Asset Purchases: Tax: Overview (Ireland)

by *Tim Kiely* and Robert Dever, *Eversheds Sutherland*

Practice note: overview | Law stated as at 30-Oct-2021 | Ireland

A Practice Note providing an overview of the key tax implications of an asset purchase for the buyer and seller.

There are many tax issues for the buyer and the seller to consider in an asset purchase in Ireland. These include the tax deductibility of acquisition costs incurred by the buyer, the tax treatment of receipts received by the seller, and the value added tax (VAT), withholding tax, and stamp duty treatment of the asset purchase.

This Note gives a brief overview of these issues and explains how the buyer and the seller can comply with Irish tax requirements. This Note also identifies the various reliefs and exemptions under Irish tax law which the buyer and the seller may be in a position to avail as part of an asset purchase. It also considers certain practical tax aspects of asset purchases in Ireland, such as the apportionment of the purchase price and the main areas relating to an asset purchase which the seller is expected to warrant.

This Note assumes, unless otherwise stated, that the buyer and the seller are both Irish tax resident companies and that the assets being transferred are located in Ireland at the time of transfer. However, any specific issues arising where the buyer or the seller are not Irish tax resident companies are highlighted where relevant.

Tax Issues for the Buyer

The buyer should address the following key tax issues, which are outlined below:

- Whether any tax deductions are available in respect of certain acquisition costs.
- The tax implications associated with financing the acquisition.
- Whether the buyer is required to operate withholding tax on the sales proceeds.
- The stamp duty (if any) payable on the asset purchase.

Availability of Tax Deduction for Acquisition Costs

Some, but not all, acquisition costs and expenses are tax deductible. The availability of tax deductions for some of the most common assets are set out below.

Land, Buildings, and Shares

The cost allocated to land, buildings, and shares, including any "incidental costs" (increased by indexation allowance), are deductible when computing the chargeable gain (or allowable loss) arising to the buyer on a subsequent sale of the asset (*section 552, Taxes Consolidation Act 1997* (TCA 1997)). Expenditure wholly and exclusively incurred on the asset (such as for land and buildings) which enhances its value is also allowed provided that expenditure either:

- Is reflected in the state or nature of the asset at the time of disposal.
- Was incurred in establishing, preserving, or defending the buyer's title to or a right over the asset.

(*Section 552(1)(b), TCA 1997.*)

(However, see *Land and Buildings* in relation to restrictions applying to development land.)

Capital allowances are also available for expenditure on certain categories of industrial buildings (see *Industrial Buildings*).

Industrial Buildings

The buyer may claim capital allowances known as industrial buildings annual allowances (IBAAs) on the expenditure incurred in acquiring industrial buildings provided that the taxpayer has a "relevant interest" in the industrial building (*section 268, TCA 1997*). An industrial building is a building or structure located in Ireland and used for the purpose of one of several listed trading activities (such as a mill, factory, or other similar premises). A relevant interest is either a freehold interest or a leasehold interest. Generally, capital expenditure on the conversion, construction, or refurbishment of buildings or structures (both new and existing) may qualify for relief.

IBAAs on new buildings are typically written off on a straight-line basis over a 25-year period at 4% per annum of the original qualifying cost. Certain categories of buildings are written off over a shorter time period. (For example, IBAAs in respect of a building used for the purpose of market gardening are claimed over a ten-year period, whereas a building or structure used for the provision of childcare facilities or as a fitness centre for employees attracts IBAAs at a rate of 15% per annum for the first six years and 10% in year seven.) The following costs are excluded from the scope of IBAAs:

- Land and site acquisition costs (*section 270(2)(a), TCA 1997*).
- Costs relating to offices, retail shops, showrooms, and dwelling houses (non-qualifying areas) (*section 268(7)(b), TCA 1997*).

However, provided that the cost of construction of the building's non-qualifying areas is not more than 10% of the total costs of construction of the building, IBAAs may be claimed on the total construction costs (*section 268(8), TCA 1997*).

Special rules operate in the case of second-hand industrial buildings and are therefore relevant in the context of asset purchases. If the sale takes place after the tax life of the building has expired, the buyer is not entitled to any IBAAs. Where the tax life has not expired at the time of the sale, the qualifying expenditure is claimed on a straight-line basis over the unexpired tax life of the building (*section 272(4), TCA 1997*). The qualifying expenditure for the buyer is determined as follows:

- If the proceeds relating to the qualifying part of the industrial building are greater than the original qualifying cost for the seller, then the qualifying cost for the buyer and the seller is the same (*section 272(4), TCA 1997*).
- If the proceeds relating to the qualifying part of the industrial building are less than the original qualifying cost for the seller, then the buyer's qualifying cost is the proceeds (*section 272(5), TCA 1997*).

Plant and Machinery

The buyer may be entitled to capital allowances for qualifying capital expenditure on plant and machinery provided that the plant and machinery is used wholly and exclusively for the purposes of the buyer's trade or profession (*section 284, TCA 1997*). Capital allowances on plant and machinery are claimed on a straight-line basis over an eight-year period at 12.5% per annum of the original qualifying cost. For capital allowances to be available, the plant and machinery must belong to the person claiming the relief at the end of the chargeable period and still be in use for the purposes of that person's trade.

Accelerated capital allowances schemes allow the buyer to claim 100% of the capital expenditure of certain equipment in the year in which the expenditure is incurred, provided that the equipment is in use for the business's trade at the end of the chargeable period (*sections 285A-285C, TCA 1997*). Both companies and unincorporated businesses can claim accelerated allowances where they incur capital expenditure on the following eligible equipment:

- Energy-efficient equipment.
- Gas vehicles.
- Refuelling equipment.
- Equipment in a gym or crèche provided by the taxpayer to its employees.

If the equipment is not in use at the end of this period, or where certain events occur, there may be a clawback of capital allowances already granted.

Stock

Subject to accounting policy, a buyer is entitled to claim an immediate tax deduction for the amount paid for any stock, where that stock is consumed in the buyer's trade.

Intangible Assets and Associated Goodwill

The buyer may be entitled to tax relief in the form of capital allowances where it incurs capital expenditure on the provision of "specified intangible assets" (*section 291A, TCA 1997*). This regime applies to a broad range of intangible assets, including patents, copyright, brand names, and computer software as well as goodwill which is directly attributable to qualifying assets. Specified intangible assets are treated as plant and machinery for the purposes of capital allowances so that normal capital allowances rules apply to these assets (see *Plant and Machinery*).

There are two options to claim capital allowances under the specified intangible assets regime:

- A fixed write-down period of 15 years at an annual rate of 7% of qualifying expenditure for 14 years, and 2% in the final year.
- An amount equivalent to the amount of depreciation, amortisation, or impairment charged in the company's profit and loss account or statement of comprehensive income for the accounting period. In practice, taxpayers tend to choose this option.

The company must be trading to qualify for capital allowances under the specified intangible assets regime. Pre-trading expenditure on specified intangible assets is also deductible. It is also a requirement that the buyer must use the intangible assets for the purposes of its trading activity and incur the capital expenditure on these assets for bona fide commercial reasons and not as part of any tax avoidance scheme.

Investigation Costs and Professional Fees

Fees paid to professional advisers may be considered in calculating the chargeable gain or allowable loss arising on the future disposal of the asset provided that these expenses directly relate to the cost of acquiring or disposing of the asset.

The cost of general advice regarding the state of the market or the prospectus of a certain form of investment is not usually allowable in this regard, nor are amounts paid for subscriptions to publications by analysts or other professionals.

Accountants' fees may be deductible where they relate to an ascertainment of market value or an apportionment calculation. However, broadly speaking, costs relating to the calculation of a tax liability are not allowable.

Payments Treated as Employment Income

Where an individual seller becomes an employee of the buyer, there is a risk that part of the consideration for the sale may be taxed as employment income, particularly if it is paid under an earn-out mechanism. While this has the advantage that the buyer should be entitled to a tax deduction for the payment, the employer company is liable to deduct and account for income tax, universal social charge (USC), and employee pay related social insurance (PRSI) under the pay-as-you-earn (PAYE) system. The employer company will also suffer employer PRSI (the current marginal rate of which is 11.05%).

Cost of Financing the Acquisition

When buying a business, there are broadly three ways in which the buyer can fund the acquisition cost:

- Cash: the buyer can use existing cash reserves.
- Debt: the buyer can borrow to fund the purchase.
- Equity: the buyer can raise the purchase price through a share issue.

These options are not mutually exclusive: the buyer can make acquisitions using any combination of all three.

Use of Existing Cash Reserves

The use of existing cash resources has no further tax implications for the buyer other than those outlined in *Availability of Tax Deduction for Acquisition Costs*.

Borrowing to Fund the Acquisition

There are three instances where a borrower may obtain tax relief in respect of interest payments arising on borrowed funds:

- **Interest treated as a trading expense.** Where the interest is incurred wholly and exclusively for the purposes of a trade carried on by the buyer, it should be allowable as a trading expense. In ascertaining whether interest is allowable as a trading expense, consideration should be given to the case of *Sean MacAonghusa (Inspector of Taxes) v Ringmahon Co [2001] 2 IR 507* In that case, which considered the deductibility of interest on monies borrowed to facilitate a buy-back of shares, it was held that the company was entitled to a tax deduction as the interest was incurred wholly and exclusively for the purposes of the company's trade.
- **Interest treated as a rental expense (*section 97*, *TCA 1997*).** Interest on monies borrowed by the buyer to purchase, improve, or repair premises held as a rental property is allowable as a deduction against the gross rental income in arriving at the taxable rental income.

- **Interest treated as a trade charge (*section 247, TCA 1997*).** Interest as a charge relief applies where interest is paid on monies borrowed by the buyer to acquire shares in or loan monies to certain other companies with that interest allowed as a charge for corporation tax purposes where the qualifying conditions are satisfied. Accordingly, this tax relief tends to relate more to share purchases than to asset purchases. However, interest as a charge relief may still be relevant where the monies are on-lent to acquire business assets.

Interest Deductibility Where the Loan Is Between Connected Parties

Claims for interest as a trading deduction by the buyer may be denied where the buyer and the lender are connected companies (*section 817C, TCA 1997*). This provision can operate such that the buyer can only claim interest as a deduction equal to the interest charged to tax on the lender. Any excess interest charged in the buyer's account over the interest taxed in the lender's tax return can be carried forward until eventually the lender is taxed on all the interest.

Subject to certain exceptions, interest may also be restricted in respect of a loan made on or after 21 January 2011 from a connected company to acquire assets from the same or a different connected company (*section 840A, TCA 1997*). This provision can operate to deny an interest deduction under any case of Schedule D (which charges to income tax a number of sources of income under five separate classes), including in respect of trading income, income from a foreign trade or property, leasing trades, or rental income.

However, it does not apply:

- To interest treated as a charge as it is allowed as a deduction against profits of more than one description.
- In respect of monies borrowed to acquire assets which come within the Irish specified intangible assets regime or which are acquired as trading stock.

(See *Intangible Assets and Associated Goodwill*.)

See also *Transfer Pricing Rules*.

New Interest Deductibility Restriction

Ireland is due to transpose the interest limitation rule (ILR) under Article 4 of the EU's *Anti-Tax Avoidance Directive ((EU) 2017/952)* into Irish law in the Finance Bill 2021 (expected to take effect from 1 January 2022). The ILR seeks to restrict tax-deductible interest expenses to 30% of earnings before interest, taxes, depreciation, and amortisation (EBITDA) in a given period.

The existing Irish interest deductibility rules (including the various restrictions outlined above) will remain in effect after 1 January 2022. Taxpayers will need to compute tax liabilities by reference to the new ILR and the old deductibility and restriction rules after this time.

Transfer Pricing Rules

Loans between connected Irish companies may also be subject to the transfer pricing regime, which can restrict the deductions available for interest payable by the buyer on debt provided by a connected lender and can also apply to guarantees provided by connected parties.

The *Finance Act 2019* made several changes to Ireland's transfer pricing regime which are generally applicable for chargeable periods commencing on or after 1 January 2020. These changes included the extension of transfer pricing rules to certain non-trading transactions subject to an exemption for Irish-to-Irish transactions where the lender undertakes the trade otherwise than in the course of a trade or profession (*section 835E, TCA 1997*).

The rationale for the introduction of this exemption was due to Ireland's dual-rate system (which taxes trading transactions at a different rate to non-trading transactions) which could result in inequitable outcomes if transfer pricing rules applied to transactions entered into between an Irish trading entity and a related non-trading entity.

As a result of difficulties in interpreting the Irish-to-Irish transfer pricing exemption mentioned above, the *Finance Act 2020* sought to address some of those difficulties by proposing to delete and replace the existing exemption with an entirely new provision. However, this proposed replacement was subject to commencement by Ministerial Order which, at the time of writing, has not and is not expected to be issued. The initial draft of the Finance Bill 2021 (published on 21 October 2021) proposes to repeal and replace the existing Irish-to-Irish transfer pricing exemption with a principles-based approach in disapplying the transfer pricing rules in the case of Irish-to-Irish transactions.

Interest Withholding Tax

Monies borrowed by the buyer may also have withholding tax implications in Ireland. The obligation to withhold income tax at source from certain payments arises under section 246 of the *TCA 1997*. This obligation only applies to payments of yearly or annual interest which is charged to tax under Schedule D. If the loans are interest-bearing, a buyer is not required to account for withholding tax on interest paid to the lender if one of the exemptions outlined in section 246 of the TCA 1997 is applicable. This includes an exemption in respect of interest paid in Ireland on an advance from a bank carrying on a bona fide banking business in Ireland (*section 246(3)(a), TCA 1997*). Ireland also has an extensive network of double tax treaties which may remove (or reduce) any withholding tax.

Where withholding tax is suffered by an Irish lender in Ireland, that withholding tax is treated as an advance payment of corporation tax. Therefore, it is creditable against the overall corporation tax liability of that Irish lender.

Share Issue to Fund the Acquisition

A buyer may issue shares in itself to raise finance for the asset purchase. The main Irish tax implications of issuing shares to finance an acquisition are that:

- The acquisition of the assets may qualify for reconstruction or amalgamation relief from stamp duty under section 80 of the *Stamp Duties Consolidation Act 1999* (SDCA 1999) where the sale constitutes a qualifying share-for-undertaking swap.
- No tax deduction is available for dividend payments (*section 76(5), TCA 1997*).
- ·The buyer should consider whether input VAT paid on supplies in connection with the share issue is recoverable.
- Except if certain anti-avoidance provisions apply, any dividends paid by the Irish buyer to an Irish corporate are exempt from corporation tax as franked investment income (*section 129, TCA 1997*).
- The buyer is not required to operate and account for dividend withholding tax under section 172 of the TCA 1997, currently at a rate of 25%, in respect of any dividend payments where the Irish corporate has made an appropriate declaration in advance to the buyer. (In the case of non-Irish resident corporates, an exemption from the requirement on the buyer to operate and account for dividend withholding tax may also apply under section 172D of the TCA 1997.)

Capital Gains Withholding Tax

Where consideration in excess of EUR500,000 (or EUR1 million in the case of a house or apartment) is paid for any of the following "specified assets," the buyer is required to withhold from the consideration, and to account for the same to the Irish Revenue Commissioners (Irish Revenue), 15% of the gross consideration for the sale:

- Irish land and buildings.
- Minerals in Ireland or any rights, interests, or other assets in relation to mining or minerals or the searching for minerals.
- Exploration or exploitation rights in a designated area on the Irish continental shelf.
- Goodwill of a trade carried on in Ireland.

(*Section 980, TCA 1997*.)

The buyer is not required to withhold any portion of the consideration where the seller provides to the buyer on completion a capital gains tax (CGT) clearance certificate (known as Form CG50A) issued by Irish Revenue. The seller or its agent may obtain Form CG50A where any of the following conditions are satisfied:

- The seller is resident in Ireland.
- No CGT is payable on the gain chargeable on the sale.
- The seller has paid the CGT arising in respect of the sale and tax on any gain accruing in any earlier tax year on a previous disposal of the asset.

(*Section 980(8), TCA 1997*.)

Irish Revenue will not issue Form CG50A where the consideration has already passed. Accordingly, it is not sufficient for the buyer to simply withhold or escrow 15% of the consideration and release the amount to the seller following completion on delivery of Form CG50A.

Where the buyer is required to operate the 15% withholding tax, it must account for the same to Irish Revenue within 30 days of making the deduction (*section 980(5), TCA 1997*). The buyer submits a certificate of deduction (known as Form CG50B) to Irish Revenue and supplies Form CG50B to the seller who may use it to claim a credit for the withholding tax withheld against its CGT liability for the tax year.

Stamp Duty

The transfer of assets as part of an asset purchase generally attracts stamp duty in Ireland for which the buyer is the accountable person. The rate of stamp duty applicable is determined by the nature, and sometimes value, of the asset(s) transferring. Typically, the asset purchase agreement is the stampable document by virtue of section 31 of the *SDCA 1999* for the majority of chargeable assets transferring, such as goodwill and the benefit of contracts, as part of the asset purchase.

The rate of stamp duty in Ireland in respect of the transfer of business assets is currently 7.5%. This rate also applies to the transfer of non-residential property. Stamp duty on the transfer of residential property is charged at a rate of 1% on the first EUR1 million and 2% on any excess over EUR1 million (although a higher rate of 10% applies where the same buyer, or a connected party, acquires ten or more residential units other than apartments over a 12-month period).

The buyer may mitigate its stamp duty liability by:

- Where possible, providing in the asset purchase agreement that all assets, the title of which can pass by physical delivery, will pass on completion by the seller physically delivering those assets to the buyer. This method of transfer ensures that these assets do not come within the charge to stamp duty and is a method often used in relation to assets such as stock, machinery, and equipment.
- Increasing the allocation of the consideration in respect of assets which are exempt from stamp duty (such as qualifying intellectual property and goodwill directly attributable to that intellectual property).
- Where the assets being acquired include both Irish and non-Irish assets, effecting the sale of the non-Irish assets by way of a separate instrument of transfer which is executed outside of Ireland. The rationale here is to ensure that these non-Irish assets do not come within the charge to stamp duty in Ireland (which might otherwise be the case on the basis that the instrument "relates" to Irish property and/or that the instrument is executed in Ireland).
- Considering whether the buyer should not acquire certain assets. For example, the buyer may elect not to acquire the existing trade debtors from the seller and instead enter into an agency collection arrangement whereby the buyer collects these debts on the seller's behalf.
- Where cash in a deposit account is being transferred to the buyer as part of the asset purchase, ensuring the cash is transferred to a current account in advance of the sale. This is because, in practice, Irish Revenue do not consider monies held in a current account to be chargeable under section 31 of the SDCA 1999. However, if monies held on deposit account are the subject of an asset purchase agreement, stamp duty is charged on the amount held in that deposit account.

The buyer must submit a stamp duty filing, along with payment of the relevant duty, to Irish Revenue via the eStamping system within 44 days after the execution of the relevant instrument of transfer. Otherwise, late payment interest and a surcharge are applied. Irish tax reference numbers for both the buyer and the seller are required to facilitate the eStamping process. Where either party (but typically the buyer) is not in possession of a valid and subsisting Irish tax reference number, it can usually obtain a temporary stamp duty number by making an appropriate submission to the National Stamp Duty Office of Irish Revenue.

Tax Issues for the Seller

The sale of a business constitutes a series of separate asset disposals from a tax perspective, rather than a single disposal as in the case of a sale of shares. Therefore, the tax consequences depend on how the consideration is allocated between the assets (see *Apportionment of the Purchase Price*).

The seller should consider:

- Whether it is within the charge to Irish tax on the sale in the first instance.
- The tax implications of selling different types of assets.

- Whether the seller is required to charge VAT on the sale of the assets.
- Any tax reliefs available to reduce the tax liability on the sale.
- The tax treatment of deferred cash consideration and consideration in the form of shares or loan notes.

Charge to Irish Tax

Generally, Irish resident companies are subject to corporation tax in Ireland (including corporation tax on chargeable gains) on disposals of their worldwide assets. Accordingly, the sale of assets by an Irish resident company typically falls within the charge to Irish tax regardless of where the assets are situated. An exception to this rule is where the sale involves assets located outside Ireland that are subject to tax in the foreign jurisdiction. In these cases, the charge to Irish corporation tax may be reduced or eliminated entirely, either in accordance with a double tax treaty agreed between Ireland and the foreign jurisdiction, or by way of a unilateral tax credit granted under Irish domestic law.

In the case of companies that are not resident in Ireland, these companies are generally only subject to Irish tax on the disposal of the following assets:

- Irish land.
- Irish minerals or any rights, interest, or other assets relating to mining or minerals or the searching for minerals.
- Assets situated in Ireland which were used for the purposes of carrying on a trade in Ireland through a branch or agency or were otherwise acquired or held for that purpose.

(*Section 29(3), TCA 1997*.)

The term "branch or agency" is defined as "any factorship, agency, receivership, branch or management" (*section 4(1), TCA 1997*). In practice, this definition is somewhat difficult to apply, especially given the relatively scant judicial and Irish Revenue guidance on the meaning of the term. Where the non-Irish resident seller is resident in a country which has agreed a double tax treaty with Ireland, the terms of that treaty should be reviewed, and considered by the seller, in particular, the provisions which determine when a permanent establishment is deemed to arise.

Tax Implications of Selling Assets

Where the assets of an Irish company are sold in exchange for cash, the Irish tax implications of the sale depend on the type of assets being sold. Some of the most common assets which are sold in an asset sale, and the relevant tax implications of the sale of those assets, are set out below. (See *Shares or Loan Notes* in relation to where the consideration is in the form of shares or loan notes.)

Land and Buildings

For land and buildings generally, the seller is liable to corporation tax on the excess (if any) of the net proceeds received over cost, after adjusting for indexation. No indexation applies in the case of land and buildings (or, indeed, other forms of capital assets) acquired before 2003.

Special rules apply in the case of development land to determine whether a chargeable gain or loss arises on its disposal. Development land is Irish land the proceeds or market value of which at the time of the disposal exceeds the current use value of the land (*section 648, TCA 1997*). The current use value of the land is the amount which would be the market value of the land if the value was calculated on the basis that it was, at the time of the disposal (and would remain), unlawful to carry out any development other than development of a minor nature.

There are several restrictions which apply on the sale of development land. For example, indexation relief only applies to the amount or value of the proceeds given to acquire the development land that is attributable to its current value at the date of acquisition (*section 651, TCA 1997*). Further, there is no indexation relief on any enhancement expenditure related to development land. Capital losses arising on the disposal of "ordinary assets" cannot be set against chargeable gains arising on the disposal of development land (*section 653, TCA 1997*). However, while development land gains are ring-fenced, development land losses are not. Accordingly, relief for losses on the disposal of development land may be claimed by the seller against any capital assets.

The above restrictions do not apply where the total proceeds from disposals of development land in the tax year does not exceed EUR19,050 (*section 650, TCA 1997*). In other words, any gain arising in these circumstances is taxed as an ordinary gain with full indexation and loss relief available.

Industrial Buildings

Where an industrial building on which IBAAs were claimed is sold and the sale proceeds exceed the tax written-down value (TWDV), a balancing charge generally arises (*section 274, TCA 1997*). However, a balancing charge cannot arise on the sale of an industrial building after the relevant holding period of the building has expired. The length of the relevant holding period depends on the purpose for which the industrial building is used (for example, the holding period for a factory is 25 years, whereas a market garden must be held for a ten-year period to avoid a balancing charge arising on its disposal).

Plant and Machinery

If the seller sells plant and machinery as part of the asset and the total proceeds for plant and machinery exceed the TWDV of those assets, a balancing charge may arise on the excess (*section 288, TCA 1997*). A balancing charge cannot exceed the capital allowances actually claimed on the plant and machinery (*section 288(4)(b), TCA 1997*). No balancing charge arises where the proceeds allocated to the asset are less than EUR2,000. If the total proceeds are less than the TWDV of the asset, a balancing allowance is available for the difference. A balancing charge is deemed to be a trading receipt that increases total profits, whereas a balancing allowance is treated as a trading expense (*section 307(2)(a), TCA 1997*).

While rare, where plant and machinery is sold for proceeds in excess of its original acquisition cost, in addition to triggering a balancing charge, the sale may also give rise to a chargeable gain in the hands of the seller. Where (as in most cases) plant and machinery is sold at a loss, the cost of acquisition of the asset is reduced by the amount of the net capital allowances granted for corporation tax purposes (*section 555, TCA 1997*). This means that the disposal of plant and machinery at a loss always gives rise to a no-gain, no-loss result for CGT purposes.

Specified Intangible Assets

Where a specified intangible asset on which capital allowances were claimed is disposed of, a balancing charge or allowances may arise in the same way as plant and machinery. Where the TWDV of the specified intangible asset exceeds the proceeds apportioned to it, a balancing charge does not arise and the expenditure on the provision of the specified intangible asset was incurred before 14 October 2020 where the asset is sold more than five years after the beginning of the accounting period in which the asset was first provided for the trade (*section 288(3C), TCA*

1997). The exclusion from a balancing charge arising does not apply where the expenditure was incurred on or after 14 October 2020.

For more information, see *Intangible Assets and Associated Goodwill*.

Trade Debtors

If the debts are sold to the buyer as part of the sale, no chargeable gain or loss arises on their disposal where the seller was the original creditor (*section 541, TCA 1997*). This is provided that the debts do not constitute a debt on security. While a debt on security is not defined in Irish law, case law in the UK and Ireland has confirmed that the debt must exhibit a number of key characteristics to constitute a debt on security, including that it must have the potential to increase in value such that it is capable of being dealt in or realised at a profit (for an example of Irish case law on this point, see *JJ Mooney v Noel McSweeney (1997) 3 IR 424*).

In any event, in practice, the consideration paid for the trade debts as part of an asset sale tends to be equal to the carrying value of the debts such that no gain or loss should arise on the sale in the hands of the seller.

Stock and Work in Progress

The amount apportioned to stock and work in progress is treated as (taxable) trading income.

Investments

A chargeable gain liable to tax may arise on the sale of shares (subject to the availability of the substantial shareholding exemption under section 626B of the *TCA 1997*) and other investments as part of the asset sale, calculated as the excess of the proceeds over the cost as adjusted for indexation and allowable costs of acquisition and sale.

Value Added Tax

A sale of assets is subject to VAT unless a particular asset is exempt. However, no VAT is chargeable on the transfer of assets in connection with the transfer of a business, or part of a business (*section 20(2)(c), Value-Added Tax Consolidation Act 2010* (VATCA 2010)). This is known as transfer of business (TOB) relief from VAT and may apply even where the business or part of it had previously ceased trading. Where TOB relief applies, the transfer of the assets is deemed not to be a supply for VAT purposes.

To qualify for TOB relief, the assets must constitute a totality of assets, or part of them, of a business where those transferred assets constitute an undertaking or part of an undertaking capable of operating on an independent basis. Further, the buyer must be an accountable person (that is, registered for VAT) for the relief to apply.

A similar relief to TOB relief under section 20(2)(c) of the VATCA 2010 is set out in section 26 of the VATCA 2010, which applies to the transfer of goodwill and intangible assets (treated as services for VAT purposes). For goodwill and intangible assets to qualify for TOB relief, the transfer must be made by either:

- An accountable person to a taxable person who carries on a business in Ireland.
- A person who is not an accountable person to any other person.

For these purposes, "accountable person" does not include a person who is an accountable person solely by reason of making intra-community acquisitions of goods into Ireland from other EU member states, receiving gas through the natural gas distribution system, or receiving taxable reverse charge services in Ireland from abroad.

There are specific rules in place, supported by guidance from Irish Revenue, that apply to the conveyance of land or buildings as part of the transfer of a business (see *Transfer of Business*). The guidance from Irish Revenue focuses on the need to examine the totality of assets being transferred. It notes that the transfer of land or buildings itself without any additional assets such as plant, machinery, goodwill, or stock, which together with the property are capable of being used to independently carry out a business, do not fall within the TOB provisions.

In the case of let properties, Irish Revenue has indicated that the transfer of land and buildings to an accountable person may qualify for TOB relief where, at the time the property is supplied, the property is subject to an existing letting agreement, agreement for lease, or a licence to occupy. This is because, together, those assets can constitute an independent business or undertaking. However, the transfer of a let property to the tenant is not regarded as coming within the TOB provisions as the only asset being transferred in those circumstances is the property itself. Accordingly, the seller should consider the specific rules to clarify whether TOB relief applies to the conveyance of any land or buildings as part of an asset sale or if the seller should charge VAT to the buyer.

Tax Reliefs Available to the Seller

Losses

The seller may be able to shelter any taxable profits (whether in the form of a trading profit or chargeable gain) arising on the disposal by the offset of certain tax losses, including trading losses, management expenses, or capital losses.

The use of these losses is subject to various restrictions and anti-avoidance provisions.

Unlike current year trading losses and surplus management expenses, capital losses in a group company cannot, in principle, be offset against chargeable gains made by another group company. However, the seller group may utilise a capital loss by transferring the asset(s) being disposed of to the group member which crystallised the capital loss before the onward sale to the buyer.

This approach relies on the use of CGT group relief under section 617 of the *TCA 1997* (whereby the group member transferring the asset(s) is deemed to have disposed of the asset(s) to the other group member on a no-gain, no-loss basis). As such, it is important to ensure that the qualifying conditions for that relief are or will be satisfied.

Capital Allowances: Balancing Allowances

If the seller sells the whole of its business, and the total proceeds for plant and machinery or a qualifying industrial building are less than the TWDV of the assets, a balancing allowance is available for the difference. The balancing allowance is treated as a trading expense for corporation tax purposes.

Business Assets Roll-Over Relief

Previously, a roll-over relief applied on the sale of assets which were used exclusively for the purpose of a trade and reinvested in new assets for use in the trade (*section 597, TCA 1997*). However, that relief has been discontinued for disposals of assets on or after 4 December 2002. Gains arising on disposals of assets before that date may continue to be rolled over while the seller continues to invest the consideration for subsequent disposals of qualifying assets in replacement qualifying assets.

Deferred Consideration

While it is less common to use deferred consideration in an asset purchase, compared to a share purchase, deferred consideration can arise in practice. The key tax issues associated with deferred consideration in this context are summarised below.

Cash Instalments

If any part of the consideration for the assets subject to CGT or corporation tax on chargeable gains is payable in instalments, the seller must bring the full amount receivable into their chargeable gains computation for the year of disposal. No allowance is made for any part of the postponed or contingent consideration (section 563, *TCA 1997*). Any over-assessment is corrected at a later date by a repayment of tax.

If the period of deferral exceeds 18 months, Irish Revenue may allow the seller to pay the tax in instalments over a maximum of five years, but not beyond the date when the last instalment is due, where the seller satisfies Irish Revenue that the taxpayer would otherwise suffer undue hardship (*section 981, TCA 1997*).

Earn-Outs

An earn-out is contingent consideration. In practice, Irish Revenue adopts the approach outlined in the English case of *Marren (Inspector of Taxes) v Ingles [1980] 1 WLR 983* even though the case does not constitute law in Ireland. This is to treat the earn-out as the right to future, unascertainable consideration which is deemed to be a separate asset for the purposes of tax on chargeable gains. This means that the market value of the right to the earn-out must be brought into the seller's chargeable gains computation on the original disposal of the assets, together with the value of any ascertainable consideration. When future consideration is paid under the earn-out right, it is considered to be a disposal of the right to the earn-out. The effect is that the seller must pay tax upfront on the value of the earn-out right. Further tax may then be due when payments are made under the earn-out right.

An issue can arise for the seller where *Marren v Ingles* principles apply and a loss arises to the seller on the disposal of a right to contingent consideration (for example, where it becomes clear that no future consideration will be paid to the seller). This is because capital losses cannot generally be carried back to a previous tax year under Irish tax law.

Where the future earn-out payment is capped, the provisions of section 563 of the *TCA 1997* appear to apply and the seller is required to bring the full amount receivable into the CGT computation in the year of disposal. To the extent that the contingency does not occur in the future, the seller can claim relief from Irish Revenue (*section 563(1)(b), TCA 1997*).

Where an individual seller becomes an employee of the buyer, there is a risk that part of the earn-out payments may be subject to tax as employment income, rather than CGT. Consequently, the employer company is liable to deduct and account for income tax, USC, and PRSI under the PAYE system in relation to the payments. The more generous CGT regime does not apply to the seller in these circumstances.

Shares or Loan Notes

Where the assets are sold in exchange (or part exchange) for shares in the buyer, the seller may benefit from certain tax reliefs, such as reconstruction or amalgamation relief from CGT in accordance with sections 587 and 615 of the *TCA 1997* where the sale constitutes a qualifying share-for-undertaking swap.

Before 4 December 2002, where debt consideration in the form of loan notes were issued on an asset sale, the seller could often qualify for reconstruction or amalgamation relief from CGT, provided the relevant conditions of that relief were satisfied. Since 4 December 2002, that relief is no longer available except in relation to loan note transactions that are effected pursuant to a binding contract entered into before that date.

Apportionment of the Purchase Price

For tax purposes, an asset purchase involves a bundle of separate disposals. Therefore, the purchase price must be apportioned between the various assets.

Ultimately, the apportionment is a matter for negotiation between the parties and should ideally be fully set out in the asset purchase agreement. However, the apportionment should be within the bounds of what is "just and reasonable" as there are provisions in the capital allowances, chargeable gains, and stamp duty legislation that allow Irish Revenue to reallocate the consideration if it is considered not to be just and reasonable. Normally, Irish Revenue will accept an agreed allocation unless it is manifestly unreasonable.

Irish Revenue has published guidance on valuing goodwill for tax purposes on the disposal of a business. The guidance confirms that, in genuine third party transactions involving a disposal of goodwill, that goodwill is valued at arm's length (see *Irish Revenue: Tax and Duty Manual: Guiding principles in relation to the treatment of Goodwill on the disposal of a business (January 2020)*).

Buyer's Perspective

The buyer is likely to want to increase the consideration allocated to:

- Stock, as the whole of the amount so allocated is normally tax deductible following the purchase as a trading expense because it is expensed to the profit and loss account or statement of comprehensive income.
- Plant and machinery to maximise the amount of any available plant and machinery allowances.
- Intellectual property and other qualifying intangible assets if it is able to claim tax deductions under the intangible assets regime (*see Intangible Assets and Associated Goodwill*).
- Assets which either do not come within the charge to stamp duty (such as assets capable of passing by way of delivery), or assets the transfer of which are exempt from stamp duty, with a view to minimising its liability to stamp duty.

Seller's Perspective

The seller may wish to:

- Increase the consideration allocated to capital assets if it can shelter any chargeable gain with unused capital losses.
- Reduce the consideration allocated to:
    - stock, as the whole of the amount so allocated is treated as taxable trading income. (However, unused, brought-forward trading losses may be set off against this income.); and

- plant and machinery to reduce or eliminate balancing charges (or create or increase balancing allowances) on the disposal.

Tax Warranties in an Asset Purchase Agreement

There are fewer tax warranties in an asset purchase agreement than a share purchase agreement because tax liabilities generally remain with the seller company unless they are specifically assigned. Similarly, there is no tax covenant or indemnity on an asset sale.

Key areas that tax warranties in an asset purchase may look to cover include the following.

Value Added Tax

The buyer should ensure that the seller has warranted that there are no outstanding VAT liabilities on the assets being transferred. The buyer may also request that the seller preserve the VAT records relating to the assets being transferred in accordance with law (such as section 84 of the *VATCA 2010* and regulations made under that section).

For the purposes of TOB relief from VAT, the buyer may be asked to warrant that:

- It is (or will become on completion of the asset purchase as a result of that purchase) an accountable person for VAT purposes.
- It is or will be duly registered for VAT following completion of the asset purchase.

(See *Value Added Tax*.)

Separate to any relevant warranties, where the provisions of TOB relief from VAT are expected or intended to apply, that expectation or intention is typically reflected in the asset purchase agreement. In these circumstances, the parties should also confirm that they will use their reasonable endeavours to secure that, pursuant to sections 20(2)(c) and/or 26 of the VATCA 2010, the sale of the assets are not treated as a supply of goods and/or services for the purposes of VAT but as the transfer of a business.

Stamp Duty

The seller should warrant that all necessary documents that are in its possession or under its control, or to the production of which it is entitled, which are necessary to establish or prove title to any of the assets that are being transferred and which attract stamp duty in Ireland or elsewhere have been properly stamped.

A buyer may also request the seller to warrant that there are no necessary documents which are located outside of Ireland which would attract stamp duty if they were brought into Ireland and that none of the assets being transferred (other than those capable of passing by delivery) were acquired by the seller other than pursuant to an instrument of transfer.

Pay-As-You-Earn (PAYE)

In acquiring the business, the buyer may take on certain tax liability and reporting obligations in relation to PAYE that require confirmation from the seller that it has properly operated the PAYE system (including the deduction and payment of all relevant payroll taxes) up to the date of completion of the asset purchase.

CGT Withholding Tax

If applicable, the seller should confirm that none of the assets transferring are assets to which section 980 of the *TCA 1997* applies (see *Capital Gains Withholding Tax*).

Capital Acquisitions Tax

The seller should warrant that:

- There is no unsatisfied liability to capital acquisitions tax attached or attributable to the assets transferring as a result of the seller having acquired the assets by way of gift or inheritance.
- These assets are not subject to a charge in favour of Irish Revenue or any other tax authority.

Tax Authority

Where the asset purchase constitutes the transfer of a business, the buyer may seek certain warranties relating to the interaction of the seller with Irish Revenue or any other tax authority as it relates to the business, including one or more of the following confirmations:

- That neither Irish Revenue nor any other tax authority has:
  - operated or agreed to operate any special arrangement (that is, an arrangement which is not based on relevant laws or any published practice) in relation to the tax affairs of the business; or
  - conducted an investigation into the business (or part of it), and neither the seller nor its agents has received any written notification that any investigation is pending or threatened.
- That no dispute exists between the seller and Irish Revenue or any other tax authority in relation to the business and, so far as the seller is aware, that there are no circumstances in existence which may give rise to a dispute.

END OF DOCUMENT

