The evolution of Ireland's tax residence rules

Ireland is a common law country which means that not every legal rule is laid down in statute or legislation.

Ireland's rules for determining the tax residence of a corporation were inherited upon our gaining independence from the United Kingdom. Irish courts in the 1940's affirmed that English case law on corporate tax residence was valid law in Ireland. This long-established case law set out that a company was to be considered resident for tax purposes not where it is registered or incorporated but instead where it carries on its real business— that is, where the business is managed and controlled.

Subsequently, in 1999, Ireland introduced a specific statutory qualification to the general common law *management and control* residence test. This provision was introduced to deter the use of Irish-incorporated companies by criminal elements that had no legitimate business connections with Ireland. It provided that, where a company is incorporated in Ireland and neither it nor any company related to it carries on a trade in Ireland, such company will be treated as resident in the State (unless it would be treated as resident in a treaty partner country for the purposes of a double taxation treaty).

Ireland's general test of residence is different to the US approach of focussing solely on the location of incorporation, but is no less valid given its longstanding origins and history.

However, it emerged that multinational businesses were exploiting the mismatch between Irish and US rules resulting in the possibility of a company being stateless for corporate tax purposes. In 2013, Ireland acted to shut down this mismatch opportunity. Ireland changed its residence laws so that where, by reason of a mismatch of residence rules with a treaty-partner country, an Irish-incorporated company would not be resident in either country, the company will be treated as resident in Ireland. This provision applies to all companies, regardless of when they were established.

It became apparent that US multinationals were still able to enter into arrangements which exploited gaps in US anti-avoidance legislation (Subpart F). Pending action from the US to fix these anti-avoidance rules, Ireland acted in 2014 to ensure that an Irish-incorporated company would automatically be tax resident in Ireland (unless it was already treated as resident in a country with which Ireland has a tax treaty). In line with standard international practice in making substantial amendments to tax law, a transition period until the end of 2020 was allowed for pre-existing companies before the amended residency rules apply.

[1]Ireland a Leader in Adopting Anti-Tax Abuse Treaties, Agreements, and Protocols

1. **Ireland is a leader in tax transparency and global tax reform**. Ireland is one of the first compliant countries with the Organization for Economic Cooperation and Development (OECD) Base Erosion and Profit Shifting (BEPS) Project, the key international standard for taxation reporting, transparency, cooperation, compliance, and anti-tax avoidance methodology. Ireland does not meet any of the international criteria for treatment as a tax haven. Ireland is doing exactly what you would want every country to do to avoid tax abuse.

2. **Ireland executed a series of tax transparency/anti-tax-abuse agreements and treaties from 2012 – 2016.**[1] It provided a five-year enforcement transition period for companies registered in Ireland prior to January 1, 2015. This is the sole issue of concern to ODOR. Numerous major tax changes have transition periods:

   a. <u>Affordable Care Act (ACA)</u> – <u>Individual mandate</u> (tax on those without insurance) – three-year transition

   b. <u>Tax on health insurers</u> – four-year transition

   c. <u>Excise tax on health plans</u> – (Cadillac Plan tax) deferred until 2018 to allow time for compliance

   d. <u>Oregon Health Plan – Individual Medical deductions limitations</u> – three-year transition

3. **Ireland's 12.5 percent broadly applied tax rate is not nominal per ODOR.**[2] Under ORS 317.717, a country must, **<u>for the current tax year,</u>** first have a zero or nominal tax rate **<u>plus</u>** run afoul of one of five other triggers. If the tax is not zero or nominal, the analysis is over. DEQ has said that the 12.5% tax rate in Ireland is not nominal. The third trigger is cited by ODOR: For **<u>the current tax year</u>**, Ireland "facilitates the establishment of

---

Contact:
Brian Doherty, Miller Nash Graham & Dunn LLP - brian.doherty@millernash.com
Molly McGrew, State Street Solutions - molly@statestreetsolutions.com

4843-9990-5603.1
251270-0001

foreign-owned entities without the need for a local substantive presence…" Ireland's transition period is only applicable to companies established in Ireland before 2015. It cannot be used in the current tax year under ODOR review to facilitate the establishment of any new companies. Ireland closed the loophole on Stateless entities. Therefore, Ireland does not meet the requirements of ORS 317.717(3).

Ireland's tax treaties narrow the number of companies that established themselves in Ireland pre 2015 by not allowing companies that are resident in a treaty country to escape taxation. The pool of companies subject to the transition period is much reduced. (list treaty nations) (Does this include Apple, Facebook)

(4. **This Fall, Business Oregon met in Ireland with the Irish Government to reach an agreement for Ireland to act as a gateway to Europe for Oregon goods.) (delete or combine with 5.?)**

5. In 2015, **Ireland was the 15th largest international market for exports from Oregon and the 4th largest European export market for Oregon.** Irish companies employ thousands of Oregonians.

(Oldcastle is the unintended consequence of a blunt ruling against a whole country rather than the entity.)

Conclusion

Ireland is doing exactly what you would want every country to do to avoid tax abuse. They have shut down the stateless entity loophole going forward The transition period is a common tax practice internationally and in the USA and Oregon for implementation of significant tax changes. Oregon should encourage other nations to adopt Ireland's actions.

Why send this negative message to a country we are courting to help Oregon sell products into Europe?

---

[1] Key tax agreements:

a. Tax Treaty/Double Taxation Agreement With USA (exchange of tax information and cooperation between US and Irish tax authorities).

Contact:
Brian Doherty, Miller Nash Graham & Dunn LLP - brian.doherty@millernash.com
Molly McGrew, State Street Solutions - molly@statestreetsolutions.com

b. 2012 Foreign Account Tax Compliance Act (FATCA) (Ireland signed this agreement with the USA allowing automatic exchange of information between tax authorities to fight against tax fraud and evasion.)
c. 2013 Finance Act (No. 2) (amended company residence rules to ensure Irish incorporated companies can't be regarded as stateless per rules of Ireland and other tax treaty country. Targeted at the most egregious tax avoidance schemes under scrutiny at that time, no delay).
d. 2014 Finance Act, section 43 (This act placed a comprehensive end to the tax avoidance methods. Companies incorporated in Ireland are residents for tax purposes unless resident of treaty partner per double taxation treaty. It applies to all companies incorporated after 1/1/2015. It also applies to all companies incorporated prior to 1/1/2015, with a transition period to 2020. It closes gap in US subpart F rules).
e. 2015 OECD Base Erosion and Profit Shifting (BEPS) Recommendations (Ireland signed on as an "early mover"; requires country-by-country reporting; implemented in Irish domestic law).
f. 2015 Global Forum on Transparency and Exchange of Information for Tax Purposes (Global Forum found Ireland had attained its top rating of "Compliant.")
g. 2016 EU Anti-Tax Avoidance Directive (Ireland agreed to implement five measures – controlled foreign company rules, interest limitation rules, hybrid mismatch rules directly implementing OECD/BEPS recommendations; and exit tax and general anti-avoidance rules).

[2] ODOR: 2017 Recommendation on Listed Jurisdictions, p. 54.

Contact:
Brian Doherty, Miller Nash Graham & Dunn LLP - brian.doherty@millernash.com
Molly McGrew, State Street Solutions - molly@statestreetsolutions.com

Actions Ireland has taken on BEPS

- The issue of aggressive tax planning by multinational companies is a global problem that requires a global solution. Ireland continues to take an active role in global work to reform the international corporate tax system.

- The publication of the OECD Base Erosion and Profit Shifting (BEPS) reports in October 2015 was a significant milestone in this work. From the beginning, the key aim of the BEPS project has been to better align the right to tax with real economic substance and activity and, as such, the key outcomes of BEPS project align with Ireland's own tax strategy.

- Ireland has committed to the BEPS process and will play its full part in implementation.

1. Ireland introduced **Country by Country reporting** (BEPS Action 13) in Finance Act 2015. The first reports will be filed in 2017 and shared with other countries through an OECD agreement.
2. Ireland introduced an OECD compliant **Knowledge Development Box** (BEPS Action 5). This incentive has been reviewed by the OECD Forum on Harmful Tax Practices and was found to be fully compliant with all OECD rules.
3. Ireland agreed the **Anti-Tax Avoidance Directive** with other EU Member States in June 2016. This is a legal commitment to introducing three of the key BEPS recommendations (Actions 2, 3 and 4) over the coming year (hybrid rules, interest limitation rules and Controlled Foreign Company rules). We also agreed two more anti-avoidance rules – a general anti-avoidance rule and an exit tax. Ireland already have versions of both of these in our domestic law.
4. BEPS action 6, 7 and 14 make recommendations for how tax treaties can be updated to reduce BEPS risks. The **BEPS multilateral instrument** will provide the mechanism for these changes to tax treaties globally. Ireland is playing an active part in this work with a view to signing the Instrument once it is possible to do so in June 2017.

Ireland has also been a leader on the exchange of tax information among tax authorities:

- Ireland were among the first countries to sign a bilateral information exchange with the US (called **FATCA**) which provides for the exchange of financial account information. Ireland were then an early adopter of the OECD **Common Reporting Standard** which provided a multilateral framework for exchange of this information globally.
- At EU level, Ireland has agreed to 5 iterations of the **Directive on Administration Co-operation**. These provide for the automatic exchange of a wide range of information among EU tax authorities. This covers tax rulings, transfer pricing agreements, financial account information and country by country reports.
- Ireland has been rated as **Fully Compliant with all international best practices** by the Global Forum – a peer review body of over 100 countries which is the leading authority in this area. Only 23 jurisdictions have achieved this top rating.

It is widely recognised that Ireland has been an active and enthusiastic participant in the BEPS process. During a visit to Dublin in September 2015, Angel Gurría, OECD secretary-general, said Ireland was "a quite exemplary case" of adapting its corporate tax regime in response to international trends (Source: Financial Times, October 4 2015 https://www.ft.com/content/60c3d9e4-6855-11e5-97d0-1456a776a4f5) .

In recent years, Ireland have published an annual Update on Ireland's International Tax Strategy which highlights the extensive actions we have taken on BEPS and international tax reform. The most recent update, published in October 2016, is available at http://budget.gov.ie/Budgets/2017/Documents/Update%20on%20Ireland's%20International%20Tax%20Strategy%202016_final.pdf

Doherty, Brian B.

To: Doherty, Brian B.
Subject: Ireland actions on BEPS

-----Original Message-----
From: HENDERSON Jeffrey S * DOR [mailto:Jeffrey.S.HENDERSON@oregon.gov]
Sent: Monday, March 13, 2017 5:34 PM
To: Doherty, Brian B.
Cc: MACK Deanna D * DOR
Subject: RE: Ireland actions on BEPS

Brian,
Thank you for sharing this. The department reviewed the document and doesn't dispute any of the BEPS actions outlined. We acknowledge Ireland is a member of the European Union and the OECD, and has enacted laws in recent years that revise its residence rules to ensure companies are no longer "stateless" in terms of its place of tax residence. You asked the department to compare the recent actions taken by Ireland to the actions taken, if any, by countries identified as listed jurisdictions in ORS 317.716. As for EU and OECD membership, there are three listed jurisdiction EU members (Cyprus, Luxembourg, and Malta) and one OECD member (Luxembourg).

The department's recommendation for Ireland to be added to the list of jurisdictions in ORS 317.716 was based on the Irish stateless law that remains in place for certain corporations during the phase-out transition period through 2020. The department acknowledges your point that the pool of companies subject to the transition period was significantly reduced by the 2014 law, however that reduction only applies to companies incorporated in Ireland on or after January 1, 2015.

Ireland has signed treaties with four listed jurisdiction countries (Bahrain, Cyprus, Luxembourg, and Malta). The remaining 40 listed jurisdiction countries do not have a treaty with Ireland, so a company incorporated in Ireland prior to January 1, 2015 that is managed and controlled from any one of those 40 listed jurisdictions without an Ireland tax treaty, would not be subject to Irish tax and would pay little tax, if any, on its income.

The stateless company law implicates ORS 317.717(3), and is the basis for the department's recommendation.

Jeff Henderson
Business Division
Oregon Department of Revenue
Office (503) 947-2124
Cell (971) 718-6566

Doherty, Brian B.

From: Doherty, Brian B.
Sent: Thursday, February 23, 2017 1:44 PM
To: Doherty, Brian B.
Subject: FW: ORS 317.717

317.717 Report to Legislative Assembly. On or before January 1 of each odd-numbered year, the Department of Revenue shall submit a report to the Legislative Assembly in the manner provided by ORS 192.245. The report shall include recommendations for legislation related to jurisdictions listed in ORS 317.716, including recommendations for additions to or subtractions from the list of jurisdictions in ORS 317.716. In making the determination of which jurisdictions to recommend for inclusion, the department shall determine whether a jurisdiction is one that **for the tax year** has no or nominal effective tax on the relevant income and for which at least one of the following applies:

(1) The jurisdiction has laws or practices that prevent effective exchange of information for tax purposes with other governments about taxpayers benefiting from the tax regime.

(2) The jurisdiction has a tax regime that lacks transparency. A tax regime lacks transparency if the details of legislative, legal or administrative provisions are not open and apparent or are not consistently applied among similarly situated taxpayers, or if the information needed by tax authorities to determine a taxpayer's correct tax liability, such as accounting records and underlying documentation, is not adequately available.

(3) The jurisdiction facilitates the establishment of foreign-owned entities without the need for a local substantive presence or prohibits these entities from having any commercial impact on the local economy.

(4) The jurisdiction explicitly or implicitly excludes the jurisdiction's resident taxpayers from taking advantage of the tax regime's benefits or prohibits enterprises that benefit from the regime from operating in the jurisdiction's domestic market.