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Brexit Relocation: Immigration and Tax Considerations

The routes into a country can't always be found on a map. Often, the route open to you can be found by only navigating through sometimes obscure, sometimes shifting immigration and tax rules and practices in your chosen country of destination.

Introduction

The only thing that can be said with certainty about Brexit is that the UK wants to leave the EU. How it will do this, what the consequences will be and how it will affect the rest of Europe remain unknown. In fact, the post-Brexit landscape is currently as littered with uncertainties as the constantly changing UK Government policies and Cabinet members tasked with navigating the UK's exit. This has not stopped the so-called "Brexodus", which is well under way – immigration has fallen across the whole of the UK, with many EU citizens considering the option of leaving. UK-based companies, their executives and employees, together with entrepreneurs and their professional advisers, are faced with the dilemma of whether to relocate. Any relocation brings the prospect of triggering a range of tax and immigration issues.

As the UK's closest neighbour offering access to the EU, a common law jurisdiction, a native-English-speaking workforce and a similar ethos and working culture, Ireland is clearly at the top of the list when considering optional jurisdictions. In this article, the main immigration and tax considerations for companies and individuals looking to navigate a route to Ireland are reviewed.

Immigration

For UK citizens in Ireland there is a general expectation that the Common Travel Area (CTA) will be maintained after Brexit – thus protecting the currently unrestricted rights of UK nationals to live and work in Ireland. However, the reality is that maintenance of the CTA (by which Ireland treats UK nationals more favourably than EU nationals) has been part and parcel of the negotiations between the EU and the UK to date and was expressly provided for in the draft Withdrawal Agreement. If the UK "crashes out" of the EU with absolutely no deal (and no Withdrawal Agreement), concern has been expressed about whether the CTA can continue unaffected post-Brexit. Although unlikely, this arguably raises the risk that UK nationals in an absolutely no-deal Brexit may find themselves treated as "third-country nationals" without an automatic right to live and work for Irish immigration law purposes.

Another, less discussed prospect is the risk that, without special accommodation, UK nationals will no longer count as EEA nationals for companies seeking to satisfy the "50:50 rule" when applying for or renewing employment permits for their non-EEA staff. The 50:50 rule requires that at least 50% of the employees of such companies are EEA nationals. A company's ratio may be drastically altered if, post-Brexit, its UK nationals morph into non-EEA nationals for the purposes of determining compliance with this rule. This will affect companies as well as their non-EEA staff reliant on employment permits.

Aside from these difficulties (which may or may not arise), Ireland is also enjoying an increased interest among EU and non-EU citizens, particularly entrepreneurs, seeking to set up in or relocate some or all of their operations Ireland. The movement of operations from the UK to Ireland is also a feature of these developments, and such movements bring not only workers but also usually their families in train.

Now appears to be a good time to consider the options available to non-Irish companies and their employees (current and potential) in Ireland's post-Brexit immigration landscape.

Right to work

Post-Brexit EEA nationals will continue to have a right to reside and work in Ireland with virtually no restrictions. However, non-EEA nationals, and possibly UK nationals, will generally have to obtain an employment permit to take up employment in Ireland. As a general rule, employment permits are available only for highly skilled roles and are also subject to minimum salary requirements. Employees who obtain an employment permit are usually tied to the named employer at least for the first 12 months. Family reunification is not automatic (except for holders of critical-skills employment permits) and, when granted, is limited in that family members will need their own employment permit to work while in Ireland.

Immigrant Investor Programme

Ireland provides an attractive programme for high-net-worth individuals, offering one of the strongest forms of immigration permission in the State for both themselves and their families. To qualify for the Immigrant Investor Programme (IIP), individual applicants must have a personal net worth of at least €2m (although they can rely on their combined worth with their spouse), be of good character and not have been convicted of a criminal offence. In addition, they must

- invest a minimum of €1m in an Irish enterprise for at least three years,
- invest a minimum of €1m in an approved investment fund to be held for at least three years,
- invest a minimum of €2m in a publicly listed real estate investment trust (REIT) to be held in part for up to five years or
- make a €500,000 philanthropic donation to a project of public benefit in the arts, sports, health, cultural or educational field.

The IIP can be particularly attractive to founders or entrepreneurs who are considering entering the Irish market and would be willing to invest their own funds in their new Irish-based business. The funds committed must come from the investor's personal wealth (they cannot be on behalf of a company), and the €1m investment required can be spread across more than one business (existing or new). There is plenty of scope here for an eager entrepreneur or savvy investor to "kill two birds with one stone" – investment and residency wrapped up in one.

If successful, the investor and his or her family (spouse/civil partner and dependent children) are each granted Ireland's "Stamp 4" residence permission, which allows them to reside, work, study or set up a business in Ireland without restriction.

Start-up Entrepreneur Programme

Of course, many entrepreneurs and founders will not necessarily have a spare €1m in their back pocket to avail of the IIP. The Start-up Entrepreneur Programme (STEP) offers an opportunity for the founders of smaller start-up enterprises to secure a right to reside in Ireland so they may establish and grow their business. To qualify for STEP, you must have secured funding of at least €50,000 for the proposed start-up, whether this is by way of self-funding, a business loan, an investment from a "business angel" or venture capital funding. Additionally, your business must be a "high-potential start-up", meaning that you are introducing a new or innovative product or service to international markets and will create 10 jobs and realise €1m in sales within three to four years of starting up (among other things).

Successful STEP applicants are granted Stamp 4 permission to live in Ireland and grow their business. They will also be entitled to immediate family reunification, and their spouse/partner/dependant children will also be granted Stamp 4 permission, giving them freedom to work without a permit, study or set up a business in Ireland.

Tax

One of the major concerns facing both individuals and companies is the tax consequences of relocating to Ireland. Once individuals acquire Irish tax residency they become liable to Irish tax on income and gains. Various reliefs to mitigate the charge are available to individuals arriving in Ireland and/or spending only part of their time in Ireland.

Some of the reliefs are aimed at reducing the equalisation cost to companies and individuals of assigning skilled individuals and key decision-makers from abroad to take up positions in the Irish-based operations of the employer or an associated company.

Individuals

Residence

For those relocating to Ireland, the charge to Irish taxation is determined by tax residence. This is a different concept from residence for immigration purposes, and citizenship has no bearing on the rules. Tax residency is based on the number of days spent in Ireland. There are certain tests to determine (1) residence and (2) ordinary residence. Individual are tax resident if they are present in Ireland on 183 days in one year or 280 days over two consecutive years with at least 30 days spent in Ireland in each year.[1] A day is counted where an individual is present in the State at any time during the day, with the exception of someone who remains "airside" of the airport.

Individuals are ordinarily resident if they have been resident in Ireland for three consecutive tax years.[2] From the beginning of the fourth tax year they become ordinarily resident. Individuals who leave Ireland after this time continue to be ordinarily resident for three consecutive tax years and then on the fourth tax year are no longer ordinarily resident.

Domicile is a general legal concept that has no explicit definition but is broadly analogous to someone's permanent home.

Where individuals are tax resident and domiciled in Ireland for a tax year, they will pay Irish tax on their worldwide income and gains in that year. The remittance basis of taxation generally applies to individuals who are Irish resident but non-Irish domiciled. The remittance basis means that individuals are taxed on Irish-source income and Irish capital gains on an arising basis but are taxed on foreign income and gains only to the extent that such income or gains are remitted to the country (subject to certain limited exceptions). The remittance basis of assessment does not apply to the income of a non-Irish-sourced employment attributable to the performance in the State of the duties of that employment and to the income and gains of certain offshore funds.

Individuals who are ordinarily resident but not tax resident are taxed on the same basis as tax-resident individuals except they are not subject to Irish tax on:[3]

- income derived from a trade or profession no part of which is carried on in the State,[4]
- income derived from a non-public office or a non-public employment all of the duties of which are performed outside the State and
- other foreign income (e.g. investment income) that, in the tax year, does not exceed €3,810.

The Revenue Commissioners have detailed guidance[5] on what constitutes a remittance for tax purposes. The remittance basis ensures that a non-Irish domiciled individuals are taxed only on their Irish-source income, allowing them to preserve their non-Irish-source income.

Transborder relief

Transborder relief[6] may be relevant to individuals who become Irish tax resident due to the number of days spent in Ireland over the course of the year but who also commute to the UK (or countries with which we have a double tax agreement) on a weekly or daily basis for a continuous period of not less than 13 weeks. To date, this relief is most commonly used by people who commute to work in Northern Ireland, but it may now see greater uptake by those who commute to the UK mainland and elsewhere to work. The relief operates to remove from the Irish tax net any earnings for a qualifying foreign employment to the extent that foreign tax has been paid on those earnings.

Split-year relief

Split-year relief[7] applies to employment income only.[8] In effect, the year is split to ensure that foreign employment earnings before arrival or after departure are not subject to Irish tax. In the arrival year, a qualifying individual is taxable on all income except pre-arrival

1 Section 819 TCA 1997.

2 Section 820 TCA 1997.

3 Section 821 TCA 1997.

4 The performance of duties in the State that are merely incidental to the exercise of an office or employment abroad will not bring the income within the charge to tax. The general guide to incidental duties is no more than 30 days a year spent in the State. If the performance of duties in the State is not incidental to the exercise of the office or employment abroad, then the entire income from the office or employment comes within the charge to tax, not just that part of the income that is derived from the exercise in the State.

5 Revenue Operational Manual Part 05-01-21A, "The Remittance Basis of Assessment".

6 Section 825A TCA 1997.

7 Section 822 TCA 1997.

8 Income from directorships is not eligible for this relief.

employment income, and in the departure year, the individual is taxable on all income except post-departure employment income.[9] Double taxation relief will not be available to the extent that any income fell outside the charge to Irish tax due to split-year relief.

Where an individual is entitled to split-year relief, to the extent that individual's employment is exercised abroad, the income from the employment is not taxable and PAYE should not apply. As a result, exclusion orders should be granted for the part of the year to which split-year treatment applies.

Special Assignee Relief Programme

The Special Assignee Relief Programme (SARP)[10], which has been extended to individuals arriving in Ireland up to 2020, provides relief from income tax for certain people who are assigned to work in Ireland from abroad. Various conditions attach to the SARP that must be met by both the employer company and the employee. The employer company must be established in a country with which Ireland has a double taxation agreement or an information exchange agreement. The employee must be an employee of the employer company or an associated company for a period of not less than six months before arriving in Ireland. The employee cannot have been Irish tax resident in the five years preceding arrival and must be Irish tax resident by the year after the arrival year with a minimum base salary[11] of €75,000. Where the conditions for the relief are satisfied, 30% of taxable employment income over €75,000 will be disregarded for income tax purposes. The relief applies only to income tax (i.e. not PRSI or USC). Employees who qualify for the SARP can recover the cost of one return trip for their family to their home country from their employer tax-free and can also have Irish school fees (of up to €5,000 per annum for each child) paid by the employer tax-free.

Capital gains tax

Individuals who acquire Irish residency should be mindful of the potential extension of the charge to Irish capital gains tax (CGT) on any disposals of assets. Individuals resident or ordinarily resident, but not domiciled, in Ireland are liable on gains arising on the disposal of assets situated in Ireland and on all other foreign gains to the extent that those gains are remitted to Ireland. Individuals neither resident nor ordinarily resident in Ireland are liable on gains made on the disposal of certain "specified" assets.

Specified assets include:

- assets of a business carried on by such a person in the State,
- interests in land, buildings or minerals situated in the State,
- exploration or exploitation rights in the Continental Shelf and
- unquoted shares that derive their value from any of these assets.

Newly Irish-tax-resident individuals will need to be mindful of the Irish tax consequences of remitting gains from disposals of non-Irish assets. Individuals disposing of shares acquired, and employer companies issuing shares in an Irish company, under a share option scheme should consider Irish CGT before any share issue or disposal of those shares. Shares in an Irish incorporated company are Irish-situate assets. Whether the shares in the Irish company are specified assets is relevant only before an individual acquires Irish tax residency as, once acquired, the shares are within the charge to Irish CGT.

Anti-avoidance

The climate with regard to tax avoidance has changed, and there has been a gradual but definite move towards the application of anti-avoidance provisions on a residency-over-domicile basis. This has dramatically increased

9 The individual is treated as non-resident for the pre-arrival and post-departure periods.

10 Section 825C TCA 1997.

11 Basic salary before benefits, bonuses, commissions, share-based remuneration etc.

the scope of these anti-avoidance provisions and, in the context of Brexit, may now be relevant to any high-net-worth individuals with trust structures or foreign corporates looking to relocate to Ireland. The anti-avoidance provisions apply to attribute income[12] and gains[13] to Irish-tax-resident individuals rather than to individuals resident or domiciled outside of Ireland.

The provisions were introduced to ensure that short-term non-domiciled individuals do not fall within the charge to Irish capital acquisitions tax (CAT), but conversely they also have the impact of potentially fixing them with a future CAT liability if they stay for five years or more. Until individuals have been Irish tax resident for five consecutive tax years, they will not fall within the scope of Irish CAT. However, once they have been Irish tax resident for a consecutive five years, any future gifts or inheritances may fall within the scope of Irish CAT.

Entrepreneurs

Reliefs are available from CGT on the disposal of shares in a trading company and business assets subject to certain conditions. These reliefs allow entrepreneurs set up businesses in Ireland knowing that there is the possibility of exiting the business at a lower tax rate.

Disposals of shares in a company or assets used for the purpose of a trade may be eligible for relief from CGT. Where the conditions of the relief are met, the rate of CGT is reduced from the current 33% to 10% for a maximum lifetime amount of €1m in chargeable gains.[14] Although the relief equates to a potential saving of €230,000, it is still a long way off the equivalent relief in the UK, which is capped at €10m.

Retirement relief provides an exemption from CGT on disposals of qualifying assets where individuals are over the age of 55. This relief is tapered if they are over the age of 66 at the date of disposal. Various conditions for relief attach to the assets being disposed of and the individuals themselves.

Property

For those who acquire property to reside in while located in Ireland, there is a complete exemption from CGT on the sale or transfer of any property that was the individual's main residence throughout the period of ownership, with a 12-month grace period to cater for the purchase and sale processes.

Corporates

With its low rate of corporation tax, relatively low levels of bureaucracy and extensive double taxation agreement (DTA) network, Ireland is well known as a prime destination for corporates. There are various reliefs that companies should be aware of when setting up in Ireland.

A company that is tax resident in Ireland is liable to Irish corporation tax on its total profits wherever arising. Companies not tax resident in Ireland are liable to corporation tax only on profits generated by an Irish branch or agency. A company is tax resident in Ireland if it is an Irish-incorporated company or if it is managed and controlled in Ireland (there are certain exceptions to the rule on Irish-incorporated companies). Some of the main reliefs that are available to a company setting up in Ireland are considered below.

Branch or subsidiary?

A foreign entity can set up operations in Ireland via a branch office or by establishing a separate corporate vehicle. A branch can be useful in the early phase while the Irish market is explored, with any losses being available to the main business. It also saves on incorporation and compliance costs and the administrative burden that comes with incorporating in another jurisdiction. There are many corporate service

12 Section 806/807A TCA 1997.

13 Section 579/579A TCA 1997.

14 Section 597AA TCA 1997.

providers in the Irish market helping entities that are looking to incorporate in Ireland.

Start-up company relief

A company starting a new trade can qualify for relief from corporation tax for the first three years. The relief can be claimed where the total amount of corporation tax payable by the company for an accounting period falling within the three-year start-up period does not exceed €40,000.

Marginal relief is granted on a tapering basis where the total corporation tax liability for the accounting period is between €40,000 and €60,000. To ensure that the measure is focused on the creation of jobs, the amount of tax relief is based on the companies' employer social security (PRSI) contributions in respect of its employees, subject to a limit of €5,000 per employee and an aggregate limit of €40,000 in any one period. Any unused relief arising in the first three years of trading, due to losses or insufficient profits, may be carried forward for use in subsequent years.

Research and development tax credit

Companies in Ireland undertaking qualifying research and development activities in Ireland or in the EEA may be eligible for the R&D tax credit. Qualifying R&D expenditure generates a 25% tax credit available for offset against taxable profits,[15] in addition to a tax deduction at 12.5%.

R&D activities can also result in cash refunds. If a company does not have a tax liability in the current or immediate prior period, it can claim a repayment of the R&D tax credit in three equal instalments over a three-year cycle. In the alternative, the tax credit can be carried forward to use again future profits. The cash refund is limited to the greater of the corporation tax payable by the company in the preceding ten years or the payroll liabilities for the period in which the relevant R&D expenditure is undertaken.

Knowledge Development Box

The Knowledge Development Box[16] offers an effective tax rate of 6.25% on qualifying profits generated in periods starting on or after 1 January 2016. The amount of profits that can avail of relief is determined by the proportion of the Irish company's R&D spend relative to the total R&D spend to develop qualifying assets. Broadly, qualifying assets are patented inventions and copyrighted software. It is imperative to assign an income stream to the qualifying assets and to document correctly how that income stream has been tracked and traced.

Holding-company exemption

There is an exemption from tax on capital gains arising to Irish-based holding companies on disposals of shareholdings in EU/DTA companies.[17] The exemption applies where the following conditions are satisfied:

- the parent company holds a minimum of 5% of the subsidiary's ordinary share capital for a period of over 12 months,
- the investee company is resident in an EU Member State (including Ireland) or a DTA country and
- at the time of disposal, the investee exists wholly or mainly for the purposes of carrying on a trade (or the group and investee taken together satisfy the trading test).

Conclusion

As is evident from this article, there are a myriad of considerations for employer companies, executives, employees and entrepreneurs when relocating to Ireland, whether on a short-term or long-term basis. It is important that all aspects of the relocation are reviewed in advance, particularly where there is scope to take advantage of tax reliefs, have an awareness of the anti-avoidance provisions and avail of immigration processes that will ease the transition. As the old adage goes, forewarned is forearmed.

15 Current-year or prior-year profits.

16 Revenue Operational Manual Part 29-03-01, "Guidance Notes on the Knowledge Development Box".

17 Section 626B TCA 1997.