IRISH TAX MONITOR

The Roundtable May 2022

Crypto Assets

Crypto assets regulation in Ireland reached a milestone when the Central Bank of Ireland, (alongside recent warnings to retail investors of the risks of investing in such assets) granted approval for two Irish funds to invest in crypto assets. The Revenue Commissioners has recently updated guidance on the taxation treatment of crypto assets. Can you please explain the tax implications for Irish investors including the recent updated guidance?

Angela Fleming, Partner, Tax, BDO: There are no special tax rules or provisions which apply specifically to crypto assets. Instead, general tax rules apply. This point is reiterated in the latest update to Revenue's guidance on the matter.

Whether or not a trade of dealing in crypto-assets is taking place depends on several facts and individual circumstances. The Revenue guidance makes clear that while transactions entered into may be described as a "trade", the use of the word "trade" in this context is not sufficient to be regarded as trading for tax purposes.

Angela Fleming

Instead, a trade in crypto-assets would be similar in nature to a trade in shares, securities, or other assets. Revenue has separately published guidance on such matters, and this guidance should be consulted when making a decision whether the activity of buying and selling crypto-assets is trading.

Where a trade is not being carried on, gains arising on the disposal of crypto-assets should be in scope of CGT, and normal CGT rules should apply. For non-domiciled individuals resident or ordinarily resident in Ireland, and thus taxable on a remittance basis, the treatment of gains arising on crypto-assets requires careful consideration. The remittance basis applies on the disposal of assets situated "outside of Ireland". The Revenue guidance states that where a crypto-asset exists "on the cloud", it will not actually be situated anywhere and therefore, cannot be viewed as situated outside Ireland. The onus is on the taxpayer to prove where the gain accrued and if the location of the crypto-asset disposed of cannot be confirmed, the gain is chargeable to tax based on the residency rules.

While it is fair to apply general tax principles to crypto-assets, the wealth of new and novel terminology that comes with the whole area of cryptocurrencies, digital money, decentralised finance, and NFTs requires an understanding of the transactions involved in order to apply such principles. While the updating of the Revenue guidance in this area is welcome, it is still relatively short, particularly in comparison to the guidance issued by the HMRC. We would hope to see further expansion of the Revenue guidance in the future.

DEBRA Directive

On 11 May 2022, the European Commission published the first draft of the proposed "debt-equity bias reduction allowance" (DEBRA) directive. What are the key aspects of the directive and what impact will it have for the financial services industry?

Angela Fleming, Partner, Tax, BDO: The DEBRA Directive is designed to reduce the bias in the tax system in favour of debt financing over equity. In order to achieve this, the Directive proposes to introduce an equity allowance, as well as a limitation on the deductibility of debt financing costs.

The equity allowance will provide a deduction based on new equity, multiplied by a notional interest rate, capped at 30% of EBITDA, and available for 10 years. The allowance will be subject to a number of anti-avoidance measures.

The Directive also seeks to limit interest deductions (on a permanent basis) to 85% of the net interest expense. This limitation applies before the ILR under ATAD 1, so if the ILR results in a lower figure, only the lower amount is deductible, but the difference between the two is available to carry forward under the ILR rules.

DEBRA will apply to all taxpayers subject to corporate income tax in an EU member state, including permanent establishments of non-EU companies. However, certain financial undertakings will fall outside the scope of the Directive including credit institutions, AIFs, UCITS and their managers, insurance and reinsurance undertakings, pension funds, and certain securitisation entities. However, not all financial services entities will be excluded, and certain fund structures may be impacted where there are leveraged asset holding companies within their structures.

The adoption of the Directive requires unanimous agreement by all EU Member States, and if adopted, it is intended to apply from 1 January 2024.

Non-resident Landlords

The Revenue Commissioners recently published guidance regarding changes to the taxation of non-resident landlords brought about by the Finance Act 2021. Can you please explain the changes and implications for those affected?

Michelle Adams, Assistant Tax Manager, Financial Services Tax, BDO: From 1 January 2022, non-Irish resident landlords are subject to Corporation Tax (at 25%) on their Irish rental profits, rather than the previous Income Tax (at 20%). As a result of this, they will need to cease their Income Tax registration and register for Corporation Tax. It should also be noted that as they are now within the charge to Corporation Tax for the first time, a new accounting period commences. Therefore, they will be subject to Income Tax on their rental profits to 31 December 2021 and Corporation Tax on their profits from 1 January. They will be required to file their Corporation Tax returns and pay associated liabilities (including Preliminary Tax) in line with the rules for Irish resident companies. There may also be a requirement to file iXBRL accounts where an exemption is not available.

In the event of a sale of the property, they are no longer subject to Capital Gains Tax but Corporation Tax on chargeable gains, although, the changes do not affect the 33% rate. Any Case V losses carried forward and any excess Case V capital allowances at 31 December 2021 can be claimed on the first Corporation Tax return. Where there is any balancing allowance/charge made in respect of capital allowances claimed in the period ending on or before 31 December 2021, these should be adjusted for the rate change.

Michelle Adams

Although the increase in the tax rate appears to be the main concern amongst non-resident landlords, there are also other significant Corporation Tax measures which they will now be subject to, such as the new Interest Limitation Rules, Anti-hybrid Rules, as well as interest recharacterization rules in s.130 and the interest restrictions under s.840A.