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Tax Treaty Policy Consultation,
Tax Division,
Department of Finance,
Government Buildings,
Upper Merrion Street,
7th May 2021

Dear Sir/Madam:

Ireland's Tax Treaty Policy Consultation

Irish Funds welcomes this opportunity to respond to your consultation on Ireland's tax treaty policy.

The Irish Funds Industry Association (Irish Funds) is the voice of the funds and asset management industry in Ireland. Founded in 1991, Irish Funds represents fund managers, depositaries, administrators, transfer agents, professional advisory firms and other specialist firms involved in the international fund services industry in Ireland.

Irish Funds' more than 145 members service or manage in excess of 14,000 funds with a net asset value of €5.3 trillion. Irish Funds objective is to support and complement the development of the international funds industry in Ireland, ensuring Ireland continues to be a location of choice for the domiciling and servicing of investment funds.

Tax Treaties for Irish Funds

We would like to address the following three questions from the first part of your consultation jointly:

(a) Does Ireland's tax treaty policy sufficiently cater for the evolving economic and business environment?

(b) Do you have any suggestions on how Ireland's tax treaty policy could be enhances, as a means to continue to facilitate economic opportunity into the future?

(c) Does Ireland's tax treaty network sufficiently serve all business sectors in the economy?

The OECD model treaties (upon which Ireland bases its tax treaties) have historically been structured principally from a manufacturing and heavy industry perspective. As such, the OECD model treaty often does not serve financial services businesses particularly well. While we appreciate that the Irish Government is not likely in a position to vary substantially from the OECD model treaty (given that it is the most favoured framework for tax treaties internationally); however, there are policy choices that could be made when Ireland sets out to negotiate or renegotiate a double taxation agreement within this framework which would help to better serve Ireland's financial services businesses and, in particular, the Irish funds industry.

Opaque Funds

As outlined above, the Irish funds industry forms a substantial part of Ireland's financial services sector. It is a significant source of employment for those businesses who are directly involved in funds and asset management and indirectly in respect of those service providers who support those businesses. The funds industry, by its nature, is frequently international in scope. While it is true that certain segments of the funds industry will have a primarily domestic focus, this tends to be true in larger countries where there are a greater variety and range of domestic investment opportunities. In the case of a country like Ireland, it is frequently the case that Irish established funds will have international investors and/or international investments. Funds are designed to be collective investment vehicles which allow for the efficient and regulated pooling of investor's monies into a single vehicle which can then invest on behalf of those investors into diversified pools of assets in a manner that is both efficient and reflects the investment objectives of those investors. The general principle behind fund structures is that they should allow for the efficient deployment of capital and, in general, should avoid imposing additional taxes on investors that they would not have incurred had they invested directly in the underlying assets themselves. For this reason, the Irish Government, although leaving investment undertakings under S739B TCA 1997 within the charge to Irish tax, does so such that tax is only payable on "chargeable events". The result of this is that generally Irish funds do not pay tax in Ireland if they only have non Irish investors and in addition, there is no tax on such non-Irish investors in Irish funds.

It also follows that it is important that Irish investment undertakings, such as ICAVs, corporate and unit trusts (i.e. funds that are not transparent for Irish tax purposes) can access Ireland's double taxation treaty network in respect of their investments in other jurisdictions. This is critically important because where investors in the fund would have been entitled to the benefits of a treaty between their home country and the jurisdiction where the relevant investment is made it generally is not possible to apply such treaty benefits when there is a fund vehicle interposed between those investors and the ultimate investments. Therefore, in order to avoid the imposition of taxes which would not otherwise have arisen, it is essential that Ireland's investment undertakings have access to Ireland's double taxation treaty network. It has been longstanding Irish Government policy that Irish investment undertakings should be entitled to the benefits of Ireland's tax treaty network and that policy is applied by the Irish Revenue Commissioners who will routinely issue tax residency certificates for Irish investment undertakings where they meet the relevant criteria under the treaty concerned.

It has also been the case that Ireland has consistently sought to ensure that the definition of residence that is used in its tax treaties is one which requires the person concerned to be "liable to tax" in Ireland (or in the other treaty partner country). Ireland has consistently interpreted this requirement to mean that the person concerned must be within the ambit/jurisdiction of the taxing authorities of the country concerned rather than requiring that the entity actually pays tax. This means, for instance, that Irish pension funds and charities as well as regulated funds have the ability to access Ireland's double taxation treaty network because they are within the scope of Irish taxation even if in general they are not subject to tax on their income or profits.

While Ireland has adopted this very sensible approach, ambiguity can arise for foreign tax authorities when they are attempting to assess whether or not Irish regulated investment undertakings should be entitled to the benefits of the treaty concerned. This confusion can arise, in part, because it is possible that some tax authorities might believe that the reference to a person being "liable to tax" in Ireland should be read as meaning that the person must be paying tax (effectively subject to tax) in Ireland instead. This confusion could be addressed by ensuring that the meaning of "liable to tax" (at least insofar as the treatment of tax-exempt persons such as pension funds, charities, and investment undertakings are concerned) is addressed properly in the treaty.

One approach to resolving this would be for Ireland to routinely seek to specify within the text of the treaty or in a protocol or exchange of notes to a new treaty/renegotiated treaty that the term "liable to tax" should be interpreted in the manner discussed above. An alternative approach would be to specify in the treaty (or in a protocol or exchange of notes) that certain specified persons (i.e. pension funds, charities, and regulated investment undertakings) are to be treated as residents of the relevant treaty partner country for the purposes of the treaty. This is an approach used, for example, in the Ireland-USA double taxation agreement.

Transparent Funds

A corollary of ensuring that Irish investment undertakings are treated as residents of Ireland for the purposes of a tax treaty is that Irish transparent funds should be treated as transparent for the purposes of the treaty and treaty benefits should be accorded based on the membership/investors in those funds.

In recent years, Ireland has sought to include in its tax treaties (or protocols thereto) a statement that Irish Common Contractual Funds ("CCFs") are to be treated as transparent for the purposes of the treaty concerned. We strongly endorse this approach and recommend that it is routinely sought as part of Ireland's treaty policies going forward. Furthermore, we would strongly recommend that this policy is expanded so that it covers both CCFs and Investment Limited Partnerships ("ILPs").

As you will be aware, the Government has recently enacted new legislation substantially revamping and improving the ILP framework in Ireland and it is hoped that this will lead to a substantial growth in the use of Irish ILPs as a means for private equity investment. Should Ireland choose to also seek confirmation that ILPs are to be treated as transparent for tax treaty purposes, we believe this would provide a significant additional boost to ILPs as it would clarify without doubt the question of whether or not such an entity should be treated as transparent.

Ireland routinely seeks to have the taxing rights on interest and royalties limited to the country in which the relevant claimant under the treaty is resident for tax purposes. It is not always possible to agree to this position with other treaty countries but we strongly encourage and recommend that Ireland adheres to this policy as much as possible. We would further recommend that Ireland seeks to adopt a similar approach in relation to dividends. As you are aware, Ireland has an extensive exemption regime from dividend withholding tax which, in general, will apply to most residents of double taxation treaty countries even if the relevant treaty allows Ireland (to some extent) to tax those dividends. As such, following a policy of having no taxation on dividends would not, in general, impose an addition cost on the exchequer.

While we appreciate that this may be difficult to achieve (and likely more difficult, in general, then getting agreement on interest and royalties) we would nevertheless strongly encourage this approach. Where it is not possible agree to a blanket position in respect of dividends we would nevertheless strongly encourage the Government to seek to agree this stance for certain types of Irish residents. In particular, consideration might be given to Irish pension funds as this would clearly be of significant benefit to Irish pensioneers. Such pension funds are also frequent investors in Irish funds and may seek to do so through tax transparent vehicles such as CCFs or ILPs.

International Tax Reforms

In question (D) of part 1 of the consultation, it is asked: “How can Ireland optimise its tax treaty priorities in the context of recent international tax reforms, notable at the OECD?”

As a signatory to the multi-lateral instrument (which has since been enacted in Irish law) Ireland has fully signed up to the OECD recommendations on counter-acting abuse of taxation treaties. As such, we consider Ireland to be fully compliant with these new OECD standards when it comes to the treatment of Irish investment undertakings.

In our view, following the above recommendations to seek to clarify in all new treaties and renegotiated treaties that Irish CCFs and ILPs are to be treated as tax transparent for the purposes of the treaty, would further ensure that Ireland is seen as being fully compliant with the OECD MLI and other international tax reform approaches (such as the EU's anti-taxation avoidance directive). This is because ensuring that there is a clarity in respect of the tax transparency of CCFs and ILPs will ensure that there is no opportunity for any mismatch or hybridity to arise (i.e. a situation where Ireland treats an ILP or CCF as transparent where the other jurisdiction, unsure of its status, treats it as an opaque person from the purposes of the treaty). Ensuring clarity between the contracting States will not only eliminate such possibilities it will, in our view, enhance Ireland's standing as fully compliant with these principles.

Priorities

In question (E) of the first part of the consultation, it is asked: "What should the criteria be for prioritising a negotiation and renegotiation of specific tax treaties in the years ahead? Are there any significant gaps in Ireland's tax treaty network with reference to those criteria?"

We have outlined above certain specific policy positions which we think the Irish Government should adhere to in all future treaty negotiation and renegotiation. We believe that adopting those approaches would ensure the survival and growth of the funds industry in Ireland and we believe that these proposals are, in general, already in line with Irish Government policy in general.

Insofar as Ireland's approach to future treaty negotiations and its priorities, we would note that the number of double taxation treaties which Ireland has with other jurisdictions is significantly lower that a number of other European countries including countries of comparable size or smaller. The ability to successfully conclude a taxation treaty is affected by many factors which, we fully acknowledge, are not fully within the control of the Irish Government. Nevertheless, there are a number of levers which the Irish Government uses when seeking to negotiate double taxation treaties.

We would recommend that greater investment is made in the negotiation of new treaties and renegotiation of older treaties. In particular, we would recommend increasing the number of people who are responsible for treaty negotiation/renegotiation and including within that a dedicated coordinator to bring together the different arms of Government that could support those negotiations/renegotiations efforts on a cross-departmental basis. In our view, a closer collaboration between the Department of Foreign Affairs (and its Embassies abroad), the Department of Finance, and the Office of the Revenue Commissioners along with substantial increased investment in the process could allow Ireland to increase the number of high-quality double taxation treaties it has with other jurisdictions. While we appreciate that this may require a significant financial investment on behalf of the Government, we believe that this is an investment which will pay handsomely in the years to come and greatly benefit the Irish economy and ultimately the Irish exchequer. Furthermore, we would suggest that focus should be put on negotiation (and where appropriate renegotiation) of double taxation treaties with jurisdictions that have the potential to invest in Ireland as well as base their international investment operations in Ireland. We note that there are significant gaps with certain areas of the world. We would, however, strongly recommend that there is a targeted approach to treaty negotiations in South America (with particular focus on the larger economies in that geography such as Brazil) as well as a targeted approach with respect of East Asia and South East Asia (such as Indonesia). We believe that there are significant opportunities for inward investment into Ireland from these geographies in particular. Furthermore, these are areas where Ireland's treaty coverage has been weak for some time. While we appreciate that there are ongoing efforts to negotiate treaties with counties located in these regions, we believe with additional investment and resource it may be possible to progress these negotiations at a faster pace.

We would also recommend a comprehensive review of all of Ireland's existing treaties. Many of these treaties are quite old and, in many cases, the policy positions of the counter-party jurisdictions have evolved in the interim. As such, it is unfortunately the case that other countries (often of similar size or smaller) have been able to negotiate better treaties with a number of existing Irish treaty partner countries in recent years because the policies of those countries have changed in the period since Ireland negotiated its treaties (e.g. Japan). As such, we believe it could be relatively straight forward for a number of these jurisdictions for Ireland to either renegotiate in full that treaty and achieve a more favourable treaty position or to enter into a protocol addressing the relevant treaty provisions. As noted above, Ireland has exemptions in its domestic law with respect to royalties, interest, and dividends which mean that, for the most part, residents of treaty countries do not suffer Irish taxation on payments of royalties, interest, and dividends not withstanding that under the terms of the relevant treaty Ireland has the right to do so (subject to certain limits). As such, renegotiating these elements of treaties should not result in any lost revenue to the Irish Exchequer.

Furthermore, in looking at the renegotiation of some of these key treaties, we would also strongly recommend that the Irish Government seek to include provisions which confirm that CCFs and ILPs should be treated as transparent for Irish tax purposes and, furthermore, that the proposed clarifications in relation to the treaty rights of Irish tax exempt persons (such as pension funds, charities, and Irish regulated investment undertakings) be confirmed and agreed as part of that process.

We are available to discuss these recommendations should that be of assistance.

Yours faithfully,
Aoife Coppinger