

Irish Registered Non-Resident Companies

1. Introduction

This paper provides a progress report on the examination of measures to deal with abuses of Irish registered non-resident companies. Work is at an advanced stage on a package of measures under company law and taxation law and it is intended that this will be submitted to the Government in the near future. The broad outlines of the proposed package are given at section 5 below. The TSG may wish to give its views on the proposals.

2. Background

An Irish registered non-resident (IRNR) company is one which is incorporated in Ireland under Irish company law but is not resident here for tax purposes because the company is controlled and managed abroad. Under existing tax law, a company is resident in the State for tax purposes if its effective management is located in the State. Companies which are resident in the State are taxable on their worldwide income, with relief provided in the form of a credit for tax paid in countries with which we have a double taxation treaty. Companies which are not resident in the State are taxable only on their Irish sourced income.

IRNR companies have posed a threat to Ireland's international image and its reputation as a well-regulated jurisdiction for conducting business. These companies are regularly advertised 'for sale' in international magazines, often alongside companies which are incorporated in tax havens and jurisdictions with relaxed regulatory regimes. Many IRNR companies have little or no connection with the country and some may be used for tax evasion, money laundering and fraud. A number of fraud cases involving IRNR's have been covered recently in the press. On the other hand, IRNR companies are used by several multinationals for legitimate international tax purposes.

The precise scale of the IRNR problem is difficult to determine although the number of IRNR companies appears to be substantial. While there were nearly 165,000 companies on the Register of the Companies Registration Office (CRO) at end 1997, notices to file tax returns were issued by Revenue to some 80,000 in that year. Undoubtedly, the difference in numbers is partly explained by the fact that a large number of companies on the Register are either dormant or defunct. However, IRNR companies may well account for a significant part of the difference.

The compliance rate for filing annual returns to the CRO is a cause for serious concern - at 31 December 1997, for example, only 36% of companies were up to date with their returns. The Registrar of Companies has recently initiated a process aimed at striking off companies which fail to file returns. Notices are being issued to 500 companies per day, randomly selected, and the process will continue until all companies with returns outstanding for two or more years have been covered. Failure to submit outstanding returns within two months will result in strike-off proceedings, unless a company appeals for more time in which case the company will be given a further two months to comply. A clearer picture of the number of "live" companies on the Register should emerge after this process is completed (i.e. mid to late 1999).

3. Measures Introduced in 1995 to Address IRNR Problem

In the 1995 Finance Act (now section 892 of the Taxes Consolidation Act, 1997), a provision was introduced requiring non-resident companies to provide, within 30 days of commencing a business or of receiving a request from a Revenue Inspector, a statement giving, inter alia, the name and address of the beneficial owners of the company and the territory in which central management and control is exercised. This measure was designed to discourage the use of IRNR companies by non-residents, although it was acknowledged at the time that it did not represent a complete or fully effective solution to the problems posed by IRNR companies.

The basic problems with the 1995 provisions are that (i) it cannot be properly enforced because non-resident companies are controlled and managed abroad and there is usually no person in the State against whom proceedings can be initiated in the event of non-compliance and (ii) unless a company openly claims to be non-resident, there is no way of identifying it as such from the details filed with the CRO. Since the introduction of these provisions, over 2600 companies have identified themselves as neither resident in the State nor carrying on a trade in the State following receipt of notices from Revenue.

4. Requirements for an Effective Solution

In considering further measures to deal with the IRNR problem, it will be necessary to ensure that such measures:

- target as far as possible those companies which have no economic connection with Ireland and are likely to be used for tax evasion or criminal activity;
- minimise any adverse effects on legitimate business;
- be enforceable and not easily circumvented, so as to ensure their credibility as an effective deterrent;
- not be administratively costly or cumbersome; and
- be compatible with EU State Aid provisions, the Code of Conduct on Business Taxation and the Treaty.

From the point of view of enforcement and "nipping the problem in the bud", it is considered that the IRNR problem needs to be addressed as far as possible at the incorporation stage of company formation. This is because the target group are those companies with no "mark" in the State on which to impose compliance obligations and it is difficult to pursue such companies once the certificate of incorporation is obtained.

5. Package of Measures under Consideration

The problem of IRNR companies was debated earlier this year in the Dail and the Dail was informed of the intention to introduce a package of measures under company law, taxation law and, if appropriate, criminal justice law to curb abuses in this area. Since then detailed discussions have taken place between the Departments of Finance, Enterprise Trade and Employment, Justice Equality and Law reform, the Revenue Commissioners, and the Attorney General's Office with a view to putting together a suitable package for submission to the Government. Subject to formal legal advice from the AG's Office and to resolving certain legal and practical administration aspects, we are moving to a consensus on the broad outline of a package containing the following company law and taxation elements:

1. Activity Test for All Companies Applying for Registration - As a pre-condition of incorporation, every company applying for registration will be required to demonstrate that it intends to carry on a business or economic activity in the State. Further consideration needs to be given to the type of documentary evidence to be provided in this regard, but it could include one or more of the following (i) a letter from Revenue that it has been advised of a proposal to form a company for specific activities and has been given the information it requires regarding this proposal, (ii) a letter from an industrial promotion agency, or from the Central Bank in the case of financial services, or from a professional body (e.g. for accountancy, engineering, property and consultancy activities), (iii) an appropriate reference in the memorandum and articles of association, (iv) a financial guarantee, bond or assets in the State.
2. This provision is designed to prevent the use of Irish registered companies for exclusively foreign activities without any connection with the State.
3. Every Company to Appoint and Maintain At All Times an Irish Resident Director - The requirement to appoint and maintain an Irish resident director, and notify this to the CRO, would be both a pre-condition of incorporation and an ongoing requirement to remain on the Register; i.e. a company which no longer meets this requirement may be struck-off the Register subject to the normal notices being issued. The company would be required to notify the CRO of any change in the Irish resident director. Residence in this context will mean the person's habitual place of abode and documentary evidence may be required by the CRO to verify this.
4. This requirement would provide a "mark" in the State for the purposes of ensuring compliance with and enforcement of various provisions of the Companies Acts. More importantly, it would serve as a deterrent against the establishment of IRNR companies by non-nationals for illicit activities (see also para. 7 below). Continuity in relation to this aspect could be facilitated by the provision at 5 below.
5. Limitation on the Number of Directorships - An individual may not be a director of more than 25 Irish registered companies, subject to certain exemptions (e.g. in the case of plcs, companies within the same group).
6. This is aimed at curbing the use of nominee (e.g. Sark) directors as a means of disguising beneficial ownership.
7. Enhanced Strike-Off Provisions
8. (a) Non-Filing of Annual Returns to the CRO - The Registrar would be empowered to move to strike off a company which fails to make a return in any year [up to now, a company return has to be outstanding for at least two consecutive years before strike off proceedings can be initiated].
9. It is likely that a considerable number of those companies which currently are not filing returns are IRNR companies. This provision would help to ensure greater compliance with filing requirements as well as the removal of those (e.g. IRNR) companies which do not file returns.
10. (b) Failing to "Register" with Revenue - The CRO would be empowered to move to strike-off a newly established company from the Register on receipt of a notification from Revenue that the company had not, within a specified period of registration with the CRO, provided the necessary information to establish their bona-fides with Revenue (i.e. advising Revenue of the business to be carried on, its location, its fiscal agent etc. or providing a certificate of residence from the tax authorities of a treaty country).
11. This would provide an incentive for newly formed companies to declare their position to Revenue. It could also apply to existing IRNR companies if the change at 6 below is made.

12. Enhance Notification to the CRO by Directors Who Have Resigned - Under existing company law, it is the responsibility of the company to notify the CRO of changes in directors. The amendment proposed here is to enable resigning directors to notify the CRO that they have resigned.
13. This would help to provide for more up to date records in the CRO in relation to company directors. It would tie in with the Irish resident director provision at 2 above and would enable the Registrar to follow up cases where companies fail to notify changes in directors.
14. Change Tax Residence Rules for Companies - The change proposed is to make registration in the State a test of tax residence [as an alternative to the control and management test] for all companies other than those which are ultimately under the control of a company resident in the State, in the EU or in a tax treaty country. For the latter excluded category of companies, residence for tax purposes would continue to be determined solely by reference to where control and management is exercised.
15. This would significantly narrow the definition of IRNR company and the scope for abuse but would not adversely affect the legitimate use of this structure by multinationals. It has also been established informally with the Commission (DGIV) that there would not be a problem as far as EU State Aid rules are concerned.
16. Irish Resident Director to be Fiscal Agent of the Company - The proposal here is to make the Irish Resident Director [appointed pursuant to the company law provisions at 2 above] accountable for registering the company with Revenue, for filing the company's tax return, for providing information under Section 892 if it is an IRNR company and for penalties in the event of non-compliance. This would provide a "mark" in the State for the purposes of ensuring compliance with and enforcement of various provisions of the Tax Acts. It would act as a deterrent against the use of IRNR companies for illicit activities.

The key elements of the package are the activity test, the change in the tax residence rules for companies and the Irish resident director/ fiscal agent requirement (i.e. 1, 2, 6 and 7). The proposed change in tax residence (item 6) is not without some drawbacks, especially in view of our growing tax treaty network [we have, or shortly will have, tax treaties with Cyprus, Russia, the Baltic countries, Mexico, South Korea]. An alternative to the proposal at 6 is to make registration a test of residence for all companies without exception and give existing IRNR companies a grace period, e.g. 3 or 5 years, in which to establish alternative structures. This would effectively abolish the IRNR company entirely. It would, however, impact on certain sectors here, though the extent of this impact is difficult to gauge.

6. Consultation with the Attorney General's Office

The AG's Office have been consulted on the broad outlines of the above package and it has indicated informally (formal advice is awaited) that the requirement for a company to appoint a resident Irish director/ fiscal agent could be defended by reference to the activity test proposed at 1 and would not therefore infringe the principle of freedom of establishment under the EU Treaty. However, a resident Irish director/ fiscal agent requirement without an activity test would be likely to infringe this principle - it would not be a proportionate response given that there were alternative means of dealing with the IRNR problem.

7. Consultation with the Department of Justice, Equality and Law Reform

It is not proposed at this stage to bring company formation agents within the scope of the money laundering provisions as this is unlikely to be an effective measure. The Department of Justice, Equality and Law Reform has indicated that given the once-off nature of transactions carried out by company formation agents it would be difficult for them to form a reasonable suspicion of money laundering by their clients. The amount of money involved in the sale of a company is simply the CRO's fee and the agent's fee and the purchaser of the company will not yet have started to use the company to conduct a business on which a suspicion could be based.

8. Next Steps

Further work is required to iron out some of the details of the above package and possible transitional arrangements for existing companies. Nevertheless, it is envisaged that the proposals will be submitted to the Government shortly with a view to their inclusion as appropriate in the Companies Amendment Bill currently under consideration and in the 1999 Finance Bill.

Budget and Economic Division

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