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Irish Tax Monitor

The Roundtable September 2023

Research & Development Tax Credit

The Revenue Commissioners has updated its guidance on the R&D Tax Credit. Can you outline the changes and any implications for companies seeking to avail of the credit?

Mark O'Sullivan, Partner, Research & Development Incentives, BDO: There were significant updates to the Revenue guidelines issued in July 2023, with almost all of these changes relating to the practical application of changes introduced in Finance Act 2022. The Finance Act introduced new rules whereby the R&D tax credit will now be distributed by way of a single refundable mechanism regardless of whether a claimant is pre-trading or trading, tax paying or not, and irrespective of what the payroll liability or corporation tax position of the entity has been to date. These new rules provide for the R&D tax credit to be paid in three annual instalments as follows:

- The first instalment is the greater of €25,000 or 50% of the R&D tax credit,
- The second instalment is 3/5 of the remaining R&D tax credit, and

Mark O'Sullivan

- The third instalment is any balance remaining.

The new guidelines set out worked examples of how these instalments operate in practice, including details of how the credit can still be used against CT liabilities and how it should be considered for preliminary tax purposes.

The new rules are applicable for accounting periods commencing on or after 1st January 2023 and are optional for accounting periods ending between 31st December 2022 and 30th December 2023 (i.e. the transitional period). The guidelines deal with how claims should be submitted within this transitional period, particularly where claimants wish to avail of an acceleration of credits owed to them for prior periods. This acceleration relates to the preceding claim period, where typically only a second instalment of a repayable amount would be due, it is possible to request both the second and third instalment of this credit be paid. The guidelines set out how a separate submission needs to be made as the current CT1 forms are not set up to accommodate this accelerated option.

Opting in to the new regime and availing of the accelerated payment option should offer a cash flow benefit for claimants who have historically been in a cash refund position. However, where a claimant is utilising the R&D tax credit against tax liabilities then it may have a negative impact if moving to the new rules during the transition period as only 50% of the value of the credit could be utilised against tax liabilities. It is important that consideration is given to these points for the transition period.

The updated guidelines have also clarified that where costs are incurred on cloud computing for the purpose of qualifying R&D then these should be considered allowable for R&D tax credit purposes.

Outbound payments

The Department of Finance released draft legislative approaches to certain outbound payments in a recent feedback statement, which follows up on its 2021 consultation 'New Taxation Measures to apply to Outbound Payments'. The new legislative provisions would apply to certain payments of interest or royalties or the making of a distribution on or after 1st January 2024. What are your observations on the proposal?

Lee Kavanagh, Assistant Manager, Financial Services Tax, BDO: On 7 July 2023, the Department of Finance published a Feedback Statement on proposed new legislation to be introduced later this year applying to outbound payments to prevent double non-taxation. The new proposed measures aim to prevent double non-taxation applying to outbound payments to jurisdictions on the EU list of non-cooperative jurisdictions, no-tax and zero-tax jurisdictions with effect from 1 January 2024.

To summarise the proposed new legislative measures, it is anticipated that the measures would apply to outbound interest, royalties and dividends paid to entities located in a specified territory. The provisions apply to payments of interest, royalties or dividends / distributions between "associated entities". For this purpose, an Irish company will be associated with an entity where one holds 50% of the shares, votes or economic interests in the other, or where a third entity holds such rights in respect of both entities.

Lee Kavanagh

Where an interest, royalty or dividend payment made by an Irish entity is subject to these new outbound payment rules, the existing withholding tax exemptions provided under Irish tax legislation will no longer be available. For instance, Ireland currently has an interest withholding tax rate of 20% but the Irish tax legislation includes various exemptions from this withholding tax such as an exemption for listed debt (Quoted Eurobonds) and wholesale debt instruments. The proposed legislation would deny these exemptions for interest payments to associated entities in specified territories which could have a serious impact on entities in Ireland, in particular securitisation companies.

The consultation and feedback process for the proposed legislation ran until 8 August 2023.

Some of the primary concerns noted in respect of the proposed legislation include the treatment of "tax transparent" entities under the proposed legislation. Currently where the foreign entity is a partnership in relevant jurisdiction, a payment to the partnership could fall within the scope of this rules. This is notwithstanding that the payment may ultimately be taxed on the investors/ partners in the partnership (or the investors/partners would not be an associated entity if they had invested directly). Similarly, for corporate entities which have been "checked open" for US tax purposes, the payment should not be viewed as paid to a zero-tax territory in circumstances where double non-taxation does not arise on the look through.

Another concern is around the fact that dividends have been included in the proposed legislation. The proposed legislation is being implemented to prevent double non-taxation on outbound payments. There is an argument to be made that dividends should be outside the scope of this legislation. As dividends are not tax deductible and are paid out of already taxed profits, double non-taxation should not arise in respect of dividend payments made by Irish entities.

It is likely that we should get further clarity on the proposed legislation when Finance Bill (No.2) 2023 is published and hopefully the updated proposed legislation will provide clarity on the above-mentioned concerns and other concerns noted in the various responses to the feedback statement as it is important that the proposed measures do not go beyond what is required to prevent double non-taxation.