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Corporate Tax

Law and Practice – Ireland

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IRELAND

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Law and Practice

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Maples and Calder's tax group advises leading investment banks, private equity firms, hedge funds and family offices. Its services include: structured finance and securitisation; property acquisition structuring and taxation; aviation and asset finance and leasing; corporate reorganisation; foreign direct investment; investment funds; mergers and acquisitions; tax controversy and litigation; indirect tax advice. The Tax Group participates actively in industry associations and liaises with the Irish Government through these industry bodies, giving it significant insight into policy formulation and legislative changes on behalf of its clients. This participation includes the Irish Funds Tax Committee, the Irish Debt Securities Association Tax Committee and the Irish Law Society Tax Committee.

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1. Types of Business Entity, Residence and Tax Treatment

1.1 Corporate Structures and Tax Treatment

Businesses in Ireland tend to incorporate in order to take advantage of the benefits of separate legal entity status and limitation of liability. Ireland enacted amended and consolidated company law legislation in 2014 (the Companies Acts 2014), which provides for the following forms of incorporated entity:

- private company limited by shares (LTD);
- designated activity company (DAC);
- public limited company (PLC);
- company limited by guarantee (CLG);
- unlimited company; and
- investment company.

The limited company has traditionally been the most popular form for incorporated trading business, and is likely to remain so. Companies involved in the issuance of listed debt securities will be formed as DACs. Investment funds are incorporated as investment companies or as an Irish Collective Asset Management Vehicle (ICAV).

Entities with separate legal form are taxed separately.

1.2 Transparent Entities

Partnerships and limited partnerships are treated as transparent for tax purposes in Ireland. Partnerships are generally used for investment purposes and also by certain professional services firms (eg, accountants, solicitors). In addition, pension funds may make use of a particular form of tax transparent investment fund called a common contractual fund (CCF).

1.3 Determining Residence

A company that has its central management and control in Ireland is resident in Ireland, irrespective of where it is incorporated. A company that does not have its central management and control in Ireland but that is incorporated in Ireland is resident in Ireland, except where the company is regarded as not resident in Ireland under a double taxation treaty between Ireland and another country. In certain limited circumstances and subject to defined cut-off periods, companies incorporated in Ireland prior to 1 January 2015 and managed and controlled outside of a double taxation treaty territory may not be regarded as resident in Ireland.

The term 'central management and control' is, in broad terms, directed at the highest level of control of the company. The Irish Revenue Commissioners ("**Irish Revenue**") and the Irish courts emphasise the location of the meetings of the board of directors.

1.4 Tax Rates

Ireland has two rates of corporation tax: 12.5% and 25%.

The 12.5% rate applies to the trading income of a company that carries on a trade in Ireland (including certain qualifying foreign dividends where paid out of trading profits). There is no precise definition of what constitutes a trade for this purpose but, broadly, it covers any company carrying on an active business in Ireland on a regular or habitual basis, with a view to realising a profit.

The 25% rate applies in respect of passive or investment income, profits arising from a possession outside of Ireland and profits of certain trades, such as dealing in or developing land and mineral exploration activities.

A 33% rate applies to capital gains.

The same capital gains rates also apply to gains earned by individuals directly or through transparent entities. Personal income is taxed at rates of up to 55%.

2. Key Features of the Tax Regime

2.1 Calculation of Taxable Profits

Corporation tax is imposed on the profits of a company, including both income and chargeable gains, for the fiscal year or "accounting period" of the company. The accounting period cannot exceed 12 months.

The starting point for determining taxable profits is the profit of the company according to its statutory accounts, subject to any adjustments required by law. Some of the more important items that are not deductible in calculating the tax adjusted profits are as follows:

- any capital expenses;
- any expenses not wholly or exclusively incurred for the purposes of the trade or profession;
- general provisions for bad debts (specific bad debts and specific bad debt provisions are deductible);
- dividends or other distributions paid or payable by the company;
- a tax deduction is not available for accounting depreciation, although capital allowances are available in relation to qualifying capital expenditure on land and buildings, plant and machinery, and certain intellectual property; and
- certain specific expenses, including business entertainment costs, interest on late payment of taxes, general provisions for repairs and certain motor leasing expenses.

Chargeable gains that do not form part of the trading profits are calculated in accordance with capital gains tax rules.

2.2 Special Incentives for Technology Investments

R&D Tax Credit

A 25% tax credit for qualifying Research and Development expenditure exists for companies engaged in in-house qualifying research and development undertaken within the European Economic Area ("**EEA**"). This credit may be set against a company's corporation tax liability, and is available on a group basis for group companies. For accounting periods commencing prior to 1 January 2015, the amount of qualifying expenditure is restricted to incremental expenditure over expenditure in a base year (2003). The tax credit is calculated separately from the normal deduction of the R&D expenditure in computing the taxable profits of the company.

Qualifying R&D activities must satisfy certain conditions; in particular, the activities must seek to achieve scientific or technological advancement, and must involve the resolution of scientific or technological uncertainty.

Where a company has insufficient corporation tax against which to claim the R&D tax credit in a given accounting period, the tax credit may be credited against corporation tax for the preceding period, may be carried forward indefinitely or, if the company is a member of a group, may be allocated to other group members. The R&D credit can also be claimed by the company as a payable credit over a three-year period, or surrendered to "key employees" to set off against their income tax liability.

Knowledge Development Box

Ireland recently introduced an OECD-compliant "knowledge development box" for the taxation of certain intellectual property. The amount of expenditure incurred by a company in developing, creating or improving qualifying patents or computer programs ("qualifying expenditure") is divided by the overall expenditure on such assets before being multiplied by the profits arising from such assets (eg, from royalties, net sales). The result is effectively taxed at 6.25%. A potential 30% uplift in the qualifying expenditure is available, capped at the total amount of acquisition costs and group outsourcing costs.

Capital Allowances on Provision or Acquisition of Intangible Assets

Capital allowances (tax depreciation) are available for companies incurring capital expenditure on the provision of intangible assets for the purposes of a trade. The relief applies to a broad range of intangible assets (eg, patents, copyright, trade marks, know-how) which are recognised as such under generally accepted accounting practice, and which are listed as 'specified intangible assets' in the Irish tax legislation. The relief is granted as a capital allowance for set off against profits arising from the use of the intangible assets. The write off is available in line with the depreciation or amortisation charge in the accounts or, alternatively, a company can elect

to take the write off against its taxable income over a 15-year period. There is no balancing charge if the intangible assets are held for more than five years. The allowance can be surrendered by way of group relief or carried forward if unused.

2.3 Other Special Incentives

Certain reliefs and incentives may apply for companies involved in shipping, financial services, property development, forestry, farming and mining businesses.

2.4 Basic Rules on Loss Relief

Ireland distinguishes between losses arising from trading income and losses arising from non-trading income. Trading losses are computed in the same manner as trading profits. Trading losses may be offset against non-trading profits but the losses are adjusted on a "value basis" so that they do not reduce the non-trading income more than they would have reduced trading income.

Broadly, trading losses can be used in the following order:

- set off against other profits of the company (before charges) in the same accounting period;
- set off against profits (before charges) of the previous accounting period of corresponding length, if the company carried on the trade in that period;
- trading losses of one Irish company (or of an Irish branch of an EU company) can be set off against the profits of an Irish resident company or Irish branch of an EU company which is in the same corporate group as the company that has excess trading losses; and
- carried forward on an indefinite basis and set off against future profits of the same trade.

2.5 Limits on Deduction of Interest

In general, trading companies can only take a deduction for interest incurred wholly and exclusively for the purposes of the trade.

Interest expenses incurred on funds borrowed to purchase, repair or improve a rented premises are allowed as a deduction against the related rental income.

Interest incurred by a company on funds borrowed to acquire shares in or loan money to certain other companies can be allowable in full against total profits of the company (as a charge on income) where specific conditions are met.

While no "thin capitalisation" rules are applicable in Ireland, it is nonetheless possible in certain limited cases that the interest may be reclassified as a distribution preventing such interest from being tax-deductible.

While the new EU anti-tax avoidance directive contains certain restrictions on borrowing costs, it is not expected to be implemented in Ireland until 2024.

2.6 Basic Rules on Consolidated Tax Grouping

The concept of consolidated tax grouping for corporation tax purposes does not exist in Ireland. Trading losses may be offset on a current year basis against taxable profits of another group company.

Both the claimant company and the surrendering company must be within the charge to Irish corporation tax. To form a group for corporation tax purposes, both the claimant company and the surrendering company must be resident in an EU country or an EEA country with which Ireland has a double tax treaty country. In addition, one company must be a 75% subsidiary of the other company, or both companies must be 75% subsidiaries of a third company. The 75% group relationship can be traced through companies resident in a 'relevant territory', ie the EU, an EEA treaty country, or another country with whom Ireland has a double tax treaty.

2.7 Capital Gains Taxation

Capital gains, other than gains from development land, are included in a company's profits for corporation tax purposes and are charged to tax under a formula that effectively means that tax is paid at the prevailing capital gains tax rate, currently 33%.

Substantial Shareholder's Relief

Disposals by a company of a substantial shareholding in a subsidiary company that is resident in an EU Member State or a country with which Ireland has concluded a double tax treaty are exempt from CGT if, at the time of the disposal:

- the subsidiary company carries on a trade or the activities of the disposing company and all of its 5% subsidiaries taken together amount to trading activities; and
- the disposing company holds or has held at least 5% of the ordinary share capital and economic interest in the subsidiary company for 12 months beginning no more than two years before the disposal.

Intra-Group Relief

Relief is available from CGT where both the company disposing of the asset and the company acquiring the asset are within a CGT group. A CGT group consists of a principal company and all its effective 75% subsidiaries, provided that both the principal and subsidiary company are resident in the EU or EEA. In addition, the shares must be within the charge to corporation tax on capital gains both before and after the transfer.

The effect of the relief is that both the company disposing of and the company acquiring the asset are treated as if the

shares were acquired for such consideration as would secure that neither a gain nor a loss would accrue to the disposing company (that is, the acquiring company takes the shares at the same base cost as applied to the disposing company).

Paper-for-Paper Reconstructions
No CGT arises for the disposing shareholders where shares are transferred as part of a bona fide scheme of reconstruction or amalgamation and certain additional conditions are met, and the acquiring shareholders are deemed to have received those shares on the same date and at the same cost as the old shares. The relief will only apply where the company acquiring the shares has – or as a result of the transaction will have – control of the target company, or where the share-for-share exchange results from a general offer made to the members of the target company.

2.8 Other Taxes on Transactions
Stamp duty and VAT may be payable by companies on particular transactions.

Stamp Duty
Stamp duty is a tax on certain instruments (primarily written documents). Generally, a document is subject to stamp duty, unless exempted, if it is both:

- of a type set out in Schedule 1 to the Stamp Duties Consolidation Act 1999 (SDCA), which lists the different categories of document to which stamp duty applies, and includes conveyances or transfers on sale of stocks or marketable securities and property; and
- executed in Ireland or, if executed outside Ireland, relates to something done or to be done in Ireland.

Generally, the purchaser or transferee is liable to pay stamp duty arising on a written instrument, and a return must be filed and stamp duty paid within 45 days of the execution of the instrument.

Stamp duty is charged on the consideration paid for the relevant asset or its market value, in certain cases. The main categories of instrument to which stamp duty applies and the applicable rates of duty are as follows:

- Transfers of shares or marketable securities: 1%.
- Transfers of non-residential property (including assets and other movable goods): 2%.
- Transfers of residential property:
  (a) 1% on consideration up to EUR1 million; and
  (b) 2% on balance of consideration in excess of EUR1 million.

Stamp duty may also be chargeable in connection with certain leases and rent payments.

There are a number of reliefs and exemptions, including:

- group relief on transfers between companies where the transferor and transferee are 90% associates at the time of execution and for two years afterwards; and
- exemptions for transfers of intellectual property and of non-Irish shares and land, loan capital, aircraft and ships.

VAT
VAT is an EU transaction-based tax that is chargeable on the supply of goods and services in Ireland by a taxable person in the course or furtherance of a business carried on by that person. The top rate of VAT is 23%, and certain services (such as "financial services") are VAT exempt. VAT is also chargeable on:

- goods imported into Ireland from outside the EU;
- the purchase of certain services from suppliers outside Ireland; and
- the intra-EU acquisition of goods.

2.9 Other Notable Taxes
Incorporated businesses operating in certain industries may be subject to additional taxes, such as relevant contracts tax (RCT) and professional services withholding tax. In addition, incorporated businesses are required to operate income tax withholding on payments to employees and directors of the company (pay-as-you-earn income tax – PAYE), to withhold tax at 20% from payments of interest, dividends and certain royalties (unless exempted), and to pay social insurance contributions in respect of employees.

3. Division of Tax Base Between Corporations and Non-Corporate Business

3.1 Closely Held Local Businesses
Most closely held local businesses operate in corporate form.

3.2 Corporate Rates and Individual Rates
Further detail on close companies is set out under **3.3 Accumulation Earnings for Investment Purposes**, below. Close companies that are professional services companies are liable to a surcharge on both undistributed investment and rental income and professional income. The surcharge is 15% of 50% of the annual undistributed professional income, and 20% of all of the company's undistributed investment and rental income.

In addition, Irish Revenue guidelines note that their position is that the mandating, allocating or routing of remuneration through a firm or company of remuneration arising from an individual having or exercising an office or employment

does not mean that the remuneration is taken outside of the individual's income tax rules.

3.3 Accumulation Earnings for Investment Purposes

For Irish tax purposes, a close company is a company controlled by five or fewer "participators" or by any number of participators who are directors. A "participator" is a shareholder or a person having an interest in the company's capital or interest.

Close companies are subject to a tax surcharge on investment income (including interest and distributions) or rental income that is not distributed within 18 months of the end of the company's accounting period. The surcharge is 20% of the undistributed income and is intended to act as a disincentive to individuals using corporates as personal holding companies and availing of corporation tax rates that are lower than the tax rates applicable to individuals.

Close companies that are professional services companies are liable to a surcharge on both undistributed investment and rental income and professional income, as described above, under **3.2 Corporate Rates and Individual Rates**.

3.4 Sales of Shares in Closely Held Corporations

Irish resident individuals are liable to income tax at their marginal rate on the gross amount of a dividend received from an Irish company (whether that company is a close company or otherwise), with a credit for any dividend withholding tax suffered.

Withholding tax at 20% is deducted from payments of dividends by Irish resident companies to both Irish and non-Irish resident individuals.

Irish resident individuals are liable to capital gains tax at a rate of 33% on the sale of shares in an Irish company (whether that company is a close company or otherwise).

Non-Irish resident individuals are generally only liable to Irish capital gains tax on the sale of unquoted shares in an Irish company if those shares derive the majority of their value from the following:

- land and buildings in Ireland;
- minerals in Ireland and rights or interests associated with mining for or searching for minerals in Ireland; or
- exploration or exploitation rights in the Irish Continental Shelf.

3.5 Sales of Shares in Publicly Traded Corporations

The treatment set out above also applies to dividends from quoted companies and gains on disposal of shares in quoted companies.

4. Key Features of Taxation of Inbound Investments

4.1 Withholding Taxes

Dividend Withholding Tax

Dividend withholding tax (DWT) at the standard income tax rate of 20% applies to dividends and distributions made by Irish tax resident companies.

There are a wide range of exemptions from DWT, where the dividend or distribution is paid by an Irish resident company to certain persons, including:

- another Irish tax resident company;
- companies that are resident in an EU Member State (other than Ireland) or a country with which Ireland has concluded a double tax treaty and which are not controlled by Irish residents;
- companies that are under the control – directly or indirectly – of a person or persons who are resident in an EU Member State or a country with which Ireland has concluded a double tax treaty;
- companies whose shares are substantially and regularly traded on a recognised stock exchange in another EU Member State or a country with which Ireland has concluded a double tax treaty or where the recipient company is a 75% subsidiary of such a company or is wholly owned by two or more such companies; and
- a company resident in another EU Member State with at least a 5% holding in the Irish paying company (under Directive 90/435/EEC on the taxation of parent companies and subsidiaries (Parent-Subsidiary Directive)).

Interest Withholding Tax

Irish tax legislation provides that tax at the standard rate of income tax (currently 20%) is required to be withheld from payments of Irish source interest.

However, there are a large number of exemptions available from the requirement to withhold on payments of interest, including for:

- interest paid in Ireland to a bank carrying on a bona fide banking business;
- interest paid by such a bank in the ordinary course of business;
- interest paid to a company which is resident in an EU Member State or a country with which Ireland has signed a double tax treaty where that territory imposes a tax that generally applies to interest receivable in that territory by companies from outside that territory;
- interest paid to a US corporation that is subject to tax in the US on its worldwide income;
- interest paid in respect of a "quoted Eurobond" (provided certain other conditions are met); and

- interest paid to certain Irish entities, including qualifying companies for the purposes of section 110 of the Taxes Consolidation Act, 1997 (as amended) ("**TCA**"), investment undertakings and certain government bodies.

Withholding Tax on Patent Royalties
Withholding tax at a rate of 20% applies to payments of a royalty or other sum paid for the use of a patent.

Withholding tax will not apply to royalty payments that are made to associated companies resident in another EU member state or to royalties paid by a company in the course of a trade or business to a company resident in a country with which Ireland has a double tax treaty.

It has been Irish Revenue's administrative practice since 2010 not to charge withholding tax on royalties payable under a licence agreement executed in a foreign territory which is subject to the law and jurisdiction of a foreign territory (subject to the Irish company obtaining advance approval from Revenue).

4.2 Primary Tax Treaty Countries
Ireland is an open jurisdiction that encourages investment from all countries; no specific countries are preferred for investing in Ireland. Many US, UK, European, Asian and GCC companies invest directly in Irish companies.

4.3 Use of Treaty Country Entities by Non-Treaty Country Residents
Generally, the use of a treaty by a tax resident beneficial owner should be respected.

4.4 Transfer Pricing Issues
Ireland first introduced transfer pricing in 2011. The Irish transfer pricing regime only applies to trading transactions involving the supply and acquisition of goods, services, money or intangible assets between associated persons or companies. As such, in order for the rules to apply, one of the parties to the transaction must be an Irish company subject to tax at the 12.5% rate in Ireland.

The rules require that transactions between associated persons should take place at arm's length, and the principles in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration must be followed when analysing whether a transaction has been entered into at arm's length. There is an exemption for small and medium-sized enterprises.

If Irish Revenue determines that a transaction was not entered into at arm's length and has had the effect of reducing profits or increasing losses within the charge to Irish corporation tax at 12.5%, an adjustment will be made by substituting the arm's length consideration for the actual consideration.

4.5 Related Party Limited Risks Distribution Arrangements
Ireland should follow OECD norms and guidelines in relation to the application of transfer pricing rules.

4.6 Variation from OECD Standards
The transfer pricing rules are based on the OECD Guidelines, so there is no significant local variation.

5. Key Features of Taxation of Non-Local Corporations

5.1 Taxation of Non-Local Corporation Versus Local Subsidiaries
Non-resident companies that carry on a trade in Ireland through a branch or agency are subject to corporation tax in the same manner as local companies.

5.2 Capital Gains of Non-Residents
Non-Irish tax resident companies are liable for gains arising on the disposal of certain assets, including:

- land and buildings in Ireland (relief from CGT may be claimed in respect of real estate acquired between 6 December 2011 and 31 December 2014, and which is held for a period of at least seven years);
- minerals in Ireland and rights or interests associated with mining for or searching for minerals in Ireland;
- exploration or exploitation rights in the Irish Continental Shelf;
- unquoted shares or securities deriving their value or the greater part of their value directly or indirectly from the above assets;
- assets situated in Ireland that are used, held or acquired for business carried on in Ireland through a branch or agency; and
- assets of a life assurance company that are situated outside Ireland but held in connection with the life business carried on by the company in Ireland that were used or held by or for the purposes of that company's branch or agency in Ireland.

5.3 Change of Control Provisions
Change of control provisions could arise in relation to an indirect disposal by a non-resident of an Irish land-rich company, as explained above.

5.4 Determining the Income of Foreign-Owned Local Affiliates
OECD standards would be expected to be applied in this case.

5.5 Deductions for Payments by Local Affiliates

The basic rule for allowance of deductions for Irish corporation tax purposes is that the expenses must have been incurred wholly and exclusively for the purposes of the trade or profession. As a general matter, it is difficult to envisage a situation where expenses incurred by a non-local affiliate could be considered to be incurred wholly and exclusively for the purposes of the trade of an Irish company, but there could be exceptions based on specific circumstances.

5.6 Contraints on Related Party Borrowing

Other than as set out below, Ireland does not operate what would be considered statutory thin capitalisation rules.

In broad terms, an Irish-based borrower should be entitled to a tax deduction for payments of interest to a non-local affiliated lender. However, there are certain restrictions that would need to be considered, including but not limited to the following:

- the interest payments should be an arm's length amount;
- the interest payment may be subject to withholding tax if the lender does not fall within relevant exemptions (see **4.1 Withholding Taxes** for details of potential exemptions); and
- in certain cases, payments to a 75% non-EU related affiliate may be re-characterised as a distribution and disallowed as a deduction.

6. Key Features of Taxation of Foreign Income of Local Corporations

6.1 Foreign Income of Local Corporations

Foreign income is not exempt from corporate tax. A company that is tax resident in Ireland is chargeable to corporation tax on all its profits, wherever they arise.

6.2 Taxation on Dividends from Foreign Subsidiaries

Foreign dividends received by Irish companies are generally subject to corporation tax at the 25% rate of corporation tax. However, dividends received by an Irish company from non-resident subsidiaries are subject to corporation tax at 12.5% where such dividends are paid out of the trading profits of a company that is resident either:

- in an EU Member State;
- in a country with which Ireland has a double tax treaty;
- in a country that has ratified the Joint Council of Europe/OECD Convention on Mutual Assistance in Tax Matters; or
- in a non-treaty country but where the company is owned directly or indirectly by a quoted company.

Companies that are portfolio investors (ie, a company that holds no more than 5% in the company and does not have more than 5% of voting rights) and that receive dividends from a company resident in an EU Member State or a country with which Ireland has a double tax treaty will be subject to corporation tax at the 12.5% rate on those dividends.

6.3 Use of Tangibles

If an Irish company licenses intellectual property to a subsidiary, it will be subject to Irish corporation tax on the licence fees (or deemed licence fees if transfer pricing applies) received in respect of the licence. The rate will be 12.5% if licensing is part of the trading activity of the Irish company, or 25% if it is a non-trading activity.

An Irish company would also be subject to tax on the proceeds of a transfer of intellectual property to a non-Irish subsidiary, either at capital gains tax rates or corporation tax rates.

6.4 Taxation of Income of Non-Local Subsidiaries Under CFC-Type Rules

Ireland does not have any CFC or similar rules as regards income (note that a limited measure can apply as regards gains).

6.5 Rules Related to the Substances of Non-Local Affiliates

There are no applicable rules regarding the substance of non-local affiliates.

6.6 Taxation on Gain on the Sale of Shares in Non-Local Affiliates

Irish companies are subject to capital gains tax on the sale of shares in directly held non-local affiliates under the normal capital gains tax rules at a rate of 33%, unless the substantial shareholder's exemption or group reliefs apply (described in detail at **2.7 Capital Gains Taxation**).

7. Anti-Avoidance

7.1 Overarching Anti-Avoidance Provisions

Ireland's general anti-avoidance rules have recently been amended and are intended to defeat the effects of transactions that have little or no commercial reality but are intended primarily to avoid or reduce a tax charge or artificially create a tax deduction or tax refund. The anti-avoidance rules mean that Irish Revenue may, at any time, deny or withdraw a tax advantage created through the use of a tax avoidance transaction by making or amending an assessment on that person.

In determining whether a transaction is a tax avoidance transaction, regard should be had to the form and substance

of the transaction, the substance of any other transactions directly or indirectly related to the transaction, and the final outcome of the transaction and any related transactions.

Where a person enters into a tax avoidance transaction that gives rise to a tax advantage contrary to general or specific anti-avoidance provisions, that person shall be liable to pay a 30% surcharge of the amount of the tax advantage. However, no surcharge is payable by a person who has made a valid protective notification. In addition, a taxpayer can also avail themselves of a reduced surcharge amount if a 'qualifying avoidance disclosure' is made to Irish Revenue.

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8. Other

8.1 Regular Routine Audit Cycle

Ireland does not have a defined audit cycle for tax purposes; companies are subject to audit by the Irish tax authorities at any time. The time limit for enquiry by Irish Revenue into a tax return is four years from the end of the accounting period in which that return was filed.