October 2016

Finance Bill 2016 – Irish Real Estate Fund ("IREF")

As readers may be aware on 6th September 2016 the Irish Minister of Finance announced proposed amending legislation to Section 110 of the Taxes Consolidation Act, 1997 focused exclusively on financial assets (loans, shares, etc) that derive their value, or the greater part of their value, directly or indirectly from real estate in Ireland. However, on announcing the proposed amendments the Minister also acknowledged that "*further targeted proposals in relation to the use of funds in the Irish property market are being considered*." Following on from this, the Minister for Finance subsequently announced in his Budget Speech (Budget 2017) that as well as the amendments to Section 110, he was aware that that further amendments are necessary to address other issues arising in relation to Funds which invest in Irish property.

Background

The background to this is that Ireland, like many countries, does not under its double tax treaties, give up its right to tax residents of the other Contracting State on gains realised on Irish real estate or assets deriving their value substantially from Irish real estate. However, through the use of tax-exempt regulated funds (and certain other Irish vehicles) such rights had been eroded. Consequently, the proposed legislation is being put in place to deal with this matter. That said, the inclusion of loans that derive the greater part of their value from Irish land within this legislation is unusual and we believe out of step with international norms.

For further information on any of the issues discussed in this article please contact:

David Lawless
DD: + 353 (0)1 673 1846
david.lawless@dilloneustace.ie

Sean Murray
DD: + 353 (0)1 673 1765
sean.murray@dilloneustace.ie

Proposed Amendments

Details of changes to property funds were subsequently announced in the Finance Bill 2016 published on **20th October** with the introduction of the concept of an Irish Real Estate Fund or IREF.

For the avoidance of doubt IREFs will, like all Irish regulated funds, continue to be exempt from tax on their income and gains. Nevertheless, an exit tax may now apply to certain types of investors in an Irish fund (or sub-fund) which qualifies as an IREF. As will be seen from the definition of an IREF below, the proposed changes will only affect a very small proportion of Irish regulated funds as, unless the fund is substantially invested (directly or indirectly) in Irish real estate or intends to acquire Irish real estate assets or carry on an IREF business, it will not be considered an IREF.

Irish Real Estate Funds ("IREF")

The proposals are to apply to non-UCITS Irish authorised funds (such as authorised unit trusts, authorised investment companies, ICAVs and investment limited partnerships) where:-

- 25% or more of the value of the fund (or sub-fund in the case of an umbrella fund) is comprised of Irish real estate assets (directly or indirectly), or
- where it would be reasonable to consider that the main purpose or one of the main purposes of the fund is to acquire Irish real estate assets or carry on an Irish real estate business (IREF business).

An IREF business for these purposes is defined as activities involving Irish land and buildings which, but for the general tax exemptions applied to funds, would:

- be regarded as dealing in or developing land
- give rise to taxable rental income on Irish property;
- involve the holding of Irish land and buildings or other assets which derive their value (or the greater part thereof) directly or indirectly from Irish land and buildings, the disposal of which would be chargeable to capital gains tax; or
- be regarded as trading in land (and taxed as a trading activity).

Withholding Tax

Where a fund is treated as an IREF, withholding tax (at a rate of 20%) is to be applied to distributions and redemptions attributable to IREF profits. IREF profits are to be computed in line with general Irish tax computational rules. However, gains arising on the disposal of Irish land to a party unconnected with the IREF or any of its investors are excluded from IREF profits, provided that the IREF has owned the land for at least five years

This withholding tax will represent a final tax charge and must be returned each year by the IREF to the Irish Revenue Commissioners.

Exemptions

There are certain exemptions from this withholding tax as it applies only to payments made to specified persons. A "specified person" is essentially non-resident investors and certain categories of exempt Irish investors. The definition does however provide for a number of exclusions for "good investors" such as Irish pension fund investors, regulated funds, life assurance funds or the EEA equivalent of the foregoing. Nevertheless, it is fully expected that many of these exemptions will be tightened up with the introduction of anti-avoidance measures at Committee Stage.

Application Date

The new regime is proposed to apply to accounting periods beginning on or after 1 January 2017 and provisions were included to prohibit IREFs from changing their year ends to delay the impact of the proposed changes.

Going Forward

As indicated by the Minister at the date of publication, due to the highly technical nature of the proposal, further consultation is ongoing to refine the above draft legislation for Committee Stage. As such, going forward additional consideration will need to be given to the appropriate Irish structure for optimal results.

Dillon Eustace
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DILLON EUSTACE

Dublin
33 Sir John Rogerson's Quay, Dublin 2, Ireland.
Tel: +353 1 667 0022
Fax: +353 1 667 0042.

Cayman Islands
Landmark Square, West Bay Road, PO Box 775, Grand Cayman KY1-9006, Cayman Islands.
Tel: +1 345 949 0022
Fax: +1 345 945 0042.

New York
245 Park Avenue, 39th Floor, New York, NY 10167, U.S.A.
Tel: +1 212 792 4166
Fax: +1 212 792 4167.

Tokyo
12th Floor, Yurakucho Itocia Building, 2-7-1 Yurakucho, Chiyoda-ku, Tokyo 100-0006, Japan.
Tel: +813 6860 4885
Fax: +813 6860 4501.