TSG 12/02

TAX STRATEGY GROUP

Residence Issues

1. Introduction and context

1.1 Scope of this paper

This paper covers taxation issues relating to the residence of individuals, with specific focus on so called "tax exiles". It sets out the current position and examines issues that have been raised, or are likely to arise, in the context of the Budget/Finance Bill 2013, the commitment in the Programme for Government, recommendations made by the Commission on Taxation, and the recent consultation process on the residence of individuals for tax purposes.

1.2 Programme for National Government

The Programme for National Government: Government for National Recovery 2011-2016 sets out guiding principles for economic and fiscal policy for the lifetime of the Government. The Programme states that "as part of our fiscal strategy the Government will … ensure that tax exiles make a fair contribution to the Exchequer".

1.3 Residence, Ordinary Residence and Domicile

The concepts of residence, ordinary residence and domicile determine whether and the extent to which an individual is liable to Irish Income Tax, Capital Gains Tax (CGT) and Capital Acquisitions Tax (CAT).

Definitions of residence, ordinary residence, domicile and the remittance basis of taxation can be found in Appendix A to this paper. A table outlining the taxation consequences of residence, ordinary residence and domicile status can be found in Appendix B.

2 "Tax exile"

There are various definitions of a "tax exile" including -

- someone who lives in a country with a lower tax rate than that of her/his native country, to avoid paying high taxes;
- an individual who lives outside a specific jurisdiction to avoid paying tax in that jurisdiction;
- an individual who lives outside of her/his native country because of the tax regime in that country.

In an Irish context, discussion on "tax exiles" focuses on individuals of Irish origin or who are largely based in Ireland but who arrange their affairs so that they are not tax resident in the State and thereby pay less tax than if they were resident.

2.1 Number of non-residents filing Irish tax returns

In 2010, the latest year for which figures are available, 10,766 non-resident individuals filed an Irish tax return in respect of Irish sourced income or gains, or income derived from working here. This figure has increased steadily in recent years

2.2 Difference between "tax exiles" and non-residents filing tax returns

It is sometime suggested that all non-resident individuals who file Irish tax returns are "tax exiles"; or it is stated that there are "10,000 tax exiles" because that is the number of non-residents who file tax returns. This is a misconception. While there is

no way of knowing how many people have become non-resident for tax reasons (individuals who leave the State are not required to declare the reasons for leaving, either on a tax return or any other document), it is likely the majority of non-residents who file Irish tax returns have become non-resident for reasons unrelated to taxation. They include

- Irish nationals who have moved abroad for work reasons but who retain their home here (their tax return is generally only in respect of rental income on their Irish home);
- foreign nationals who never resided here but who have investments (including property) here;
- foreign nationals who worked here for a period and who may have acquired Irish tax residency for that period during a relevant tax year (for example, individuals who worked here on a temporary assignment).

Equally, some "tax exiles" may not be obliged to file an Irish tax return, because they do not have Irish source income or gains.

The Revenue Commissioners do not have a "list of tax exiles" and, given the issues outlined, there is no way of establishing such a list.

2.3 Reasons for public concern

Nonetheless, it is undoubtedly the case that some individuals have arranged their affairs to become non-resident for tax purposes. Controversy is further fuelled by the fact that some people perceived to be "tax exiles" maintain a high public profile.

There are three main categories of non-residents who file Irish tax returns who might be regarded as using the residence rules to avoid tax on certain income or gains:

- Long-term non-residents – people who are largely based here but use the residence day counting rules to be non-resident in Ireland and are resident elsewhere or not resident anywhere
- Short-term non-residents – people who move abroad, or who move spouses abroad, in order to avoid tax on, for example, large capital gains
- Occasional non-residents – people who may be abroad for work purposes and are non-resident in certain years, such as touring musicians

In recent years a number of measures have been taken to tackle avoidance among these sectors. These are outlined in Appendix C.

3 Taxation of residents and non-residents

3.1 Charge to tax in Ireland

The taxation of individuals in the State is broadly in line with that prevailing in most other OECD jurisdictions. In general,

(a) individuals who are resident in the State for tax purposes are taxable here on their worldwide income and gains; and

(b) individuals who are not resident here for tax purposes pay tax here only on income arising in the State and income derived from working here;

those who are neither resident nor ordinarily resident are only liable to Irish tax on gains from certain assets in the State[1].

For a tax exile, the savings in Irish tax terms is the difference between –

(i) the tax due if that individual were Irish tax resident for a tax year; and

(ii) the tax due for that year if that individual is not Irish tax resident.

However, there is no mechanism to measure how much tax an individual is "saving" by becoming non-resident, as a non-resident individual is not, in general, obliged to disclose his or her non-Irish source income to the Revenue Commissioners.

3.2 Double Taxation Agreements

A charge to Irish tax on income and gains must be found in Irish domestic tax legislation. Such a charge may be relieved by virtue of a Double Taxation Agreement (DTA) between the State and another jurisdiction. A DTA allocates certain taxing rights to both jurisdictions which are party to that agreement and also prevents double taxation by providing either that only one jurisdiction may tax an individual's income or gain; or that both jurisdictions have taxing rights, but one jurisdiction (usually where the individual is resident) gives a credit for the tax paid in the other. Most double taxation agreements are largely based on the OECD's *Model Tax Convention on Income and on Capital.*

3.3 Dual residence

An individual may be resident in more than one jurisdiction, depending on the tax residence rules applying in each. To resolve any conflicts, DTAs include a "tie-break" clause (see Appendix D) to determine of which state an individual is deemed to be a tax resident.

3.4 Implications of DTAs for tax exiles

Most tax exiles are likely to be tax resident in a jurisdiction with low tax rates or no tax at all and/or resident in a jurisdiction with which the State does not have a double taxation agreement. A widened definition of residence (for example, by supplementing the current day counting rules with other rules – see 5.2.2 below) would mean that tax exiles living in non-DTA countries would not have the benefit of the "tie-break" clause, while those living in a DTA county could benefit from the "tie-break" clause

4 Measures taken in Budget and Finance Bill 2012

4.1 Domicile Levy – removal of "citizenship" condition

The Minister removed the Irish citizenship condition for payment of the Domicile Levy in Finance Act 2012. This broadens the scope of the levy and prevents individuals avoiding the levy by renouncing their citizenship.

4.2 Residence consultation

The Minister decided not to make changes to the residence rules in the Budget or Finance Bill 2012 but announced that a public consultation process would be launched into possible changes to the residence rules.

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[1] Individuals who are neither resident nor ordinarily resident are liable to Irish CGT only on "Irish specified assets" – land, buildings and minerals in the State, and unquoted shares deriving their value from land, buildings and minerals in the State.

The text of the residence consultation document can be found at Appendix E to this paper. A summary of the submissions in contained in section 6.

5 Possible measures for consideration

A number of possible measures are considered below with a view to fulfilling of the Programme for Government commitment to "ensure tax exiles make a fair contribution to the Exchequer". As noted above, individuals who arrange their affairs to be non-resident for tax avoidance purposes are likely to be a small sub-set of the total number of non-resident individuals filing Irish returns. It is also possible that some such individuals will sever connections with Ireland if more of their income or gains are brought within the tax net, with possible consequences for investment and employment. For these reasons, it would be prudent not to expect a significant yield from any broadening the scope of the residence rules.

The possible measures examined below are:

- Amendment of the current day counting rules
- Supplementing the current day counting rules with other rules
- Changing the conditions for or rate of application of the domicile levy
- Amending the CGT definition of "specified assets"

5.1 Changing the day counting rules

As noted above, the current residence rules are based on counting days of presence in the State. An individual is regarded as resident if s/he is present in the State for 183 days in the current year and 280 days between the current year and the previous year. Most jurisdictions use some form of day counting rule in conjunction with other criteria.

Even after the abolition of the "Cinderella rule" (which provided that an individual was present in the State on a day only if s/he was present at midnight), it is still possible for an individual to arrange her/his affairs so that s/he does not become resident, by only being present in the State for a maximum of 139 days in any year (taking account of the 280 day rule). While a rule based on day counting is reasonably clear, it is somewhat artificial – it is hard to argue that an individual who is present in the State for 139 days every year is much less resident than an individual who is present for 140 days, but their tax treatment will be significantly different. Especially when the "Cinderella rule" was in place, the day counting rules can also lead to some elaborate measures to avoid being resident, such as leaving the State late at night to avoid being present on a particular day.

The 183 day residence test is common among OECD countries and is a feature of most tax treaties. For that reason, the 183 day rule could not be changed without creating significant problems for treaty partners. The 280 day test ensures that people with a consistent physical presence in the State are treated as being resident. Consideration could be given either to changing this rule or supplementing it with a rule which would give a longer view. For example, prior to 1994, one of the tests for residence was that an individual was "habitually resident" over a number of years[2].

[2] Revenue normally regarded an average annual period or periods amounting to three months as "substantial" and the visits as having become "habitual" after four years. However, where a visitor's arrangements indicated from the start that regular visits for substantial periods were to be made, he or she would have been regarded as resident in and from the first year.

However, as noted by the Commission on Taxation, reducing the number of days in which an individual was deemed resident would not prevent individuals still managing their affairs in order to be non-resident.

5.2. Supplementing the day counting rules

Another option would be to supplement the day counting rules with criteria such as are used in other countries – for example, a "place of abode" or "permanent home" test, or a "centre of vital interests" test. This would mean an individual would be deemed resident either under the day counting rules or under one of the other tests.[3] The Commission on Taxation recommended that the day counting rules for tax residence be supplemented by these tests, on the basis that the manipulation of the day counting rules was inequitable and damaging the integrity of the tax system, and because it thought changing the day counting rules would not be sufficient in itself (as noted above). These two tests are considered below.

Place of abode/Permanent home

One of the tests for residence prior to 1994 was that an individual was deemed to be resident if s/he had a place of abode available for her/his use, and was physically present in the State for any period. This test was modified in 1987 by providing if that an individual was domiciled in Ireland and working wholly outside the State, her/his residence would not be determined by reference to the "place of abode" test. The reason for that amendment was that many Irish citizens at that time had emigrated to work but retained their house here with the intention of returning at some stage. The place of abode test for tax residence was abolished when the 183 and 280 day rules were introduced in 1994.

A place of abode test, if re-introduced would not be confined to a house owned by the individual – it could include a rented property or even a hotel room, based on earlier case law.

The "permanent home" test recommended by the Commission on Taxation would be similar to a "place of abode" test. Other countries which use a variation of a "place of abode" test as one of the determining factors in an individual's tax residence include the UK and New Zealand; in Australia an individual is deemed resident if s/he spends more than half the year in the country, unless s/he can establish a usual place of abode outside Australia and show no intention to take up residence.

Many of the higher profile "tax exiles" have places of abode in Ireland, and would probably be deemed to be resident if such a test was introduced. The Commission stressed that if such a test was introduced, the definitions would have to be clear in order to minimise uncertainty. However, the permanent home concept is used in the tie break clause in DTAs (see Appendix D).

Centre of vital interests

A "centre of vital interests" is defined in the OECD model tax convention as the state with which an individual has her/his closest economic ties. It is one of the criteria used as a "tie breaker" in DTAs to determine in which state an individual is resident (see Appendix D). Countries which use a variant of this test as one of the determining factors for tax residence include the Netherlands, New Zealand, Spain and Switzerland.

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[3] A useful comparison of tax residence rules in a number of countries can be found at http://comparativetaxation.treasury.gov.au/content/report/html/12_Chapter_10-01.asp

The test is widely used in DTAs, so it is well-recognised and would be reasonably clear. Many of the higher profile "tax exiles" may have centres of vital interest outside the State so such a test might not make them resident for tax purposes. The test might still be useful as one of the alternative tests for residence (along with day counting and place of abode/permanent home) to ensure that individuals whose activities are based here are within the tax net.

5.2.1 Potential difficulties with introducing supplementary tests without reference to minimum presence requirement

Providing that an individual could be resident under a "place of abode"/"habitual abode"/"permanent home" test or a "centre of vital interests" test irrespective of the number of days s/he spends in the State could have unintended consequences and could render people Irish resident for tax purposes who have little or no real time connection with the country – for example, an individual who has left to work abroad for a few years but who retains her/his family home in Ireland, and may have left family members at home; or individuals with holiday homes in Ireland.

Notwithstanding the relatively wide currency of the concepts, the tests require a measure of judgment, unlike a day counting test, which is a matter of fact. They are also inherently difficult to police and could result in tie-break decisions under tax treaties and possible recourse to the courts.

A way of counteracting such difficulties could be to provide that in cases where an individual was consistently in the State but not with sufficient days of presence to become resident under the current day counting rules, s/he could be determined to be resident in the State by virtue of a shorter period within the State plus one or other of the additional tests, rather than being resident simply by virtue of one or other of the tests.

For example, if an individual was present in the State for at least 90 days or 120 days in a tax year, and also had either a place of abode/habitual abode/permanent home or a centre of vital interests in the State, that individual could be deemed to be resident in the State.

5.3 Citizenship or "passport" taxation

Some commentary has suggested that Irish citizens should be taxed on their worldwide income regardless of their tax residence status. The USA has such a system (in addition to a residence based system for non-US citizens resident in the US). US citizens can avail of a "foreign earned income exclusion" and a "foreign housing cost exclusion"[4] which can be claimed in addition to normal credits under DTAs for foreign tax paid. Citizenship based taxation is not the OECD norm and is far less common than residence based taxation – the only countries apart from the USA which are known to have had some form of citizenship based taxation are Eritrea, Israel, Mexico and the Philippines.

In general Irish taxation is not based on citizenship, with two exceptions which are now abolished: the Domicile Levy was originally based on citizenship and domicile; and the remittance basis for income tax could previously be claimed by Irish citizens who were not ordinarily resident in the State.

A number of issues would have to be considered if citizenship based taxation was to be introduced:

[4] In 2010 these were US$91,500 and US$27,450, respectively.

- **Scope** – it would probably be prudent to exclude all Irish citizens resident in the EU or the European Economic Area from further tax; otherwise, for example, everyone resident in Northern Ireland is entitled to Irish citizenship and therefore obliged to file an Irish tax return.
- **Double Taxation Agreements** – all our DTAs (other than the Ireland-USA DTA) would have to be re-negotiated to allow us to tax individuals on the basis of citizenship regardless of their residence. This could lead to the cancelling of some DTAs and would effect our competitiveness (it is notable that the US has fewer DTAs than, for example, the UK).
- **Compliance/enforcement** – there could be difficulties ensuring that Irish citizens resident abroad were filing returns, collecting any tax due, and auditing the returns filed. There have been estimates that over 60% of US expatriates do not file US tax returns. [While the US passport form requires US citizens to supply their Social Security Number, and this information is passed to the Internal Revenue Service (IRS), a US citizen resident abroad will not be refused a passport for failing to file a tax return.] The IRS would probably have greater resources to enforce a citizenship-based system than would the Irish Revenue Commissioners, so if the IRS has difficulties in this area any difficulties the Revenue Commissioners might face are likely to be greater.
- **Additional yield** – The main income of most Irish citizens resident abroad would be their employment/trade/professional income, and their country of residence would have the primary taxing rights on such income. For practical reasons a "foreign earned income exclusion" similar to the US provision would probably have to be included in any citizenship based taxation system to put most foreign resident citizens outside the Irish tax net.
- **Other issues** - A citizenship based tax might be aimed at the well-off but it would apply to all Irish citizens outside the State (subject to possibly excluding EU residents and excluding or discounting foreign earned income, as suggested above). At a time when individuals are emigrating from Ireland to find work, it would not be well received if the Irish Government continued to seek tax from the income. The measure might also deter expatriates from returning to or investing in Ireland

While citizenship has obligations as well as rights, and taxation should perhaps be one of those obligations, the difficulties highlighted above militate against the introduction of citizenship based taxation. It might be more appropriate to make changes to the residence, ordinary residence and domicile rules rather than to introduce citizenship based taxation in order to meet the Programme for Government commitment.

5.4 Domicile levy

If it was felt that it was not appropriate at this time to make changes to the residence rules, an alternative method of raising the tax contribution from non-residents with a substantial connection to Ireland would be to increase the Domicile Levy. The levy was introduced in 2010. It applied an individual who was Irish domiciled and an Irish citizen; whose worldwide income in the tax year exceeds €1 m; whose Irish located property is worth more than €5 m; and whose liability for Irish income tax in the year is less than €200,000. The amount of the levy is €200,000 (see Appendix C for further details). One of the reasons it was introduced was that it was felt that it was not appropriate to change the residence rules at that time.

As noted above, the Minister removed the Irish citizenship condition for payment of the levy in Finance Act 2012.

The first returns and yield from the levy were received in October 2011 in respect of the 2010 tax year. A total of 11 individuals paid the Domicile Levy for that year, with a yield of €1.667 million. The yield is restricted by the availability of Irish income tax paid in the year as a credit against an individual's levy liability.

If it was decided to amend the levy, options which could be considered in context of Budget 2013 include:

- Restricting the amount of income tax available as a credit to €100,000 – this would mean everyone liable to pay the levy would have to pay at least €100,000 – however, based on the first year figures, many of those liable to pay the levy have paid the full amount, so reducing the income tax available as a credit would not affect their liability;
- Increasing the amount of the levy to €300,000 – since the minimum income requirement for the levy is €1 million, increasing the levy payment to 30% of that amount could be portrayed as a cross-taxhead measure to put it at the same level as the "high earners' restriction" in income tax.

5.5 CGT definition of "specified assets"

Individuals who are neither resident nor ordinarily resident in Ireland are liable to Irish CGT on "Irish specified assets"[5]. This is a small range of assets and the exclusion of quoted shares from the charge means that such individuals could invest in Irish assets via a quoted company and pay no CGT on any gain made on such shares. By contrast, such individuals are liable to Irish Income Tax on all Irish source income, and would be liable to CAT on gifts or inheritances of Irish situate property. While consideration could be given to broadening the range of assets on which such individuals are liable, this would have to be balanced by concerns about deterring investment.

6. Summary of submissions received in public consultation process

Eight submissions were received in response to the Minister's invitation to interested parties to make submissions on possible changes to the tax residence rules. Four of the submissions were from representative bodies of professions or businesses; two were from professional firms; one was from a business think tank, and one from an individual. None of the submissions favoured any changes to the current day counting rules or supplementing the current rules with other rules, on the grounds that the current rules were clear and helped facilitate investment. The submissions will be published in due course. A number of submissions opposed introducing citizenship as a basis for taxation. Some submissions favoured leaving the Domicile Levy in place in its current form as a way of obtaining tax revenue from wealthier individuals. Many of the submissions stated that changes to the residence rules which would be intended to obtain additional revenue from "tax exiles" might have the unintended effect of discouraging individuals from moving to Ireland.

The submissions will be published by the Department in due course.

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[5] As stated at footnote 1 above, individuals who are neither resident nor ordinarily resident are liable to Irish CGT only on "Irish specified assets" – land, buildings and minerals in the State, and unquoted shares deriving their value from land, buildings and minerals in the State.

7 Conclusion

A broader definition of residence to include a “place of abode” test and a “centre of vital interest” test could help meet the commitment in the Programme for Government to ensure “tax exiles make a fair contribution to the Exchequer”. If it was felt such changes were not appropriate at this time, amendments to the Domicile Levy to increase the yield from this source would be an alternative. However, the submissions received during the public consultation process did not favour making changes to the current rules.

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The Tax Strategy Group may wish to discuss.

Capital and Savings Taxation Policy
September 2012

Appendix A –

Definitions of Residence, Ordinary Residence and Domicile; Remittance Basis

Residence

An individual is resident in Ireland for tax purposes in a year if s/he is present in the State

- for 183 days in that year;
- for 280 days between the current year and the previous year;
    - although if the individual is present in the State for 30 days or fewer in either year, those days are ignored for tax residence; or
- an individual can also elect to be resident if s/he satisfies Revenue s/he will be resident in the State in the following tax year.

From 1994 to 2008 an individual was treated as present for a day if s/he was in the State at midnight on that day (the "Cinderella rule"). Now an individual is treated as present on a day if s/he is in the State at any time during the day.

As outlined above, an individual may be resident in more than one country, depending on the rules in each state. Double Taxation Agreements (DTAs) contain a tie break clause to determine where the individual should be regarded as resident. The state of residence normally gives credit for taxes deducted in another State when calculating the individual's liability on income from outside the country of residence. Ireland also gives unilateral credit for tax deducted from certain forms of income from non-DTA countries.

Ordinary Residence

An individual who moves to the State becomes ordinarily resident in her/his fourth consecutive year of residence (e.g., if an individual is resident in 2008, 2009, and 2010, becomes ordinarily resident in 2011).

An individual who leaves the State retains her/his ordinarily resident status for three tax years after ceasing to be resident (e.g., if an individual leaves the State in 2008 but is still resident in that year, s/he is ordinarily resident in 2009, 2010 and 2011; and ceases to be ordinarily resident in 2012.)

Domicile

Domicile is a concept of private international law and is not defined in statute (unlike residence and ordinary residence, which have been defined in statute since 1994). Broadly speaking, it means an individual's permanent home. Everyone has a domicile of origin, which is derived from her/his father's origin and is not necessarily the individual's place of birth. An individual can change her/his domicile by breaking links with the domicile of origin and establishing a domicile of choice in another territory. Everyone has a domicile, and no one has more than one domicile at any time.

Remittance basis

The remittance basis means that certain foreign income and gains are only taxable in Ireland if they are brought into ("remitted to") the State. When the UK introduced

income tax in 1799, the remittance basis applied to the non-UK income of all taxpayers (there were few taxpayers with such income at the time). In 1914 the remittance basis was restricted to the foreign income of individuals who were either not ordinarily resident in the State or not domiciled in the State. This version of the remittance basis applied when the Irish State was established in 1922. UK income and gains were not within the remittance basis in Ireland until recent years (2008 for UK income and 2009 for UK capital gains) – previously they were taxable in full whether or not the income or gain was remitted to Ireland. Non-ordinarily resident individuals who are Irish domiciled can no longer claim the remittance basis for foreign income since 2010 (they could never claim the remittance basis for foreign capital gains). Foreign employment income relating to duties carried out in the State was removed from the remittance basis in 2006 (such income had not been subject to the remittance basis in the UK since 1956). As noted above, a relief for unremitted foreign employment income (related to duties carried out in the State) for non-domiciled individuals was introduced in 2009. This has been replaced by a "special assignee relief programme" in 2012.

Appendix B

Effect of Residence, Ordinary Residence and Domicile Status

Income Tax and Capital Gains Tax

Resident	Ordinarily Resident	Domiciled	Income Tax	Capital Gains Tax
Yes	Yes	Yes	Worldwide income	Worldwide gains
Yes	No	Yes	Worldwide income (from 1/1/10)[1]	Worldwide gains
Yes	Yes	No	Irish income[2]; foreign income if remitted; foreign employment income ex here	Irish gains[3], other gains if remitted
Yes	No	No	Irish income[2]; foreign income if remitted; foreign employment income exercised here	Irish gains[3], other gains if remitted
No	Yes	Yes	All Irish income; foreign investment income if > €3,810; foreign trade/employment exercised here	Worldwide gains
No	Yes	No	Irish income; foreign trade/employment income exercised here	Irish gains[3], other gains if remitted
No	No	Yes	Irish income; foreign trade/employment income exercised here	Irish specified assets (land, buildings, minerals, trade assets, unquoted shares)
No	No	No	Irish income; foreign trade/employment income exercised here	Irish specified assets (land, buildings, minerals, trade assets, unquoted shares)

Notes:

1 Up to 31/12/2009 individuals who were resident but not ordinarily resident could claim the remittance basis on certain foreign income.

2 Up to 31/12/2007 the remittance basis could not be claimed for UK source income

3 Up to 31/12/2008 the remittance basis could not be claimed for UK source capital gains

Capital Acquisitions Tax

A gift or inheritance is subject to CAT if either the disponer (the person making the gift/leaving the inheritance) or the donee (the beneficiary of the gift or inheritance) is either resident or ordinarily resident; or if the gift/inheritance is Irish situate property. An individual who is not Irish domiciled is regarded as neither resident nor ordinarily resident for CAT purposes for the first five years of residence in the State.

Appendix C – Recent tax measures to counter-act avoidance by non-residents

As outlined in section 3 above, there are three main categories of non-residents who file Irish tax returns who might be regarded as using the residence rules to avoid tax on certain income or gains:

- Long-term non-residents – people who are largely based here but use the residence day counting rules to be non-resident in Ireland and are resident elsewhere or not resident anywhere
- Short-term non-residents – people who move abroad, or who move spouses abroad, in order to avoid tax on, for example, large capital gains
- Occasional non-residents – people who may be abroad for work purposes and are non-resident in certain years, such as touring musicians

Measures which have been taken in recent years to tackle avoidance among these sectors are detailed below

Long-term non-residents

Abolition of Cinderella rule: From 1994 to 2008 an individual was regarded as present in the State on a day (for day counting purposes under the tax residence rules) only if s/he was present in the State at midnight on that day. This led to much criticism of individuals leaving the State late in the evening to avoid being present for a day. From 1 January 2009 an individual is now regarded as present in the State on a day for tax residence purposes if he is in the State at any time during the day. This increases the likelihood that such individuals will be Irish resident for tax purposes.

[In the UK, up to 2009, days of arrival in and departure from the State were not counted as days on which an individual was present in the State for tax residence purposes. From 2009 days of arrival are counted but days of departure are not. This is broadly similar to the position in Ireland when the "Cinderella rule" was in place.]

Domicile Levy: This measure applies to an individual who is Irish domiciled and an Irish citizen; whose worldwide income in the tax year exceeds €1 m; whose Irish located property is worth more than €5 m; and whose liability for Irish income tax in the year is less than €200,000. Although the levy will apply irrespective of whether the individual is resident or non-resident, in practice Irish resident individuals who meet the other criteria will pay Irish income tax in excess of €200,000. The levy is €200,000 but the Irish income tax for that year can be used as a credit against the levy liability (i.e., if an individual is liable to pay the levy but has paid Irish income tax of €150,000, his levy liability will be €200,000 - €150,000 = €50,000). The first payment date for the levy is 31 October 2011 in respect of the 2010 tax year.

Short-term non-residents

Capital Gains Tax for non-resident/non-ordinarily residents: Individuals who are neither resident nor ordinarily resident in the State are only liable to Capital Gains Tax on what are called "Irish specified assets" – land, building and minerals in the State; assets of a trade carried on in the State; and certain unquoted shares. The charge for such individuals did not apply to quoted shares, and some individuals became non-resident and non-ordinarily resident in Ireland and resident in a country with no CGT in order to avoid an Irish CGT charge on significant sales of quoted shares (and usually paid no CGT in any jurisdiction).

To counter-act this, Finance Act 2003 provided that individuals who

- cease to be Irish resident;
- dispose of certain assets while non-resident for a period of not more than five tax years; and
- then resume Irish residence

are deemed to have disposed of the assets on their last day of residence in Ireland and liable to Irish CGT on the disposal on their return to Ireland. The assets in question are shares in a company or the right to acquire shares in a company, which the individual beneficially owned on the last day of the year of departure from the State, the market value of which on that date was either equal to or greater than 5% of the existing share capital or in excess of €500,000.

Transfers to non-resident spouses: In normal circumstances, disposals of assets between spouses are deemed to be for "no gain/no loss". There were a number of high profile cases where an individual's spouse moved abroad and became neither resident nor ordinarily resident in Ireland; the individual transferred quoted shares to his spouse; and the spouse disposed of the shares and paid no Irish CGT (and no CGT in the foreign jurisdiction).

Finance Act 2006 provided that, where a spouse who received an asset from the spouse would not be liable to Irish CGT in the year in which s/he disposed of the asset, the initial transfer between spouses would be treated as taxable.

Occasional non-residents

In previous years some individuals organised their affairs so that they never became ordinarily resident and could benefit from the remittance basis on non-Irish income. This is no longer possible if the individual is Irish domiciled – from 1 January 2010 individuals who are resident and domiciled are liable to tax on worldwide income and gains, regardless of their ordinary residence status.

Appendix D

The OECD tax residence "tie break" Rules

The OECD Model Tax Convention mentioned above states that the term resident of a State means resident under the domestic tax legislation of that State.

However, the OECD recognises that, under the domestic tax legislation of certain jurisdictions, an individual may himself or herself being tax resident in two or more jurisdictions. This can have adverse tax consequences and the OECD advocates that where -

- an individual is tax resident in two jurisdictions in the same tax year; and
- there is a double taxation agreement in place between two jurisdictions,

then the following "tie-break" rules are to apply in the order shown below.

Test 1 - Permanent home
An individual shall be deemed to a resident of the State in which he or she has a ***permanent home*** available to him or her. If he or she has permanent home available in both States it is necessary to look at the next test.

Test 2 - Centre of vital interests
An individual shall be deemed to be a resident of the State to which his or her personal and economic relations are closer (centre of vital interests). If Test 2 cannot be determined, it is necessary to look at Test 3.

Test 3 -Habitual abode
An individual shall be deemed to be resident of the State in which he or she has an habitual abode. If he or she has an habitual abode in both States, or in neither, then it is necessary to look at Test 4

Test 4 - Nationality
An individual shall be deemed to be a resident of the State of which he or she is a national.

Final Test
If Tests 1 to 4 cannot determine which jurisdiction the individual is deemed to be tax resident, then tax residency is decided by the competent authorities of each jurisdiction.

Appendix E

Announcement of residence consultation

Public consultation on tax residence rules

The Minister for Finance, Mr Michael Noonan TD, invites interested parties to make submissions on possible revisions to the current residence rules for the taxation of individuals.

In the Programme for Government, the Government indicated that, as part of its fiscal policy, it would ensure that tax exiles make a fair contribution to the Exchequer. In Budget 2012 the Minister abolished the "citizenship" condition for payment of the Domicile Levy to ensure that "tax exiles" could not avoid the levy by renouncing their citizenship. He also said that he intended to keep the contentious issue of the tax treatment of tax exiles under constant review. The Programme for Government update in March 2012 confirmed the commitment to undertake a consultation process on residence issues in 2012 to inform preparation for further changes in 2013.

Tax Residence
In line with the position prevailing in many other countries, individuals who are tax resident in the State are taxable here on their worldwide income, gains, gifts and inheritances; whilst individuals who are not resident here for tax purposes are taxable on Irish source income and gains, on income from employments where the duties are carried out in the State, and on gifts and inheritances of Irish situated property. .

In Ireland, an individual's residence status for tax purposes for a tax year is determined by reference only to a "day counting" test of the number of days that an individual is present in the State for that tax year (183 days in a tax year or 280 days between the year in question and the preceding year).

In addition to the residence rules, the Domicile Levy was introduced in recent years with the aim of ensuring that individuals with strong links with Ireland made a minimum tax contribution. The levy, as introduced, applied to Irish citizens who were Irish domiciled, with Irish located assets worth in excess of €5 m, Irish income in excess of €1 m in a tax year, and an Irish income tax liability below €200,000. The levy is €200,000, but any Irish income tax paid in respect of the tax year can be credited against the levy liability. From 1 January 2012, the levy no longer applies solely to Irish citizens.

Commission on Taxation
The Commission on Taxation in its 2009 Report[6] considered that residence rules for tax purposes should contain a number of features:

- Be equitable in that they allow for the application of taxation fairly to taxpayers in a variety of circumstances;
- Be easily understood;
- Be based on objective and clearly defined criteria so as to provide certainty and avoid manipulation;
- Be framed so as to protect Ireland's taxing rights.

[6] A copy of the report of the Commission on Taxation can be accessed through the Tax Policy section of the Department of Finance website at http://www.commissionontaxation.ie/Report.asp

The Commission recommended that the 183/280 days test for determining the tax residence of an individual should be supplemented by additional criteria, which should include a permanent home test and a test based on an individual's centre of vital interests.

These additional criteria are used in a range of other jurisdictions. A "citizenship" test is also used in a very limited number of jurisdictions.

Views sought
The issues on which the Minister would welcome views include:

- Whether or not, and how, the current day counting rules should be amended;
- Whether or not, and how, the day counting rules should be supplemented with other rules;
- The appropriateness of citizenship as a basis for taxation;
- Whether or not, and how, the conditions for and/or the range of application of the Domicile Levy should be changed;
- Whether or not the Domicile Levy should continue in place if the rules for determining residence were modified.

Any proposals should have due regard to

- The need to ensure that Exchequer tax yields are not undermined;
- The continued promotion of Ireland as a location for inward investment;
- Their ease of administration;
- Their implications for arrangements in place under double taxation agreements with other jurisdictions.

Submissions received will be published on the Department's website following the conclusion of the consultation process. Submissions may be e-mailed to: residence.consultation@finance.gov.ie, or posted to

Residence Consultation
Capital and Savings Taxation Policy Unit
Economic and Taxation Division
Department of Finance
Government Buildings
Upper Merrion Street
Dublin 2

All submissions should be received, at the latest, by 1 August 2012.