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IRISH TAX MONITOR

The Roundtable April 2024

Tax Appeals Commission

Can you comment on noteworthy determinations from the Tax Appeals Commission from the first quarter of 2024?

Cian O’Sullivan, Tax Director, BDO:

A particular determination of interest was 47TACD2024, which dealt with the deductibility of royalty withholding taxes (RWHT). This was the latest of a number of determinations relating to the deductibility of foreign taxes.

The appellant licenced its technology solutions to a large number of distributors internationally. A number of licensees deducted RWHT at source and the appellant claimed a corporation tax deduction for the RWHT under section 81 of the Taxes Consolidation Act 1997 (“TCA 1997”) on the basis that they were incurred wholly and exclusively for the purpose of its trade. Revenue argued that RWHT are not a deductible expense, one of the reasons being that foreign RWHT are, by their nature, taxes on income.



Cian O’Sullivan

The Appeal Commissioner found in favour of the appellant by determining that it had shown on the balance of probabilities that it met the test for deductibility as outlined in the UK case *Strong & Co of Romsey Limited v Woodfield* (Surveyor of Taxes) 5 TC 215.

The facts of this case were similar to a 2023 determination (128TACD2023),

in which the Appeal Commissioner also found in favour of the appellant. It is worth noting that the accounting periods in question for both cases predated the introduction of section 81(2)(p) TCA 1997, which specifically disallows a deduction in respect of any taxes on income. The Appeal Commissioners in both cases accepted that the RWHT were taxes on income but noted a Digital Services Tax is also a tax on income and may be allowable as a deduction, as acknowledged by Revenue. Therefore, there may be some doubt over whether the introduction of section 81(2)(p) TCA 1997 would necessarily deny a deduction for foreign RWHT.

It is also worth noting that credits in respect of the RWHT were not available to the appellants in both cases. The determinations do not provide any real clarity on the order of claiming credits under schedule 24 TCA 1997 versus a deduction under section 81 TCA 1997 where both options are available to a company.

Both the 2023 and 2024 determinations are being appealed to the High Court by Revenue, the outcomes of which may provide further clarity on this topic.

VAT Treatment of Negotiation Services

The Revenue Commissioners has introduced new guidelines on the VAT treatment of negotiation services in respect of financial services. Can you outline the changes and implications for affected taxpayers?

Philip Nolan – VAT Partner, BDO:

The Irish Revenue Commissioners (Revenue) published a Tax and Duty Manual entitled “VAT treatment of negotiation services in respect of financial services” (TDM) in March 2024. We understand that this manual was published to clarify the VAT treatment as a result of a number of queries being received by Revenue.

The TDM outlines Revenue’s current view as to what a “negotiation or agency” service is and the conditions which need to be satisfied to fall within the VAT exemption. In summary, please note the following:

- Merely describing a party as an “agent” or “intermediary” or a service as “agency” or “negotiation” is not sufficient;
- The nature of the service being provided and the relationship between the parties is key;
- A negotiation or agency service must consist of bringing together parties with a view to either “concluding a contract” or “negotiating a change to contract terms”.
- The agent or intermediary must:
 - Not be a party to the agreed or amended contract;



Philip Nolan

- Do all that is necessary for the parties to enter into or amend a contract; and,
- Provide more than the mere outsource of clerical or admin tasks.
- Negotiation is a distinct act of mediation which may consist of:
 - Pointing out to your client, as one of the parties to a contract, suitable opportunities for the conclusion of such a contract;
 - Making contact with another party; or,
 - Negotiating, in the name and on behalf of your client, the detail of the payments to be made by either side.

Examples:

- Stock, shares, debentures & other securities
 - Post a decision to effect a transaction, an adviser becomes actively involved in making the arrangements and has clear and

specific responsibility to carry out the negotiations essential towards bringing the deal to its conclusion.

- Payments
 - Services consisting of the marketing, distribution, and sale of payment products, where the distributor is responsible for carrying out all tasks necessary to facilitate, negotiate and arrange the sale of the product to customers and arrange the incoming payment flows.
- Debts
 - Services consisting of bringing together the credit provider and the debtor with a view to either concluding a contract or negotiating a change to the payment terms.
- Credit
 - Services consisting of negotiation in relation to the granting of credit, regardless of whether any such transaction is finally concluded.

As you can see from the above summary, this is a very complex area of VAT law and as with all VAT exemptions they are to be interpreted narrowly. The TDM does provide however a very welcome insight into Revenue’s current view on the VAT treatment of negotiation and agency services in the context of financial services, particularly in respect of stocks, shares, debentures, securities, payments, debts, and credit. As this issue is extremely topical and as VAT is a transactional based tax where errors can lead to substantial VAT liabilities, we would strongly recommend that affected businesses review their current activities to confirm whether the VAT treatment applied is in line with Revenue’s current view.