Further Enhancements to Ireland's Intellectual Property Regime

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FURTHER ENHANCEMENTS TO IRELAND'S INTELLECTUAL PROPERTY REGIME

In a welcome move which the Irish Government had flagged in the budget, Ireland's latest Finance Bill introduces a scheme of capital allowances (tax depreciation) on capital expenditure incurred by companies on acquiring certain specified intangible assets. These provisions allied to the 12.5% corporate tax rate and the recent improvements made to Ireland's R&D regime mean that Ireland should continue to be well placed to attract businesses looking for a centre for IP creation and exploitation.

Definition of Intangible Assets

The definition of intangible assets is widely drafted and includes the acquisition of, or the license to use:

- any patent, registered design, design right or invention
- any trade mark, trade name, trade address, brand, brand name, domain name, service mark or publishing title
- any copyright or related right within the meaning of the Copyright and Related Rights Act 2000
- certain supplementary protection certificates for medicinal products
- certain supplementary protection certificates for plant protection products
- certain plant breeders' rights
- know-how, generally related to manufacturing or processing
- any authorisation required in order to sell a medicine or product or any design, formula, process or invention for the purpose it was intended
- any right derived from research, prior to authorisation, on the effects of items covered directly above
- any licences in respect of an intangible asset referred to above
- any "non-Irish" rights similar to those outlined above
- goodwill to the extent that it is directly attributable to the items set out above

At the moment there are opportunities for tax relief for know-how and scientific research. However, the new rules widen the scope of intangible assets to include brands and trademarks.

Operation of Relief

Companies carrying out a trade will be entitled to claim a deduction for the capital costs of acquiring specified intangible assets. The tax deduction is available for offset against income generated from exploiting IP assets or as a result of the sale of goods or services that derived the greater part of their value from the IP.

The legislation does however provide both for restrictions on the level of tax deductions which may be claimed by a company in any given year and for ring fencing provisions which restrict the ability to claim relief against unrelated income.

The legislation requires that activities relating to the management, development or exploitation of specified intangible assets on which a tax deduction has been claimed is to be regarded as a separate trading activity and that the maximum deduction available in a given year is restricted to 80% of the relevant profits of the company (i.e. income excluding the IP deduction and deduction for interest).

Excess deductions can be carried forward indefinitely and utilised against IP profits in future years.

There are similar restrictions in respect to the tax deductibility of interest incurred on borrowings used to invest in a company which acquires specified intangible assets. Where the interest relief being claimed exceeds any amount of interest or certain dividends received from the company that acquires the specified intangible assets, the amount of interest that can be deducted as a charge is limited to the interest that would have been deductible had the company which acquired the specified intangible assets incurred the relevant interest expense directly.

Alternatively, a company can elect to take the tax write-off over a 15 year period. In that situation, a rate of 7% will apply for years 1 – 14 and 2% for year 15. Where a company elects to claim the deductions over a 15 year period it will be required to make that claim in its tax return. The legislation does provide however that there will be no claw-back of the capital allowances granted on the disposal of that asset after it has been held for 15 years, unless the asset is sold to a connected company and that connected company claims capital allowances on the particular IP asset.

The new provisions will not apply in circumstances where

- any relief or deduction is available under any other section of the legislation,
- the expenditure incurred on the asset exceeds an arms length amount, or
- the expenditure by the company was not incurred wholly and exclusively for bona fide commercial reasons but rather as a means of reducing or avoiding any liabilities of tax.

The Revenue Commissioners also have the power under the legislation to appoint an independent expert to determine whether the price paid for the intangible assets exceeds an arms length valuation in circumstances where the asset is acquired from a connected company/individual. The Revenue Commissioners are required, however, prior to disclosing the information to an independent expert to advise the company that they plan to do this. Where the company can demonstrate to the Revenue Commissioners that such disclosure will prejudice the company's trade, no disclosure will be made.

No deduction is available where a company acquires the specified intangible assets from another company in circumstances where the capital gains tax group relief provisions apply to treat the disposal as being made on a no gain/no loss basis. The company's may however make a joint election that the capital gains tax group relief provisions shall not apply to the transfer and in those circumstances a claim will be permitted.

Impact on existing IP Reliefs

The existing tax relief available for patent rights and know-how acquisitions will remain available for another 2 years for new acquisitions. After this 2 year period, any acquisition of patent rights and know-how will fall within in the new IP tax regime. The capital allowance regime for computer software remains unchanged and therefore capital expenditure on computer software continues to qualify for allowances over an 8 year period.

Stamp duty

The Finance bill also expands the definition of "intellectual property" for the purposes of the existing exemption from stamp duty on transfers of intellectual property.

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