption from tax on foreign dividends.

Additional Tax Credit

Furthermore, an additional tax credit may be available in respect of certain foreign dividends received by an Irish company. The additional credit for foreign tax is calculated by reference to the nominal rate of tax in the source country where this gives a larger double tax credit than would otherwise be applicable. The additional credit is to be available on receipt of a dividend by an Irish resident company (or an Irish branch / agency) from a company which is not resident in Ireland and which is resident in an EU / EEA DTT country. This additional credit should ensure that additional tax will not arise in Ireland on dividends received from companies resident in EU/EEA jurisdictions which have a nominal rate of tax higher than the applicable Irish corporate tax rate.

Repatriation of Dividends from Ireland

Withholding tax of 20% must be applied in respect of dividends paid and other profit distributions made by companies resident in Ireland. The obligation to withhold tax is placed on the company making the distribution.

Exemption from dividend withholding tax is available to non-resident shareholders in the following circumstances:

- under domestic law, where the dividend is paid to individual recipients resident in the EU (other than Ireland) or in a country with which Ireland has concluded a DTT (or in a country with which Ireland has signed but not yet ratified a DTT) ("**Qualifying Country**");

- under domestic law, where the dividend is paid to a company resident in a Qualifying Country and which is not controlled (more than 50%) by Irish residents;

- under domestic law, where the dividend is paid to a company that is under the ultimate control of persons resident in a Qualifying Country;

- a listed company or a 75% subsidiary of a listed company;

- in accordance with the EU Parent-Subsidiary Directive as implemented into Irish domestic law, where the dividend is paid by a subsidiary company to its EU parent.

With the exception of a subsidiary company relying on the EU Parent-Subsidiary Directive, when making a dividend payment to an EU/ Swiss parent, all of the foregoing persons must make a declaration in a specific format laid down in the legislation in order to avail of the above exemptions (i.e. no declaration is required if a company is relying on the EU Parent-Subsidiary Directive). If there are no changes in circumstances the declaration should remain operative for five years. Please note that on the making of a relevant dividend to which one of the above exemptions applies (including the EU Parent-Subsidiary Directive) it is still necessary to complete and file a nil dividend withholding tax return with Revenue on or before the 14th day of the month following the month in which the dividend is made (i.e. a return is required to be made with Revenue even in the event that nil withholding tax applies).

Exemption from Interest Withholding Tax on Payments of Interest

In many situations a holding company may be required to pay interest on borrowings. Such interest paid by an Irish holding company to a non-Irish resident person will generally be subject to withholding tax at 20%. However, there are a number of exemptions from this withholding tax including where interest is paid by an Irish holding company in the ordinary course of its trade or business to a non-Irish resident company that is resident in the EU or in a country with which Ireland has concluded a DTT (or in a country with which Ireland has signed but not yet ratified a DTT). In addition to the residence requirement, in order to avail of the withholding tax exemption the country in question must impose a tax that generally applies to interest receivable from sources outside that specific country and the interest must not be paid to the non-resident company in connection with a trade or business carried on by it in Ireland through a branch or agency.

Ireland also allows for an exemption from withholding tax on payments of interest in the case of listed bonds or commercial paper.

Interest Relief on Borrowings

Irish holdings companies can be financed by debt. Interest is generally deductible on a paid basis (subject to satisfying certain conditions) where the debt is used to either acquire shares in (i) a trading company, (ii) a real estate company or (iii) a holding company which holds shares in either real estate or trading companies.

Thin Capitalisation

Irish tax legislation does not contain thin capitalisation rules, but it does re-characterise certain interest payments in certain cases as non-deductible interest.

Controlled Foreign Corporation (“CFC”) Legislation

Ireland does not currently have CFC legislation and as a result foreign subsidiaries profits are generally not taxed in Ireland unless those profits are repatriated to Ireland.

Transfer Pricing

Transfer pricing (“**TP**”) rules adopt an arms-length principle for transactions between associated companies. Ireland has limited TP rules. The TP rules only apply to certain transactions conducted in a trading context and as holding companies are not considered to be carrying on a trade for Irish tax purposes, the TP rules should not be applicable.

VAT

VAT will not arise if the holding company's activity is limited to the holding of shares as the company will not be required to register for VAT. This means that any VAT incurred (in Ireland or elsewhere) on costs attributable to the holding activities are not recoverable by the holding company.

A holding company may however depending upon the circumstances be required to register for and account for VAT in respect of the receipt by it of certain services from abroad e.g. services of non-Irish lawyers, accountants, consultants, etc (such services are commonly referred to as "**B2B supplies**") or on the acquisition of certain goods. To the extent that a holding company is engaged in both exempt activities and VATable activities it will be required to register for and charge Irish VAT as appropriate in respect of its VATable activities.

However if the holding company takes a direct or indirect role in the management of subsidiaries and charges a fee in respect of this, such companies are engaged in an economic activity and it may be necessary to register for VAT. They are therefore entitled to deduct VAT incurred (in Ireland or elsewhere) on costs relating to this economic activity only. General costs are eligible for partial VAT recovery by reference to a suitable apportionment calculation. The issue of VAT recovery for holding companies can be complex and requires careful consideration.

The standard rate of VAT in Ireland is currently 23%.

Disposal of shares in an Irish holding company

Capital Gains Tax

Capital gains tax for non-Irish tax residents arises on the disposition of shares only where those shares are unquoted and derive the greater part of their value from Irish situated minerals or mining rights or Irish real property. The current rate of Irish capital gains tax is 33%.

Stamp Duty

Stamp duty is a once-off tax on documents implementing certain transactions. Stamp duty does not apply to share subscriptions or debt financing of Irish companies. However the transfer of shares in Irish companies attracts stamp duty at a rate of 1% of the consideration (or the fair market value of the shares if greater). Generally no stamp duty arises on the acquisition of shares in non-Irish companies. There are various stamp duty reliefs for transactions involving associated companies and group re-organisations. There are also numerous exemptions from stamp duty including an exemption on the transfer of intellectual property.

In addition, some groups have used a company incorporated in, for example, the Channel Islands but tax resident in Ireland. In that way, no stamp duty arises on the transfer of shares but as the holding company is tax resident in Ireland all of the benefits outlined for establishing a holding company in Ireland remain applicable.

Ceasing operations in Ireland

Migration of Tax Residence from Ireland

It may be possible to "migrate" an Irish tax resident company to another jurisdiction by changing the location of its central management and control. Please see section above entitled "Tax Residency" for further detail in relation to the "central management and control" of a company.

Irish legislation provides for a charge to capital gains tax for companies ceasing to be Irish resident which own assets at the time of the cessation of residence. The legislation deems the company to have disposed of all its assets, other than assets situated in Ireland and used for the purposes of an Irish trade or used or held for the purposes of an Irish branch or agency, whether at that time or subsequently (where the company after ceasing to be resident in Ireland continues to carry on a trade in Ireland through a branch or agency). The disposal is deemed to take place at market value. The participation exemption is not available to the deemed disposal on migration, however there is an exclusion from capital gains tax for companies of which not less than 90% of the issued share capital is held by a foreign company, which is effectively defined as a company resident in a country with which Ireland has a DTT.

Where a charge to capital gains tax occurs it should be noted that Irish tax legislation allows in certain circumstances for a deferral of the payment of this tax. Irish tax legislation also provides for a postponement of the charge to capital gains tax in certain circumstances.

Liquidation of Holding Company

On liquidation the gains and losses arising are deemed to be gains and losses of the company in liquidation and it should therefore be possible for gains arising on the disposal by the liquidator of shareholdings (which meet the necessary conditions) to benefit from the participation exemption and therefore be exempt from capital gains tax.

Distributions to Shareholders made on Liquidation

Where a shareholder receives a distribution on liquidation such a distribution is not regarded as a dividend and instead may be subject to capital gains tax in the hands of the shareholder. It is however unlikely that such a distribution to a non-resident shareholder would attract a liability to capital gains tax given the fact that a liability to such tax only arises on shares deriving their value from Irish minerals or mining rights or from Irish real property.

Tax Treaty Network

Ireland has a large DTT network which is continually expanding. The signing of new DTTs in 2015 and 2016 (to date) brings to 72 the number of DTTs signed by Ireland (70 of which are fully in force). A complete list of these countries is set out in Appendix 1 and can also be found at http://www.revenue.ie/en/practitioner/law/tax-treaties.html. Irish legislation allows companies resident in countries with which Ireland has signed but not yet ratified DTTs to avail of any of the exemptions available to companies resident in countries with which Ireland has fully ratified DTTs. This legislation greatly expands Ireland's network of DTTs for many of Ireland's domestic tax reliefs.

Conclusion

An Irish resident holding company will be subject to the Irish corporation tax system as well as to Irish VAT and withholding taxes. The Irish corporation tax system is recognised internationally as uncomplicated and is associated with low compliance costs. On the tax side the main advantages to using an Irish holding company are; the absence of CFC legislation, the absence of thin capitalisation rules, availability of relief on interest from funds borrowed to acquire certain shareholdings, the capital gains tax participation exemption, the taxation regime for foreign dividends and the extensive DTT network.

Furthermore there are many favourable non-tax factors to be considered when examining Ireland as a location for a holding company. These include factors such as Ireland being an English speaking country, having a skilled and flexible labour market, having exceptional professional / administrative services available close at hand, being a common law jurisdiction and being a long established Member State of the EU. In addition, the Irish government and regulators have both adopted a business friendly approach to Irish holding companies (for example, a holding company can usually complete the incorporation process in Ireland within a matter of days).

The combination of favourable tax and non-tax factors make Ireland the destination of choice for the establishment of many holding companies.

Appendix I

Ireland has signed comprehensive DTTs with 72 countries of which 70 are currently in effect.

Albania	China	Greece	Luxembourg	Panama	Spain
Armenia	Croatia	Hong Kong	Macedonia	Poland	Sweden
Australia	Cyprus	Hungary	Malaysia	Portugal	Switzerland
Austria	Czech Republic	Iceland	Malta	Qatar	Thailand
Bahrain	Denmark	India	Mexico	Romania	Turkey
Belarus	Egypt	Israel	Moldova	Russia	United Arab Emirates
Belgium	Estonia	Italy	Montenegro	Saudi Arabia	Ukraine
Bosnia & Herzegovina	Ethiopia*	Japan	Morocco	Serbia	United Kingdom
Botswana*	Finland	Korea	Netherlands	Singapore	United States
Bulgaria	France	Kuwait	New Zealand	Slovak Republic	Uzbekistan
Canada	Georgia	Latvia	Norway	Slovenia	Vietnam
Chile	Germany	Lithuania	Pakistan	South Africa	Zambia

*The Republic of Ireland has signed a DTT with these countries and although not yet in force, the DTT has the force of law by virtue of section 826(1) Taxes Consolidation Act, 1997. Consequently Ireland will allow dividends, interest and patent royalties etc. to be paid in gross, free of withholding tax, to these countries.

Negotiations for an updated agreement with Pakistan have been signed and when notification of the completion of ratification procedures by Pakistan is received, the Agreement will enter into force.

Negotiations are in train for new agreements with Azerbaijan, Kazakhstan, and Turkmenistan
Negotiations for new Double Taxation Agreement with Ghana and the Netherlands are ongoing.

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