Residency and Tax Exposure – An Individual and Corporate Tax Update

By: Claire Scott McAteer, BSc, MSc Advanced Accounting, ACA, AITI, CTA, Examiner in Professional 2 Advanced Taxation
and Clodagh Hegarty BComm, MA Advanced Accounting, FCCA, AITI, CTA

This article discusses the main rules in respect of individual and corporate tax residency in Ireland. From an individual's tax perspective, the scope of Irish taxation on different sources of income is outlined. From a corporate tax perspective, the area of double taxation on overseas trading operations will be explored. This article is of interest to students of Professional 2 Advanced Taxation.

Section A Residence, ordinary residence and domicile – implications for an individual's liability to income tax

Recap on how to determine whether an individual is resident, ordinary resident or domiciled in Ireland

A statutory definition of residence is set out in Section 819(1) of the Tax Consolidation Act (TCA) 1997. Two basic tests of residence exist:

1. Current year test: An individual is present in Ireland for 183 days in a tax year.
2. Look back test: An individual is present in Ireland for 280 days taking the current and preceding calendar years together. However, where an individual is present in Ireland for 30 days or less in a tax year, the individual will not be regarded as tax resident in Ireland for that particular tax year. The 280 day test shall not be applied to that tax year.

It is important to note that when determining an individual's residence, an individual is counted as being present in Ireland for a day if they are here for any part of the day. There are two exceptions to this test – where an individual remains "airside" throughout their time in Ireland or where an individual's time in Ireland is due to "force majeure" circumstances. Revenue E-Brief 03/2009 provides more detailed guidance.

A statutory definition of ordinary residence is set out in Section 820 TCA 1997. If an individual has been resident in Ireland for three years they will also be ordinarily resident in Ireland. Ordinarily resident implies a greater degree of permanence than simply being resident. Section 820 TCA 1997 also sets out how an individual stops being ordinarily resident in Ireland. Once an individual becomes ordinarily resident in Ireland he or she will retain their ordinarily resident status until he or she is non-Irish resident for 3 consecutive years.

In terms of establishing if an individual has an Irish domicile, the tax legislation does not provide a statutory definition. This is because domicile is a common law legal term. Irish Revenue state that it may, broadly speaking, be interpreted as meaning residence in a particular country with the intention of residing permanently in that country. It is outside the scope of this article to provide a detailed discussion on the meaning of 'domicile' however it should be noted that under common law, every person must have a domicile. A person can only have one domicile at any particular time but cannot be without a domicile. There are three kinds of domicile: domicile of origin; domicile of choice and domicile of dependence.

<u>How an individual's liability to income tax in Ireland varies depending on his/her residence, ordinary residence and domicile status</u>

Individual's status	**Liability to Irish income tax**
Resident, ordinarily resident and domiciled AND Resident and domiciled but not ordinarily resident	Liable to Irish income tax on his/her worldwide income as it arises.
Resident and ordinarily resident but non-domiciled AND Resident, non-ordinarily resident and non-domiciled	Liable to Irish tax on foreign income under the remittance basis of taxation. An individual taxable under the remittance basis will be liable to Irish income tax on: • Irish income, • Foreign employment income to the extent it relates to Irish duties, irrespective of where paid, and • Foreign income to the extent it is remitted into Ireland.
Non-resident but ordinarily resident and domiciled	Liable to Irish income tax on worldwide income with the exception of income from the following sources: • Income from a trade or profession no part of which is carried on in Ireland, • Income from an office or employment all of the duties of which are carried on outside Ireland (apart from incidental duties). No statutory definition of incidental but in practice Revenue will generally treat up to 30 days duties in Ireland per annum as incidental duties assuming that they are part of a larger foreign employment exercised abroad. • Other foreign income which is less than €3,810 per annum.
Non-resident, non-ordinarily resident but domiciled AND Non-resident, non-ordinarily resident and non-domiciled	Liable to Irish tax on Irish source income and income from a trade, profession or employment to the extent exercised in Ireland.

Section B Residence of companies - implications for liability to corporation tax

How to determine whether a company is resident in Ireland

The general incorporation rule states that if a company is incorporated in Ireland, it is deemed to be resident in Ireland (s.23A(2) TCA 1997). However there are two exemptions from this rule, the trading exemption and the treaty exemption. This article does not intend to look at these exemptions in detail but it should be noted that where one (or both) of these exemptions applies, a company is deemed to be resident in the place where it is centrally managed and controlled.

How does a company's liability to corporation tax in Ireland vary depending on its residence status?

Generally speaking (subject to the two exemptions mentioned above), if a company is incorporated in Ireland it is liable to Irish corporation tax on its worldwide profits. However, many Irish companies have operations overseas and therefore it is important to understand how income/profits from such overseas operations may be taxed in other countries. An Irish company's exposure to foreign tax on its overseas operations is discussed in section c.

A non-resident company is liable to Irish corporation tax only if it carries on a trade in Ireland through a branch or agency. A branch or agency is defined in s.4 TCA 1997 as "any factorship, agency, receivership, branch or management". However, it should be noted that it is possible that under the terms of Ireland's Double Taxation Agreements (DTAs) that a particular branch or agency may fall outside the scope of Irish corporation tax where the level of activities carried on by the non-resident company in Ireland are such that they do not create a permanent establishment in Ireland as outlined in the DTA. This concept of permanent establishment is discussed in section c.

Section C Permanent establishment and double taxation

As businesses now operate in a global marketplace, many Irish businesses (incorporated or unincorporated) will have operations overseas. It is therefore important to understand when and how income from such overseas operations may be taxed in other countries.

In order to help establish the level of exposure an Irish business has to overseas tax on its overseas operations, we need to look to the terms of the DTAs which Ireland has entered into with countries around the world. Such DTAs are designed to allocate taxing rights between the two countries in order to ensure that income is not subject to double taxation. Most DTAs concluded by Ireland are based on the Organisation for Economic Co-operation and Development's (OECD) Model Tax Treaty.

Article 5 (Permanent Establishment) of the OECD Model Tax Treaty defines a permanent establishment as 'a fixed place of business in which the business of the enterprise is wholly or partly carried on'. This definition helps an Irish business establish whether it has created a permanent establishment overseas and hence whether it has an exposure to overseas taxation on its overseas operations in a particular country.

There are three criteria in the permanent establishment definition:

1. There must be a place of business
   The OECD commentary makes it clear that if an employee from a business in one country is purely visiting a client in another country on a short term basis then this will not constitute a place of business.

2. The place of business must be "fixed". This implies a degree of both physical and temporal permanence.

3. The business of the enterprise must be carried on through the fixed place of business.

Article 5 also provides a non-exhaustive list of examples of things which the term 'permanent establishment' may include:

- a place of management
- a branch
- an office
- a factory
- a workshop
- a building site or construction or installation project which lasts for more than six months.

Article 5 also deals with the circumstances where an agent can create a permanent establishment. It should be noted that an employee will always be treated as an agent. The Article states that where sales are concluded in the other country by independent agents of the enterprise, no permanent establishment will be created in the other country. However, if say, sales people of an Irish business travel to or are based in the other country, the place of completion of the sales contracts is crucial to determining if a permanent establishment has been created in the other country. If the sale is agreed in the other country, by say an employee of an Irish business then a permanent establishment will have been created in the other country.

Article 7 (Business Profits) of the OECD model treaty provides guidance on how the business profits of an enterprise should be taxed once it has been established that a permanent establishment exists in another country.

Where an overseas permanent establishment exists (say in the UK) for an Irish business, Article 7 states that only profits attributable to that permanent establishment, can be taxed in the overseas country (i.e. the UK). The amount of profit to be allocated to the permanent establishment will depend on the facts of the business operations but the permanent establishment should be treated as if it were run as a separate and independent enterprise.

In terms of taxation in Ireland on the overseas business profits of the permanent establishment, the Irish business should be allowed credit relief in respect of the overseas tax paid on the same profits.