IRELAND

INTERNATIONAL DEVELOPMENTS

1. WHAT ARE RECENT TAX DEVELOPMENTS IN YOUR COUNTRY WHICH ARE RELEVANT FOR M&A DEALS AND PRIVATE EQUITY?

A reduced rate of capital gains tax ("CGT") has been introduced for entrepreneurs and the self-employed with effect from 1 January 2016. Finance Act 2017 lowered the reduced rate to 10% (as opposed to the standard CGT rate of 33%). The reduced CGT rate will apply to the disposal in whole or in part of a trade or business up to a maximum lifetime limit of €1 million of net chargeable gains. The relief will be available to the individual owners of a trade or business on the disposal of all or part of that trade or business. The individual must have owned the chargeable business assets for a continuous period of 3 years in the 5 years immediately prior to the disposal of the assets. Relief will apply to the disposal of shares in a private company provided the individual owned at least 5% of the shares in the company (or 5% of the shares in a holding company which holds 51% of the shares) and was a full time working director for at least three years before the sale. Relief will not apply to disposals of the following assets:

- shares, securities or other assets held as investments
- development land
- assets on the disposal of which no chargeable gain would arise
- assets personally owned outside a company, even where such assets are used by the company

Additional anti-avoidance measures were introduced in Finance Act 2017. These changes provide that the relief will not be granted where:

- goodwill or shares/securities are disposed of to a company with which the individual is connected immediately following the disposal; or
- incorporation tax relief has already been granted on the transfer of business assets to a company.

However, these new anti-avoidance measures do not apply in situations where a disposal is made for bona fide commercial reasons and is not part of a tax avoidance arrangement. A general anti avoidance measure has also been included to ensure that the relief will not apply where the steps are taken to ensure that an individual is artificially unconnected with a company for the purposes of avoiding tax.

There have been a number of anti-avoidance measures introduced in recent years. Of particular relevance to M&A deals are provisions designed to counteract schemes which were used to avoid a CGT charge on the sale of Irish shares which derived the greater part of their value from certain Irish "specified assets" (broadly Irish land or buildings, minerals or mineral rights and certain exploration rights). Such schemes involved transferring cash or other assets to the company prior to the sale to ensure that the shares derived their value from cash rather than Irish specified assets, to avoid a charge to Irish CGT. Amendments made by Finance Act 2015 and Finance Act 2017 ensure that any cash or other non-specified assets will not be taken into account in determining how the shares derive their value.

2. WHAT IS THE GENERAL APPROACH OF YOUR JURISDICTION REGARDING THE IMPLEMENTATION OF OECD BEPS ACTIONS (ACTION PLANS 6 AND 15 SPECIFICALLY) AND, IF APPLICABLE, THE AMENDMENTS TO THE EU PARENT-SUBSIDIARY DIRECTIVE AND ANTI-TAX AVOIDANCE DIRECTIVES?

In general Ireland's tax legislation already covers many of the areas which the BEPS project has focused on e.g. anti-avoidance and mandatory disclosure. In addition, Ireland has introduced a number of measures with a strong focus on BEPS compliance, including Country-by-Country reporting. Ireland has signed up to the Multilateral

Competent Authority Agreement for the automatic exchange of Country-by-Country reports. Ireland has also launched a consultation process on Ireland's Corporation Tax Code with a view to bringing certainty to the implementation of the remaining BEPS recommendations.

Ireland was one of the countries which participated in the development of the Multilateral Instrument pursuant to Action 15. Ireland signed the Multilateral Instrument on 7 June 2017. It must now be ratified into Irish law by the Irish legislature. This will enable Ireland to update 71 of its 72 tax treaties currently in effect as covered tax agreements (CTAs) under the MLI (Ireland's treaty with the Netherlands is the exception and is currently under renegotiation). Ireland will adopt a Principal Purpose Test instead of a Limitation of Benefits clause to prevent treaty abuse. Ireland will also adopt the new best practice rule in Article 4 on determining tax residence for dual resident entities. However, Ireland will opt out of Article 10 (Anti-abuse Rule for Permanent Establishments Situated in Third Jurisdictions) and Article 11 (Application of Tax Agreements to Restrict a Party's Right to Tax its Own Residents) in Action Plan 6.

The Irish law implementing the EU Parent Subsidiary Directive was amended in Finance Act 2015 to introduce broader anti-avoidance measures. These changes ensure that the reliefs provided for under the PSD will not apply where arrangements are in place which are not genuine, and where the main purpose, or one of the main purposes of such arrangements is to obtain a tax advantage which defeats the objective of the PSD.

Ireland is a strong supporter of the Second Anti-Tax Avoidance Directive and aims to implement the changes within the transposition period.

GENERAL

3. WHAT ARE THE MAIN DIFFERENCES BETWEEN AN ACQUISITION OF SHARES AND AN ASSET DEAL IN YOUR COUNTRY?

BUYER'S PERSPECTIVE

Stamp duty

In general, the stamp duty on the transfer of shares is 1% of the consideration paid or of the market value if higher. However, provided certain conditions are complied with, an exemption from stamp duty is available on the sale of shares where the amount or value of the consideration is €1,000 or less. In certain cases, where the shares derive their value or the greater part of their value from Irish non-residential land or buildings, the rate of stamp duty may rise to 6% (see section 16 for further detail).

For asset deals, the stamp duty rate is 6% of the consideration paid or of the market value if higher. There is an exemption on the sale or transfer of certain intellectual property such as patents and trademarks. Where assets are capable of being transferred by delivery and are transferred by delivery and not pursuant to any written instrument, then no stamp duty applies.

VAT

The purchase of shares is a VAT-exempt activity. Therefore, a company which incurs costs in relation to the acquisition of shares in a newly acquired entity is not generally entitled to recover the VAT on such costs.

However, there are specific circumstances where the Irish Revenue Commissioners ("Revenue") accept that a company which has acquired shares can recover a portion of the VAT incurred on such costs. See section 11 below for further detail.

Generally, the transfer of assets is subject to VAT. However, where the assets transferred constitute a business or part of a business capable of being operated on an independent basis, the transfer is deemed not to be a supply for VAT purposes. This exemption applies to the transfer of tangible and intangible assets. It also applies even if the business has ceased trading.

Base cost and deferred gain

In an asset deal the purchaser's base cost in the assets will be the price paid for the assets. This will be relevant for any future sale of the assets.

In a share deal the purchaser's base cost is represented in the shares acquired. To the extent that the target company owns assets which have a base cost of less than their current market value, a deferred or latent gain exists. Such a deferred gain is often taken into account by purchasers in deciding on the price for the shares. However, since the stamp duty is less on a share sale than on an asset sale (save where the shares derive their value from non-residential land and buildings), this may also be taken into account in the pricing.

SELLER'S PERSPECTIVE

Double taxation

The sale of assets in a company will typically result in two layers of taxation, and corporation tax will be payable by the company in respect of any chargeable gains or balancing charges triggered on the sale of the target assets. CGT or income tax or corporation tax will also be payable in the hands of the ultimate shareholders, depending on whether the proceeds from the sale are distributed upon a subsequent liquidation of the company or as a dividend. In contrast, the sale of shares avoids double taxation on the extraction of the sale proceeds. Share sales typically only trigger a single layer of taxation — either CGT or corporation tax in the hands of the selling shareholder. In addition, in certain circumstances where a company disposes of shares it will be exempt from CGT under the participation exemption regime (see section 15 below).

Losses

In a share sale, where a target company has losses, it may be possible for the losses to be used going forward (see section 8 below). However, in an asset sale, it is not possible to purchase losses.

VAT recoverability

Generally, the transfer of assets is subject to VAT. However, depending on the VAT status of the seller and purchaser, where the assets transferred constitute a business or part of a business capable of being operated on an independent basis, the transfer is not deemed to be a supply for VAT purposes. This applies to transfers of tangible and intangible assets and applies even if the business has ceased trading.

There are provisions under Irish VAT legislation which may allow a company to recover VAT incurred on costs associated with the transfer of a business or part of a business.

The transfer of shares is VAT-exempt under Irish VAT legislation. Therefore, where costs (e.g. professional fees) are incurred by a vendor and those costs have a direct and immediate link to the sale of the shares, the VAT on such costs is generally irrecoverable under Irish legislation (apart from transactions involving non-EU clients (i.e. qualifying activities)).

EU case law suggests that VAT on costs incurred in a disposal of shares may in certain circumstances be recoverable where a holding company disposes of shares in a subsidiary to which it has supplied management services.

Exiting a group

If a company leaves a group as a result of a sale of shares, a CGT charge may arise where an asset has been acquired from a group member within the previous ten years.

Anti-avoidance

Anti-avoidance legislation provides that, where dividends or distributions are made in connection with the disposal of shares in a company, these can be taxable as part of the proceeds of the disposal of the shares.

This provision applies where the amount of the dividends paid to a company is more than would reasonably be expected to be made if there were no disposal of the shares.

BUY-SIDE

4. WHAT STRATEGIES ARE IN PLACE, IF ANY, TO STEP UP THE VALUE OF THE TANGIBLE AND INTANGIBLE ASSETS IN CASE OF SHARE DEALS?

In share deals in Ireland, no step-up in value of any assets of the target company is possible.

5. WHAT ARE THE PARTICULAR RULES OF AMORTISATION OF GOODWILL AND SIMILAR INTANGIBLE ASSETS IN YOUR COUNTRY?

No specific tax depreciation is available for goodwill in Ireland. However, tax relief is available in Ireland on capital expenditure incurred by companies on the acquisition of intangible assets, including goodwill which is directly attributable to these intangible assets.

The definition of an "intangible asset" which qualifies for this relief is very wide and includes patents, trademarks, brand names, domain names, any copyright, computer software, know-how generally related to manufacturing or processing and customer lists (except where such customer lists have been provided directly or indirectly in connection with the transfer of a business as a going concern).

The relief is designed to provide tax allowances broadly equal to the write-off to the profit and loss account available under normal accounting rules for capital expenditure incurred on the provision of specified intangible assets.

Under the relief, the capital expenditure incurred to acquire intellectual property can be written off either in line with the accounting write-off or over a 15-year period. If a company makes this election, a rate of 7% will apply for years 1 to 14 and of 2% for year 15. Certain claw back provisions may apply if the asset is disposed of within 5 years of acquisition.

However, Finance Act 2017 introduces a cap on the amount of capital allowances that can be deducted for intangible assets. The cap restricts the deduction for capital allowances to 80% of the trading income derived from those intangible assets. This cap applies to expenditure incurred on or after 11 October 2017.

6. WHAT ARE THE LIMITATIONS ON THE DEDUCTIBILITY OF INTEREST EXPENSE? ARE THERE SPECIAL INTEREST LIMITATIONS IN THE CASES OF ACQUISITION OF SHARES AND ASSETS?

In considering whether any limitations apply to the deductibility of interest on borrowing, it is necessary to look at the various bases upon which a deduction can be claimed:

Tax deduction against trading income

The general principle is that where interest is incurred wholly and exclusively for the purpose of a trade carried on by the company in the period in which the interest is accrued, it is allowable as a trading expense.

Tax deduction against rental income

In general interest on money borrowed to purchase, improve or repair a rented property is allowed as a deduction against the related rental income in arriving at the taxable rental income under Case V of Schedule D of the Irish Taxes Consolidation Act.

The deduction is limited to 85% of the interest accruing on or after 1 January 2018 on loans for the purchase, improvement or repair of residential rental property, including foreign property loans. The deduction of interest on loans used to purchase, repair or improve rented commercial property is unrestricted.

Interest as a charge on total income (for companies and individuals)

Subject to certain conditions, interest relief may be available to a company or an individual on interest paid on monies borrowed to acquire shares in or loan money to a trading company or a company whose business consists wholly or mainly of holding stocks, shares or securities in such a company.

A company can also claim interest relief on loans applied in acquiring an interest in or loaning money to a company whose income arises wholly or mainly in the form of rents or other income from property. Relief is not available to an individual in such circumstances. Finance Act 2017 codified the long-standing Revenue practice of allowing the relief to apply in the case of interest paid in acquiring the shares in or lending to a company whose business consists wholly or mainly of the holding of stocks, shares or securities of a trading company indirectly through an intermediate holding company(s).

Subject to a number of conditions being met, interest relief is available and can be treated as a "charge". This means that it can be off-set against the company's total profits or, in the case of an individual, against the income for the year of assessment in which the interest is paid. The charge can also be used against profits in other group companies subject to certain conditions. It should be noted that this is a complex area which is subject to a number of detailed anti-avoidance provisions.

7. WHAT ARE COMMON STRATEGIES TO PUSH-DOWN DEBT ON ACQUISITIONS?

In the case of a share purchase, assuming that the conditions set out above in relation to interest as a charge are satisfied, interest relief may be available as a charge in respect of the interest paid on the funds borrowed to acquire the shares. Such interest is deductible against the total profits of the company. However, to the extent that there is excess interest, such current-year interest can be surrendered within a corporation tax group (i.e. a 75% group). The interest surrendered can be off-set against the other company's total profits, minimising its tax.

8. ARE THERE ANY TAX INCENTIVES FOR EQUITY FINANCING?

In general, there are no particular rules allowing a deemed interest deduction for equity contributions or a deduction for paid in capital.

Subject to certain restrictions, relief may be available to companies in respect of interest on monies borrowed to purchase, directly or indirectly, a trading company or a company whose income derives wholly or mainly from rents or other income from property.

Ireland does not have thin capitalisation rules.

9. ARE LOSSES OF A TARGET COMPANY AVAILABLE AFTER AN ACQUISITION IS MADE? ARE THERE ANY RESTRICTIONS ON THE USE OF SUCH LOSSES?

General rule for using trading losses forward

Subject to anti-avoidance legislation, in general a trading loss in an accounting period may be carried forward indefinitely for off-set against the trading income from the same trade in succeeding accounting periods.

Anti-avoidance legislation on sale of shares

Where shares in a loss-making company are sold, specific rules apply to carrying losses forward. The legislation provides that relief for the losses forward is not available where:

- Within any period of three years there is both a change in the ownership of a company and (whether earlier or later in that period or at the same time) a major change in the nature or conduct of a trade carried on by the company, or

- At any time after the scale of the activities in a trade carried on by a company has become small or negligible and before any considerable revival of the trade, there is a change in the ownership of the company.

The legislation defines "major change in the nature or conduct of a trade" as including:

- A major change in the type of property dealt in, or services or facilities provided, in the trade, or
- A major change in customers, outlets or markets of the trade.

Following a spin-off (known as a "three-party-share-for undertaking swap") it should be possible for losses carried forward to be transferred where a trading company ceases to carry on a trade and thereafter another company carries it on, provided there is substantial identity in the ownership of the trade before and after the change. In order for losses to be available the following conditions must be met:

- there must be a transfer of and succession to a trade;
- an interest in the trade of at least 75% belongs to the same person at some time within one year before the change and at sometime within two years after the change; and
- between the times when the ownership test is satisfied, the trade is carried on only by a company within the charge to corporation tax.

There are no specific rules related to the transfer of losses on a domestic merger of private companies. The provisions which apply to spin-offs may be relevant for mergers depending on the circumstances. However, it is likely that Revenue confirmation would need to be sought on the point.

10. ARE THERE ANY ITEMS THAT SHOULD BE INCLUDED IN THE SCOPE OF A TAX DUE DILIGENCE THAT ARE VERY SPECIFIC TO YOUR COUNTRY?

If the Irish target company has claimed any reliefs, allowances or credits any such claims should be reviewed to ensure such amounts were properly claimed. In particular where a target company has claimed research and development tax credits, it should be considered whether the activity would fall within the definition of "research and development" and whether the target has retained all necessary documentation. This is an area which Revenue scrutinise quite closely.

11. IS THERE ANY INDIRECT TAX ON TRANSFER OF SHARES (STAMP DUTY, TRANSFER TAX, ETC.)?

Stamp duty is generally payable on the transfer of shares in Ireland at a rate of 1% of the consideration paid for the shares or of the market value, whichever is the higher.

However, in certain circumstances stamp duty is payable at a higher rate of 6% for the transfer of shares which derive their value from Irish non-residential property. (See section 16 for further detail)

An exemption from Irish stamp duty is available for transfers which are part of a bona fide reconstruction or amalgamation and where certain conditions are met. An exemption from Irish stamp duty is also available for transfers between "associated companies". This exemption applies where both parties intend to, and in fact do, remain 90% "associated" for the two-year period following the transfer. In the case of a merger by absorption, as a result of which the transferor is dissolved, this test can be satisfied where the recipient retains the assets for the two-year period following the transfer and the beneficial owner of the ordinary shares in the recipient remains unchanged for the two-year period following the transfer.

It is worth noting that there is no stamp duty on the issue (as opposed to the transfer) of new shares.

The transfer of shares or other securities in a company is exempt from VAT.

12. ARE THERE ANY RESTRICTIONS ON THE CORPORATE TAX DEDUCTIBILITY OF ACQUISITION COSTS?

If acquisition costs are capitalised they will form part of the base cost of the asset for CGT purposes and as such will not be deductible as a trading expense. Such acquisition costs should be deductible on a future sale of the property.

13. CAN VAT (IF APPLICABLE) BE RECOVERED ON ACQUISITION COSTS?

The purchase of shares is a VAT-exempt activity. Therefore, a company which incurs costs in relation to the acquisition of shares in a newly acquired entity is generally not entitled to recover the VAT on such costs.

However, there are specific circumstances where Revenue accepts that a company which has acquired shares in a new entity can recover a portion of the VAT incurred on such costs. Where the purchaser plays an active part in the management of the newly acquired entity and provides services such as accounting, administration or marketing services, then a portion of the VAT incurred on the costs can be recovered by the purchaser. Revenue reviews each transaction on a case-by-case basis. Therefore, each transaction should be reviewed individually to determine whether the purchaser of the shares is entitled to an element of VAT recovery on the costs incurred.

Generally, the transfer of assets is subject to VAT. However, depending on the VAT status of the seller and purchaser, where the assets transferred constitute a business or part of a business capable of being operated on an independent basis, the transfer is deemed not to be a supply for VAT purposes. This exemption applies to the transfer of tangible and intangible assets. It also applies even if the business has ceased trading. Certain conditions need to be met in order for the exemption to apply. There are provisions under Irish VAT legislation which may allow a company to recover VAT incurred on costs associated with the transfer of a business or part of a business.

Particular care should be taken to analyse the detailed rules which apply to immovable property.

14. RE THERE ANY PARTICULAR TAX ISSUES TO CONSIDER IN THE ACQUISITION OF A DOMESTIC COMPANY BY A FOREIGN COMPANY?

A company that is non-resident in Ireland is generally only liable to Irish CGT on the disposal of "specified assets," including land and buildings in Ireland and the shares of an Irish company which derives its value, or the greater part of its value, from Irish land or buildings.

A foreign company should be aware that when acquiring shares in an Irish company which derives its value, or the greater part of its value, from Irish land or buildings, the purchaser is obliged to withhold 15% of the consideration and remit same to Revenue unless the vendor provides a Form CG50 (CGT Clearance Certificate) (see point 16 below for further detail). This will be relevant on a future sale of the shares in any such Irish company as Revenue will only issue a Form CG50 to a non-resident where the non-resident has:

- satisfied Revenue that they have no CGT liability; or
- satisfied Revenue as to the amount of the CGT liability and that the tax will be paid by the non-resident.

15. CAN THE GROUP REORGANISE AFTER THE ACQUISITION IN A TAX NEUTRAL MANNER THROUGH MERGERS OR A TAX GROUPING?

The Companies Act 2014, which commenced on 1 June 2015, introduces a statutory framework for mergers and divisions between private companies in a purely national context for the first time under Irish law. Previously, mergers between private companies could generally only be implemented if there was a cross-border element to the transaction and by obtaining court approval. The Act allows for a merger of private domestic companies,

without the need for court approval. Finance Act 2017 introduced new measures designed to ensure that domestic mergers and divisions may be carried out in a tax neutral basis.

It should also be possible for a group to carry out a reorganisation in a tax neutral manner. Relief is available from corporation tax, CGT and stamp duty on intra-group transfers. It should be noted that the definition of a "group company" or "associated company" differs for CGT, corporation tax and stamp duty.

It should be noted that there are certain conditions which will need to be satisfied in order for the relevant tax reliefs to apply to mergers, divisions and reorganisations. In certain circumstances the reliefs may be clawed back.

16. ARE THERE ANY PARTICULAR ISSUES TO CONSIDER IN THE CASE OF A TARGET COMPANY THAT HAS SIGNIFICANT REAL ESTATE ASSETS?

A withholding tax applies where, on a purchase of shares in a company, the consideration exceeds €500,000 and the shares (other than shares quoted on a stock exchange) also derive their value or greater part of their value directly or indirectly from land and buildings in Ireland, minerals in Ireland or any minerals or mining rights, exploration, exploitation right in a designated area.

In these cases, under Section 980 of the Taxes Consolidation Act 1997, the purchaser must withhold from the consideration and remit to Revenue tax amounting to 15% of the consideration unless the vendor provides a Form CG50 (CGT Clearance Certificate). A CG50 is also required when the consideration for the shares exceeds €500,000, the shares were acquired following a reorganisation and the "old shares" fell within the category of shares outlined above.

The 15% withholding tax obligation does not apply if the seller obtains a CG50 from Revenue and delivers it to the purchaser prior to the consideration being paid.

VAT

Ireland has complex rules for VAT on property which should also be closely examined. A capital goods scheme tracks the use of a property over a 20-year period to ensure the VAT recovered reflects the use of the property over the period. An annual review will establish if there are any adjustments to be made. There are also record-keeping requirements over the life of the capital good.

Close company

A close company is a company which is controlled by five or fewer "participators". When there is surplus rental and investment income, a close company surcharge applies (at a current rate of 20%) if such income has not been distributed by the close company within 18 months of the end of the accounting period.

Stamp Duty

For transfers on or after 6 December 2017 of certain shares and interests in companies and funds which derive their value, or the greater part of their value, directly or indirectly from non-residential land and buildings in the State, the rate of stamp duty is 6%. This increased rate of stamp duty will apply where the transfer leads to a change in the control of the land or buildings and where the land or buildings were acquired or were developed for the sole or main object of realising a gain on its disposal.

17. IS FISCAL UNITY/TAX GROUPING ALLOWED IN YOUR JURISDICTION AND IF SO, WHAT BENEFITS DOES IT GRANT?

There is no fiscal unity or consolidated tax grouping in Ireland. However, group relief may be claimed where one member of a group is entitled to surrender its trading loss to another member of the same group. In order to be deemed a member of a group, the following conditions must be satisfied:

(a) one company must be a 75% subsidiary of the other company or both companies must be a 75% subsidiary of a third company;

(b) the parent must hold 75% of the ordinary share capital of the subsidiary;

(c) the parent must be beneficially entitled to not less than 75% of the profits available to equity holders; and

(d) the parent must be beneficially entitled to not less than 75% of the assets available for distribution on a winding-up.

The 75% group relationship may be traced through companies resident in the EU, an 'EEA treaty country' or another country with which Ireland has a double taxation agreement (a "relevant territory"). In addition, in determining whether one company is a 75% subsidiary of another company for the purpose of the group relief provisions, the other company must either be resident in a 'relevant territory' or quoted on a recognised stock exchange in a 'relevant territory' or on another stock exchange approved by the Minister for Finance.

In general, the surrender of losses is only allowed by Irish resident companies, or, in certain cases, branches of companies which are resident in the EU or an 'EEA treaty country' that are within the charge to corporation tax in Ireland and such losses may only be surrendered to an Irish resident company. However, in certain circumstances losses that are incurred by a subsidiary company which is resident in an EU Member State or an EEA state with which Ireland has a double tax treaty may be surrendered to an Irish parent company. It must be shown that the loss being surrendered to the Irish parent company cannot be utilised in any other way by the foreign subsidiary.

In addition, group relief may be claimed from capital gains tax where there is a 75% direct or indirect group. Since Finance Act 2017 it is now possible to trace the group relationship through any country with which Ireland had a double tax treaty. Previously the group relationship could only be traced through companies resident in the EU or an EEA state which Ireland has a treaty with.

18. DOES YOUR COUNTRY HAVE ANY SPECIAL TAX STATUS SUCH AS A PATENT BOX FOR COMPANIES THAT HOLD INTANGIBLE ASSETS?

Finance Act 2015 introduced a new corporation tax regime for income arising from certain intellectual property. The regime is known as the Knowledge Development Box (KDB).

In brief, where a company qualifies for the KDB relief, it is entitled to a 50% allowance on its qualifying profits (as defined) which in effect, results in a 6.25% corporate tax rate on those qualifying profits. There are a number of conditions which must be satisfied to avail of the KDB.

The KDB provisions apply to accounting periods which begin on or after 1 January 2016 and before 31 December 2020. The KDB applies to "qualifying assets", being intellectual property, other than marketing related intellectual property, which has resulted from research and development activities.

Intellectual property is defined as:

- a computer program, within the meaning of the Copyright and Related Rights Act 2000 (this includes computer programs which represent a derivative work or an adaption of an original work);
- an invention protected by a qualifying patent or certain supplementary protection certificates;
- plant breeders' rights within the meaning of section 4 of the Plant Varieties (Proprietary Rights) Act 1980.

A "qualifying patent" includes a patent which was granted following a substantive examination for novelty and inventive steps. Accordingly, not all patent systems may fall within this scope. A short-term patent is not regarded as a "qualifying patent".

The KDB relief will apply to qualifying profits made in the course of a specified trade (as defined) which consists of one or more of the following –

1. the managing, developing, maintaining, protecting, enhancing or exploiting of intellectual property;
2. the researching, planning, processing, experimenting, testing, devising, developing or other similar activity leading to an invention or creation of intellectual property; or
3. the sale of goods or the supply of services that derive part of their value from activities described in (i) and (ii), where those activities were carried on by the relevant company.

In order to ascertain the amount of profits arising from qualifying assets which can avail of the KDB relief, the below formula is used:

$$\frac{QE + UE}{OE} \times QA$$

where –

- QE is the qualifying expenditure on the qualifying assets. This is the expenditure incurred wholly and exclusively by a company in the research and development activities of the qualifying asset, such activities having taken place in the EEA. Companies should note that outsourcing to unrelated parties in any jurisdiction can be included and this differs from the treatment for the purposes of research and development credits. Certain items are excluded from the definition of qualifying expenditure including acquisition costs, interest and intra group expenditure. However, some excluded expenses can be "saved" to some degree by means of the
  uplift expenditure.
- UE is the uplift expenditure. This is the lower of 30% of the qualifying expenditure or the aggregate of acquisition costs and group outsourcing costs (as defined).
- OE is the overall expenditure on the qualifying asset being the total of qualifying expenditure, acquisition costs and group outsourcing costs.
- QA is the profit of the specified trade relevant to the qualifying asset (before taking account of any KDB allowance)

The KDB was the first patent box to be recognised as being fully compliant with the OECD "modified nexus" as set out in the final reports of the OECD's Base Erosion and Profit Shifting ("BEPS") Project.

19. DOES YOUR COUNTRY IMPOSE ADVERSE TAX CONSEQUENCES IF OWNERSHIP OF INTANGIBLES IS TRANSFERRED OUT OF THE COUNTRY?

There are no particular adverse tax consequences associated with a transfer of intangibles out of Ireland. Any gain arising on the disposal of intangible assets may be subject to CGT (currently at a rate of 33%) (see section 20 for further detail).

SELL-SIDE

20. HOW ARE CAPITAL GAINS TAXED IN YOUR COUNTRY? WHAT, IF ANY, GAINS ARISING IN AN M&A CONTEXT ARE ELIGIBLE FOR SPECIAL TREATMENT?

CGT for residents

The current rate of Irish CGT is 33%. Individuals who are resident or ordinarily resident and domiciled in Ireland are liable to Irish CGT on their worldwide gains. The charge to CGT applies to individuals, trusts, unincorporated bodies and companies in the case of development land gains.

Companies resident in Ireland are taxed on chargeable gains, other than for development land, at the same rate

as CGT, but the tax falls under corporation tax liability. As a general rule, companies incorporated in Ireland are resident in Ireland. However, an Irish incorporated company regarded as not resident in Ireland by virtue of a tax treaty is treated as not being tax resident in Ireland. A company can also be tax resident in Ireland (whether it is incorporated here or not) if its central management and control is exercised in Ireland.

CGT for non-residents

A company that is non-resident or an individual who is neither resident nor ordinarily resident is liable to Irish CGT on the disposal of "specified assets," including land and buildings in Ireland and the shares of an Irish company which derives its value, or the greater part of its value, from Irish land or buildings.

An individual who is resident or ordinarily resident in Ireland but not domiciled is liable on gains from the disposal of Irish situate assets in full and on gains from the disposal of foreign assets to the extent that the gains are remitted into Ireland.

An individual who is temporarily non-resident in Ireland may, under Irish anti-avoidance legislation, be liable to Irish tax on any chargeable gain realised on a disposal during the period in which such individual is non-resident.

Participation exemption regime (applies only to companies)

Subject to certain conditions, capital gains realised on the disposal by an Irish resident company of shares in another Irish company or in companies resident in another EU country or a country with which Ireland has a double taxation treaty will generally be exempt from Irish CGT provided the following criteria are met:

- The shares disposed of must be held in a company that is, at the time of the disposal, resident for tax purposes in either an EU member state (including Ireland) or a country with which Ireland has a double taxation treaty
- The company that disposes of the shares must, either directly or indirectly:
    - hold least 5% of the company's ordinary share capital
    - be beneficially entitled to at least 5% of the profits available for distribution to equity holders of the company, and
    - be beneficially entitled in the case of a winding up at least 5% of the assets available for distribution to equity holders for a consecutive period of 12 months ending not more than two years before the date of disposal
- Either the subject company alone or, alternatively, the combination of the subject company, the disposing company and every other company in which the disposing company holds a 5% or more equity interest, considered as a whole, must exist wholly or mainly for the purposes of carrying on a trade or trades
- The shares disposed of must not derive their value or the greater part of their value from land or mineral rights in Ireland, or be held as part of a foreign business fund

The exemption extends to disposals of certain assets related to shares, including options over shares, securities convertible into shares or options to acquire securities convertible into shares.

21. IS THERE ANY FISCAL ADVANTAGE IF THE PROCEEDS FROM THE SALE OF SHARES OR ASSETS ARE REINVESTED?

Generally, there is no rollover relief available in Ireland.

22. ARE THERE ANY LOCAL SUBSTANCE REQUIREMENTS FOR HOLDING COMPANIES?

There are no requirements for holding or finance companies to have a certain level of substance. However, where a company has no substance in Ireland this will impact on the company's VAT recoverability and the corporate tax rate which will apply. It would be necessary to consider whether any foreign tax implications would arise in such circumstances and whether benefits under the relevant tax treaty would be available.

23. ARE THERE ANY SPECIAL TAX CONSIDERATIONS REGARDING MERGERS/SPIN-OFFS?

As indicated above at section 15, Finance Act 2017 introduced new measures designed to ensure that domestic mergers may be carried out in a tax neutral basis.

Stamp Duty

Cross border mergers effected under the EU Regulations should not be subject to stamp duty. Relief from stamp duty should be available on domestic mergers and spin offs provided certain conditions are met.

Capital Gains Tax

Relief from CGT should be available in respect of a pre-sale spin-out known as a "share-for-undertaking three party swap". This involves the Target's business being transferred to new company set up outside the group in consideration of the issue of shares to the shareholder of the Target. A specific indemnity is usually sought for any liabilities (including tax liabilities) related to the reorganisation.

CGT relief should be available in respect of cross-border mergers effected under the EU Regulations. In respect of domestic mergers, CGT relief should be available subject to certain conditions.

VAT

No VAT should arise on a transfer of shares as part of a spin-out/merger. Transfer of business relief may apply to any transfer of assets such that any such transfer taking place pursuant to a merger/hive-out should not be deemed to be a supply for VAT purposes.

MANAGEMENT INCENTIVES

24. WHAT ARE THE TAX CONSIDERATIONS IN YOUR JURISDICTION FOR MANAGEMENT INCENTIVES IN CONNECTION WITH SELLING OR BUYING A COMPANY?

Approved Share Option Scheme

Income tax relief will be available where a right to acquire shares in the company is granted by the company to its employees or directors and exercised in accordance with a share option scheme that has been approved by the Revenue Commissioners. A three-year claw back provision applies. In order to qualify for an approved share option scheme, the scheme must be made available to all employees and directors at the same time subject to a maximum service requirement of three years. There is scope to include a "key employee" element to an approved share option scheme but the scheme cannot be limited to key employees only. The total number of shares granted to key employees or key directors cannot exceed 30% of the total number of shares in respect of which rights have been granted to all employees and directors under the scheme. Where a share option scheme has not been approved by Revenue, income tax and CGT at the normal rate will apply. Entrepreneurial relief will apply to the liability to CGT where the individual disposing of the shares holds at least 5% of the company's ordinary share capital. In such circumstances, CGT will be chargeable at 10% rather than the standard rate of 33%.

Key Employee Engagement Programme

Finance Act 2017 introduces a new initiative which provides for advantageous tax treatment of gains arising on the exercise of qualifying share options acquired in SME companies. An SME is a company which employs fewer than 250 people and has an annual turnover not exceeding €50 million and/or an annual balance sheet total not exceeding €43 million.

Specifically, the regime exempts any gains realised on the exercise of qualifying share options granted between 1 January 2018 and 31 December 2023 from income tax, social security and the Universal Social Charge. However, the gain remains chargeable to CGT on future disposals on the shares. To qualify for the regime, the share option must be held for at least 12 months, but must be exercised within 10 years.

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