May 2018

Tax Alert

Tax and Duty Manual

"Section 110: entitlement to treatment"

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1. Introduction

On 24 May the Irish Revenue Commissioners ("Revenue") published a Tax and Duty Manual entitled "Section 110: entitlement to treatment" (the "Manual"). The Manual is an important development for a number of reasons. We strongly recommend that those utilising Section 110 Taxes Consolidation Act 1997 ("Section 110") consult with their tax advisers to consider the implications for their transactions.

Taxpayers should be aware that the Manual is indicative of Revenue's ever increasing attention to Section 110 and their desire to ensure that it is not utilised for transactions which they would view as not genuinely satisfying the various conditions and anti-avoidance provisions. We would expect Revenue audit activity to focus on the points mentioned. It is also worth bearing in mind from a practical perspective that your auditors will likely focus more closely on the points of emphasis in the Manual.

This Alert summarises the key changes and important points of emphasis in the Manual.

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2. Section 110 qualifying conditions and anti-avoidance provisions

The Manual puts taxpayers on notice that Revenue will be focussing closely on the qualifying criteria and anti-avoidance provisions in Section 110 and specifically discusses the following:

- The requirement that the Section 110 company must be resident for tax purposes in Ireland and must be carrying on its business in Ireland. These are two slightly different tests.
- The fact that all transactions entered into by a Section 110 company must be by way of a bargain at arm's length. In particular, Revenue will be looking at situations where the Section 110 does not pay directly for services which it receives.
- Whether orphan structures have been put in place for genuine commercial reasons or for tax avoidance motives. Revenue acknowledge that there are many legitimate reasons for establishing a Section 110 company as an orphan structure but also state that they will be considering whether there are valid commercial reasons for the orphan arrangement. They also state that all agreements that the Section 110 company has entered into should be examined to ascertain whether it is truly orphaned.

As part of the discussion on the arm's length requirement, Revenue note that where an expense is not invoiced directly to the Section 110 company, this does not alter the VAT analysis. We would expect in light of this statement that Revenue will pay increased attention to ensuring that VAT is correctly accounted for by the Section 110 company even where it does not directly pay the invoice. We would advise that taxpayers consider their practices in relation to accounting for VAT as part of their review of the implications of the Manual.

3.Irish property business

The Manual provides some clarification on what is excluded or included within the definition of a "specified property business" including the following:

- guidance on what constitutes a loan origination business, which is excluded from the definition of a specified property business; and
- guidance on what falls within the definition of a CLO transaction and a CMBS/RMBS transaction, which are also excluded from the definition of a specified property business.

4. Subject to tax test

The Manual confirms that Tax Briefing 02 of 2012 relating to securitisation transactions ("TB 02/12"), which outlined Revenue's view of when interest payable on a profit participating note would be regarded as being subject to tax will expire on 1 June 2018. Those aspects of TB 02/12 which Revenue will continue to apply have been reproduced in the Manual. Certain aspects of TB 02/12 which have been commonly relied upon by S110s have <u>not</u> been included in the Manual. The exact status of TB 02/12 will need to be considered in the context of historical transactions.

5. Next Steps

The above is a brief summary only, see below a link to the full text of the Manual:

https://www.revenue.ie/en/tax-professionals/ebrief/2018/no-1072018.aspx

Again we would emphasise that the Manual is a significant development the implications of which should be considered on a case by case basis in conjunction with your tax advisors.