ESTATE PLANNING UPDATE

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27 MARCH 2015

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ESTATE PLANNING

- Estate Planning - Key Legal and Tax Issues Refresher and Update
- Cross-Jurisdictional Legal Issues
- Cross-Jurisdictional Tax Issues Including Mandatory Reporting for Professionals
- Case Studies
- Q&A

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ESTATE PLANNING

- The orderly and tax efficient transfer of assets/wealth between individuals, and most commonly to the next generation.
- Estate planning covers both gifts and inheritances
- Trusts are equally relevant in both circumstances, as one of the main tools to facilitate estate planning arrangements.
- The core elements of estate planning are legal effectiveness, tax efficiency and practicality.

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ESTATE PLANNING

- For many individuals estate planning can be very straightforward.
- In other cases complexities can arise, including divorce, second marriages, non-marital relationships and children, difficult relationships with children, concerns about in-laws, children in marital difficulties, children with significant debt, children with special needs, complex asset structures, assets in foreign jurisdictions and the impact of cohabitants legislation.

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ESTATE PLANNING

- Capital acquisitions tax is payable by a beneficiary on the receipt of a gift or inheritance in excess of their available tax-free threshold.
- The tax-free threshold depends on the relationship between the donor and the beneficiary.
- There is no capital acquisitions tax between spouses.
- The tax-free threshold of children is €225,000. Grandchildren have a tax-free threshold of €30,150.
- Any aggregable gifts or inheritances received since 5 December 1991 are taken into account in computing the available tax-free threshold.

ESTATE PLANNING

- Capital acquisitions tax applies to both gifts and inheritances

	Tax-Free Threshold for Children	Rate of Tax
2008	€521,208	20%
2015	€225,000	33%

ESTATE PLANNING

Example:

Client holds assets (including the family home) of €2M and has four children. If he had died in 2008 none of his children would have paid capital acquisitions tax. If he dies in 2015, his children will have an aggregate capital acquisitions tax liability of €363,000.

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MAKE A WILL

- The first step in estate planning for most people is to make a Will.
- The presumption of testamentary freedom is qualified by the legal right share of a spouse (one third/one half of estate) and the “moral duty” towards children.
- Under Section 117 of the Succession Act, a child can potentially take an action against the estate of the deceased parent on the basis that they have not been properly provided for by their parent in accordance with parent’s means.

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TRUSTS

- Trusts are flexible and valuable tools in estate planning.
- Trusts fulfil a robust protective mechanism, to retain control over and protect capital, and protect individuals, by delaying the vesting of significant assets in an intended beneficiary until the time is right.
- While there are many different types of trust, a discretionary trust is the most common and most flexible structure in estate planning.
- A discretionary trust involves property being held by trustees to apply the income and capital for the benefit of members of a class of beneficiaries, who are specified in the trust deed, in such proportions as the trustees in their absolute discretion see fit. The beneficiaries have no interest in the fund for legal or taxation purposes until income or capital is appointed out of the trust to them. A non-binding letter of wishes from the settlor to the trustees provides guidelines for the administration of the trust.

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USES OF DISCRETIONARY TRUSTS

- Parents with young children and significant assets – to create flexibility as to the vesting of assets and to take account of unforeseen circumstances (for example illness, financial difficulties, addiction).
- Parents of children who lack capacity or are unable to manage their affairs.
- Parents of children who are in financial difficulties – to protect the assets for future generations and take decisions on an ongoing basis.
- Parents of children who are experiencing marital difficulties – to protect the assets from the matrimonial proceedings and create flexibility for future inheritance.
- To provide flexibility for the timing of inheritance tax payments and enable beneficiaries to arrange their affairs for the tax efficient vesting of assets, utilising reliefs and exemptions where available.

CAPITAL ACQUISITIONS TAX

- In a low tax environment clients were generally happy to pass assets directly to adult beneficiaries under their Wills, when children had high tax-free thresholds and the capital acquisitions tax rate was 20%.
- Increasingly, clients are reviewing their Wills and reverting back to a discretionary will trust structure.
- There can be a tax cost for the flexibility of a discretionary trust, in the form of discretionary trust tax. This only arises after the death of the parent and when the youngest child reaches 21 years. This is an initial charge of 6% on the value of the trust fund and an annual charge of 1% thereafter. The initial 6% charge reduces to 3% if the trust is wound up within five years.
- While there is therefore a tax cost to establishing discretionary trusts for adult children, the charge to discretionary trust tax may be contrasted with the charge to capital acquisitions tax at a rate of 33%, particularly where the estate is illiquid or if it is possible for the beneficiaries to avail of any reliefs or exemptions from capital acquisitions tax.

RELIEFS AND EXEMPTIONS

- **Dwellinghouse exemption** is an exemption in respect of the gift or inheritance of a dwellinghouse by a beneficiary, provided that the conditions of the exemption are satisfied. The beneficiary must not have an interest in any other dwellinghouse, they must have lived in the dwellinghouse that is the subject of the gift or inheritance for a period of three years as their only or main residence, and the beneficiary must continue that occupation for six years post gift/inheritance (although there are replacement provisions).
- **Business relief** is a substantial relief in respect of the gift or inheritance of business property. The legislation is complex but the relief is designed to prevent the forced sale or break up of trading entities to pay significant capital acquisitions tax liabilities on death or lifetime transfer. Where available, business relief reduces the tax payable from a rate of 33% to an effective rate of 3.3%.
- **Agricultural relief** is a relief on gifts or inheritances of agricultural property which was introduced to prevent the break-up of farms when passing to the next generation. The relief reduces the effective rate of inheritance tax from 33% to 3.3%. The conditions for the relief have been significantly tightened up in the Finance Act 2014.

EXAMPLE OF DWELLINGHOUSE EXEMPTION FOR INHERITANCE OF ESTATE BY TWO CHILDREN

Estate = €2,000,000	**Estate = €2,000,000**
Tax Free = (€ 450,000)	Passes to discretionary trust
Taxable = €1,550,000	Avail of dwellinghouse exemption, i.e. purchase house for each child
Inheritance tax @ 33% = €511,500	Potentially zero inheritance tax Discretionary trust tax charged at: 6% overall = €120,000 **Tax Saving = €391,500**

- The above example demonstrates how a discretionary trust structure in a Will could produce an inheritance tax saving of €391,500 in an estate valued at €2M.

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LIFETIME ESTATE PLANNING

- It often makes sense to pass on assets to the next generation by way of lifetime gift. This will depend on the financial security of the parents and the nature and value of assets proposed to be transferred.
- An important factor of lifetime estate planning is the selection and value of assets to be transferred. Depending on the nature and value of assets, lifetime transfers can give rise to capital gains tax and/or stamp duty. However, transfers of cash are tax efficient in this context and some capital gains tax reliefs, for example retirement relief or capital gains tax/capital acquisitions tax 'same event' offset, may be available.
- Capital acquisitions tax will always be a consideration in lifetime estate planning. Dwellinghouse exemption may be considered depending on the circumstances of the child. Each child may receive €225,000 free of capital acquisitions tax.
- Educational funds for grandchildren are increasingly common. A fund of approximately €90,000 can be distributed over ten years from a discretionary trust to a grandchild free of capital acquisitions tax.
- A beneficiary can receive up to €3,000 from any donor annually free of capital acquisitions tax (small gift exemption). Therefore a child can receive €6,000 per annum from their parents without eroding their €225,000 tax-free threshold

LIFETIME ESTATE PLANNING FOR FAMILY BUSINESS

- The taxation treatment of the lifetime transfer of businesses to the next generation remains generous. The main taxes that arise are capital acquisitions tax, capital gains tax and stamp duty. It is important to note that capital gains tax and stamp duty do not arise in an inheritance context. They are only potentially relevant in relation to lifetime estate planning.
- There are significant reliefs from capital acquisitions tax and capital gains tax in the transfer of family businesses. The legislation is complex and it is important to carefully examine the accounts and activities of the business to ensure that the conditions of the reliefs are satisfied. Stamp duty will arise but the current rates are low.
- The financial security of the founder/parent can be satisfied by share buy-backs, pension arrangements, deferred consideration or a combination. In addition, parents can retain a "golden share" controlling voting rights.
- Shareholders agreements are an integral aspect of estate planning in a business context, to safeguard the business and protect the children/successors and the business through future generations. A shareholders agreement will normally include pre-emption rights in the event of sale, death or marital breakdown of a shareholder.

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FAMILY PARTNERSHIPS

- A family partnership is commonly used where parents wish to make gifts to their children and retain control over the assets both in relation to investment and distribution.
- A family partnership agreement governs the relationship between the partners. Minor children are frequently partners through the use of bare trusts. However, the children will not have access to the fund on reaching the age of 18 as the partnership agreement will typically provide that the parents control the partnership assets until they are happy to relinquish control in the future.
- Parents control the partnership through exercising weighted voting rights, although the children would typically hold the majority partnership share between them.

FAMILY PARTNERSHIPS

- The partnership agreement would usually provide for the appointment of one or both parents as managing partners, who have the power to deal with the day to day business of the partnership.
- The partnership agreement would make provision for the death or retirement of partners and the ultimate distribution of the partnership assets on winding up.
- The children can become involved in partnership meetings at an early stage and gain an understanding of the world of investment and financial responsibility.
- From a tax perspective, the income and gains of the partnership are assessed on each of the partners for tax purposes. Crucially, the growth of the partnership assets over time belongs mainly to the children and will therefore not be subject to inheritance tax on the death of the parent.

EXAMPLE – WITHOUT FAMILY PARTNERSHIP

Client has two children	
Client invests in 2015	€ 450,000
Value of fund in 2025 =	€ 800,000
Value of fund in 2035 =	€1,400,000
Client dies in 2035 and children inherit	€1,400,000
Tax-free threshold for inheritance tax =	(€ 450,000) combined
Taxable inheritance =	€ 950,000
Inheritance Tax at 33% =	€ 313,500

EXAMPLE – USING FAMILY PARTNERSHIP

- Client gifts €225,000 to each child in a family partnership. Children have 90% share in partnership.
- Gift tax = zero.
- In 2035 the value of the childrens' combined partnership shares = €1,400,000.
- In 2035 client dies.
- Inheritance tax on value of €1,400,000 = zero (the partnership shares are already owned by the children).
- Inheritance tax saved = €313,500.

EXAMPLES OF DISCRETIONARY TRUSTS PAUL and KATE

Paul and Kate have three minor children, one of whom has been diagnosed with a learning difficulty. They wish to make Wills to provide for their children in the event of their premature death.

Paul and Kate should consider establishing two discretionary trusts in their Wills, one specifically for their child with special needs, so that exemption from discretionary trust tax under section 17 CATCA 2003 may be available when he reaches the age of 21. Charities and public bodies caring for individuals with learning difficulties should also be included as potential beneficiaries. The beneficiaries of the second trust should include all children, so that funds can be transferred to the first trust if required. This presumes that there are sufficient assets to make provision for all of the children.

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EXAMPLES OF DISCRETIONARY TRUSTS

Ringo is a widower with four adult children. His two sons suffer from alcoholism. Ringo has investment assets of approximately €6M. Ringo has given up on his two sons and believes that they would be better off not to receive any portion of his estate, and wishes to leave all of his estate equally between his two daughters.

A section 117 claim(s) could be catastrophic for the value of the estate. Ringo should consider making some provision for his two sons by way of separate discretionary trusts, to protect the assets and to protect his sons from the receipt of significant income or capital. The discretionary trusts may survive indefinitely, depending on the outcome of his sons' illnesses.

EXAMPLES OF DISCRETIONARY TRUSTS

Ozzy owns a significant family business, in which each of his four sons works. He wishes to leave the shares equally between his children in his Will. However, one of his children has suffered from disastrous financial advice over the years and is now in significant financial difficulty.

Ozzy should consider carving out the company shares that he would wish to leave to his son, into a discretionary trust, the beneficiaries of which could include his son's children. This would permit the discretionary trustees to "generation-skip" and would allow time after Ozzy's death to decide on the best course of action for Ozzy's son, the grandchildren and the business. The trustees, together with the other three sons, could manage the business during the trust period.

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EXAMPLES OF DISCRETIONARY TRUSTS

George and Chrissie have assets of €8M, including the family home and investments. They have four adult children in their 30's and 10 grandchildren. They wish to make a tax efficient Will and divide their estate equally between their children.

George and Chrissie could consider benefiting each of their grandchildren out of the one-quarter shares designated for each child, to provide overall equality as between the four limbs of the family. Each grandchild could receive approximately €30,000 free of capital acquisitions tax. They could also consider utilising discretionary trust structures for each individual child to enable the children to possibly avail of reliefs or exemptions from capital acquisitions tax and allow for an orderly disposal of assets in order to discharge their capital acquisitions tax. It is possible to provide for flexibility in this regard, to enable children to receive a certain share direct (perhaps up to their available tax-free threshold) and to pass other funds/assets to a separate discretionary trust for them and their families. This would provide a vehicle to allow for potential tax planning and an overall reduction in the effective rate of capital acquisitions tax on the assets ultimately vesting in the children.

TIPS FOR ESTATE PLANNING

- Put assets into joint names.
- Make a tax efficient Will and review every three years for changes in personal/family circumstances and tax laws.
- Obtain local tax and legal advice for assets held abroad.
- Remember that a Will is a public document but there are ways of ensuring that the details of legacies do not become publicly available.
- Ensure personal financial security before lifetime transfers of assets.
- Open lines of communication within a family where appropriate. This can assist is formulating any arrangement which meets the needs of everyone insofar as possible.
- Consider lifetime gifts but ensure this is carried out tax efficiently.
- Utilise all available tax-free thresholds of children, grandchildren and (perhaps) son/daughter-in-law.
- Utilise the annual small gift exemption. A married couple with three children can gift up to €18,000 per annum to their children free of tax and without eroding the children's tax-free threshold for future gifts or inheritances.
- Consider section 72 insurance policies?

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SUCCESSION PLANNING – JURISDICTIONAL ISSUES

- Individuals have become more mobile over recent years. Irish individuals increasingly hold non-Irish investments, whether holiday homes, stocks and shares or other investment assets in Europe and further afield.
- How do we deal with succession planning for non-Irish assets, and how do we advise non-domiciled/resident individuals in relation to succession planning for their Irish assets?
- The starting point is the fundamental principle of Irish private international law that the law of domicile (lex domicilii) of an individual determines the succession of moveable property whereas the law of the country where the property is situate (lex situs) determines the succession of immoveable property.
- In other jurisdictions, particularly civil law countries, either the habitual residence or the nationality of the individual determines the succession of moveable property. In some jurisdictions, this factor also determines the succession of immoveable property.
- This can give rise to complicated issues from a legal perspective.

DOMICILE

- Domicile is a complex legal concept that is determined by reference to a person's intention to permanently or indefinitely reside in a country together with their physical presence in that jurisdiction. There is therefore a significant element of subjectivity, based on a person's intentions. However, objective proof is sought in situations of doubt.
- A person may only have one domicile at any one time, although a domicile of origin can be displaced by a domicile of choice. An individual will always be domiciled somewhere, even though it may be unclear exactly where that is.
- There is no statutory test or definition of domicile, and it is purely a common law concept. An additional complication is the fact that the issue of domicile is not determined on universal rules. An Irish Court will determine a person's domicile according to Irish law, while an English Court will determine the same issue based on English law. The result may not always be the same.

FORCED HEIRSHIP V TESTAMENTARY FREEDOM

- Forced heirship is the term used where a country provides that specified persons have automatic rights to the succession of a portion of a deceased's estate, which take precedence over any Will of the deceased.
- Generally speaking, certain civil law countries provide enforceable fixed shares to heirs, whereas common law jurisdictions tend to start with the principle of testamentary freedom, while providing protection for dependents, e.g. the legal right share of a surviving spouse/civil partner under the Succession Act 1965.
- If a French domiciled individual leaves an Irish holiday home in his estate, is this subject to the legal right share of his surviving spouse? Similarly, if an Irish domiciled individual has significant real property in France, does his spouse's legal right share include the value of the French property?
- Foreign divorces complicate matters further. In order to determine whether there exists a legal right share entitlement of the spouse, if they have obtained a foreign divorce, is that divorce recognised in Ireland, and if not, it would appear that the individuals are still married as a matter of Irish law. The domicile of the individuals will be very important in determining the recognition of a divorce obtained outside Ireland.

BRUSSELS IV – THE EU REGULATION ON SUCCESSION

- The Brussels IV Regulation comes into effect in August 2015. The attempt was to harmonise succession laws throughout the EU, but it has fallen short in many respects.
- Ireland, Denmark and the UK opted out of the Regulation. However, confusingly, the Regulation will still have an effect on how Ireland will deal with signatory States and how signatory States will deal with Ireland.
- The Regulation attempts to provide that in all signatory EU member States, habitual residence is to be the connecting factor to determine the jurisdiction to deal with Wills and succession for all moveables and immoveables. Alternatively, the testator can designate the law of their nationality as applying to the whole of their estate.
- It remains to be seen whether the signatory States will interpret the term "habitual residence" consistently.
- From the perspective of advising an Irish domiciled person/national, it appears clear that he can elect to apply Irish law to govern the succession to assets situate in signatory States, even though Ireland is not a signatory. The reverse does not hold true. Ireland will continue to apply the principles of Irish private international law to assets situate in Ireland.
- The future under the Regulation is uncertain, which creates difficulties for Irish advisors, who may effectively be asked to advise on non-Irish legislation and its effect in foreign jurisdictions. Local legal advice in the foreign jurisdiction is key.

ENDURING POWERS OF ATTORNEY

- An enduring power of attorney enables a person to appoint an attorney(s) to manage their affairs and take decisions on their behalf if they should lose capacity.
- An enduring power of attorney is registered and becomes effective only when the donor is, or is becoming mentally incapacitated, i.e. by reason of a mental condition they are unable to manage and administer their own property and affairs.
- The alternative to making an enduring power of attorney, in the event of mental incapacity, is wardship under the Lunacy Regulations, which is an outdated, cumbersome and expensive system.
- There are no guidelines available for the registration of a foreign enduring powers of attorney, these are dealt with on a case by case basis. The Registrar of Wards of Court will seek to bring the requirements of the Irish system to bear on the foreign enduring power of attorney. Generally speaking, the foreign enduring power of attorney needs to be similar as to form and content to the Irish enduring power of attorney under our legislation.
- Similarly, it can be very difficult or impossible to register an Irish enduring power of attorney in a foreign jurisdiction. Therefore, it would be prudent to make an enduring power of attorney in a foreign jurisdiction where assets are held.

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ANTI-AVOIDANCE LEGISLATION

- Settlements for Minor Children – section 795
- Transfer of assets abroad – income tax - sections 806 and 807A
- Attribution of gains in non-resident trusts – CGT - sections 579/579A and 590 TCA
- GAAR – section 811 TCA (noting Finance Act 2014 amendments)

ANTI-AVOIDANCE LEGISLATION – SECTION 795

- Settlements for Minor Children
- Section 795 of the TCA directs that where a settlor transfers any income or makes any settlement on a minor child such that the income becomes the beneficial income of the child or is used directly or indirectly for the child's benefit, then that income is deemed to be that of the settlor and not of the child. This prevents income splitting and capital settlements in favour of children and applies to both income and capital settlements.
- Does not apply to income arising under a settlement in any year of assessment in which the settlor is non-resident in Ireland.
- Does not apply where the settlement is irrevocable and provides for the accumulation of income
- It is necessary in including a power to accumulate income to ensure that its inclusion does not give rise to any argument that the trust is a discretionary trust rather than a bare trust which in turn could give rise to a concern that, if the income is being accumulated in accordance with such a power, depending on the terms of the trust, the trustees may be liable to a 20% surcharge on the income**.**

ANTI-AVOIDANCE LEGISLATION – SECTION 806/807A

- Section 806 designed to counter individuals (which term includes any such individual's spouse) resident or ordinarily resident in Ireland avoiding tax by means of a transfer of assets abroad as a result of which income becomes payable to a person who is resident or domiciled outside Ireland. The income arising abroad is chargeable to tax on the Irish resident where he/she is entitled to receive income and has the power to enjoy any of the income or any capital sum which is in any way connected with the transfer or with any associated operation.
- Exemption if show to the satisfaction of the Revenue that:
  - it would not be reasonable to draw the conclusion, from all the circumstances of the case, that the purpose of avoiding liability to taxation was the purpose, or one of the purposes, for which the relevant transactions or any of them were effected; or
  - all the relevant transactions were genuine commercial transactions and it would not be reasonable to draw the conclusion, from all the circumstances of the case, that any one or more of those transactions was more than incidentally designed for the purpose of avoiding liability to taxation.
- Section 807A applies to impose a tax charge on an individual who receives a benefit but does not come within the charge imposed by section 806, because that individual was not the transferor of the assets concerned. Section 807A will not apply unless an individual who is domiciled and resident or ordinarily resident receives a benefit.

ANTI-AVOIDANCE LEGISLATION – SECTION 579/579A

- Section 579 can operate to attribute gains arising to certain non-resident trustees, to resident beneficiaries or resident settlors of offshore trusts. If the settlor of an offshore trust is resident or ordinarily resident in Ireland, then he will be liable to tax on any gains arising to the trustees and attributed to an Irish domiciled and resident or ordinarily resident beneficiary under section 579. The gains are treated as accruing to the settlor and not to any other person, regardless of whether the settlor is a beneficiary or not.
- Section 579A also attributes gains of a non-resident trust to beneficiaries who are either resident or ordinarily resident in Ireland and also domiciled in Ireland. However, gains made by the non-resident trustees will only be attributed to the Irish beneficiary in proportion to capital (i.e. non-income) benefits received directly or indirectly by that beneficiary.

ANTI-AVOIDANCE LEGISLATION – SECTION 590

- Section 590 TCA applies to chargeable gains accruing to non-resident companies, which would be considered close companies were such companies situate in Ireland, and seeks to attribute any chargeable gains arising to such companies back to the Irish domiciled and resident or ordinarily resident shareholders in proportion to their shareholding in the relevant companies.
- Section 590(2) makes provision for circumstances where a trust holds shares in a non-resident company, in which case the trustees of the trust, rather than the beneficiaries are treated as being the participator for the purposes of section 590.
- Section 590(13) provides that trustees who are participators can have a part of the chargeable gains of a non-resident company attributed, even if the trustees are neither resident nor ordinarily resident in Ireland.
- Although it is not possible to further attribute the gains attributed to the trustees of a non-resident trust under section 590 to the beneficiaries, section 579A is capable of attributing such gains to beneficiaries where they have received benefits from the trust. Alternatively section 579 may apply in circumstances were the beneficiaries have not received benefits.

ANTI-AVOIDANCE LEGISLATION- SECTION 811 C AND 811 D

- Finance Act 2014 amended the general anti-avoidance legislation in section 811 and section 811A restricting those provisions to apply only to transactions which commenced on or before 25 October 2014 and introduced two new sections.
- Section 811C (intended to effectively replace section 811 with respect to transactions commenced after 25 October 2014) which provides that where a person enters a transaction and it would be reasonable to consider, based on a number of specific factors, that the transaction was a tax avoidance transaction, then that person shall not be entitled to benefit from any tax advantage arising from that transaction. One of the primary differences between section 811 and section 811C is that it removes the necessity for a nominated officer of the Revenue to form an opinion that a transaction is a tax avoidance transaction and to issue a notice to the taxpayer for the purposes of challenging the transaction. Going forward, if a person files a tax return claiming the benefit of a tax advantage arising from a tax avoidance transaction, then the Revenue Commissioners may, at any time, withdraw or deny that tax advantage by making or amending an assessment on that person.
- Section 811D (intended to effectively replace section 811A with respect to transactions commenced after 25 October 2014) which provides that where a person enters into a tax avoidance transaction and claims the benefit of a tax advantage contrary to section 811C, a surcharge of 30% of the amount of the tax advantage will be due and payable (increased from the previous section 811A surcharge of 20%). As with section 811A, a taxpayer may file a protective notification with Revenue (but the taxpayer is required to satisfy additional conditions, including the submission of (i) all documentation pertaining to the transaction and (ii) an opinion by the taxpayer (or someone on their behalf) as to why the general anti-avoidance provisions do not apply) to avoid the 30% surcharge or, in certain circumstances where a taxpayer claims the benefit of a tax advantage contrary to Section 811C or one of the specific anti-avoidance provisions listed in the new Schedule 33 added by FA 2014 to the TCA (including sections 590, 806 and 807A), that taxpayer may make a full signed disclosure to Revenue together with payment of tax and interest due in order to avail of a reduced surcharge amount. The new section 811D also introduces a range of reduced surcharge rates that can apply to a taxpayer who decides to make a disclosure in relation to a transaction after the expiry of the time limits for making a “protective notification”. The rate of reduced surcharge to apply will depend on when the qualifying avoidance disclosure requirements are acted upon.
- Note: the protections offered by “protective notifications” do not apply where the transaction was one which was disclosable to Revenue under the Mandatory Disclosure regime, unless the taxpayer was unaware that the transaction was a ‘disclosable transaction’.

ANTI-AVOIDANCE LEGISLATION EXAMPLE (FACTS)

- Barry Jones is domiciled in Ireland but is not resident in Ireland in the tax year 2014 due to his employment by a foreign company exercised outside Ireland. He is not ordinarily resident in Ireland as he has not been resident in Ireland for the tax years 2011, 2012 and 2013 for the same reason. He is married to Brenda, an Irish domiciled, resident and ordinarily resident individual. They have three children all of whom are Irish domiciled and Irish resident and ordinarily resident.
- Barry is proposing to settle cash and investment portfolios (comprising stocks and shares) which he currently holds outside of Ireland on trust in an offshore jurisdiction and a local trustee company will act as trustee. Under the terms of the trust instrument the trustee will have broad discretionary powers in relation to the appointment of income or capital to any member of a class of beneficiaries. The class of beneficiaries for the trust will include Barry's wife and children as well as remoter issue.

ANTI-AVOIDANCE LEGISLATION EXAMPLE (ISSUES 1)

Tax considerations on the basis that the proposed trust is non-Irish resident are as follows:

- Income Tax - Section 806 / 807A – on the basis that Barry settles funds/assets to establish the trust he would be considered to be the transferor in relation to the settlement at date of establishment. On the basis that Barry's wife is a beneficiary of the trust she will be entitled to be considered by the trustees to potentially receive income from the trust and will have 'power to enjoy' the income or capital of the trust (coming within the definition of 'individual' in section 806). Accordingly, the provisions of section 806 are likely to apply. Section 807A should not apply where section 806 applies.
- Capital Gains Tax – Section 579 / Section 579A – Barry will be considered the settlor of the trust at the time of establishment and there are Irish resident and domiciled beneficiaries of the trust, his wife and children. Accordingly, should Barry become Irish resident again in the future, it is likely that section 579 will operate to attribute gains of the trust to him. Section 579A is unlikely to apply on the basis that Barry's wife is a beneficiary of the trust and therefore Barry will be considered to have an interest in trust.

ANTI-AVOIDANCE LEGISLATION EXAMPLE (ISSUES 2)

Tax considerations on the basis that the proposed trust is non-Irish resident are as follows:

- CAT – regardless of the settlor, Barry's, residence and the situs of the trust assets, CAT is likely to be payable on any distributions to the beneficiaries where those beneficiaries are Irish resident and ordinarily resident at the date of distribution although Barry's spouse will be entitled to avail of the spousal exemption from CAT.
- Stamp duty – No stamp duty should arise provided that all assets settled on the trust as currently outside of Ireland and all related settlement documents are executed outside of Ireland. Distributions from the trust will not attract SD.

FILING REQUIREMENTS REMINDER

- Section 896A, TCA 1997 – requires persons who in course of trade or profession are concerned with the making of a settlement where the settlor is resident in Ireland and the trustees are not resident in Ireland to deliver information to the Revenue on Form 8-S within 4 months of the making of the settlement
- Section 46(15) CATCA – Form DT1 – return detailing disposition by Irish resident or ordinarily resident person as a result of which property becomes subject to a discretionary trust
- Form TR1 and annual Form 1

MANDATORY DISCLOSURE

- Mandatory disclosure is required for a scheme which is:
  - designed to give the tax payer a tax advantage; and
  - not a scheme that relies on ordinary tax planning using standard statutory exemptions and reliefs in a routine fashion for bona fide purposes, as intended by the legislature
- Directed mainly at professional advisers
- Follows international trend (e.g. UK DOTAS regime)
- Finance Act 2014 - amendments regarding discretionary trusts

RELEVANT LEGISLATION AND DOCUMENTS

- The primary legislation in relation to the mandatory disclosure regime was introduced as sections 817D to 817R of the TCA. Further guidance in this area was introduced by way of the Mandatory Disclosure of Certain Transactions Regulations 2011 (SI No. 7 of 2011) (the "Regulations") and the Guidance Notes on Mandatory Disclosure Regime issued by the Revenue in January 2011. Finance Act 2014 incorporated many of the rules included in the Regulations into the TCA.
- The regime applies to all taxes, duties and levies excluding only customs duties. The legislation gives rise to reporting obligations for 'promoters' (such as legal and accountancy firms and financial institutions) and in some cases 'users' of planning that will result in an Irish tax advantage for the user. The regime extends to promoters and users whether or not they are located in Ireland.
- A transaction (which is very broadly defined) will be disclosable where the transaction gives rise to a tax advantage which is the main or one of the main benefits of the transaction and the transaction falls within one of the 'specified descriptions'/'hallmarks' set out in the legislation. Broadly, these specified descriptions relate to the confidentiality of the transaction, whether a premium fee was chargeable, whether the transaction is a standardised tax product or whether the transaction gave rise to a particular type of tax advantage.

RELEVANT LEGISLATION AND DOCUMENTS

- Finance Act 2014 amended the relevant legislation so that any transaction that seeks to avoid tax through the use of a discretionary trust will now be a disclosable transaction for the purposes of the Mandatory Disclosure regime. FA 2014 introduced section 817DA(10) of the TCA 1997) under which the reference to "specified description" in the definition of "disclosable transaction" (see paragraph 6 above) is extended to include various classes of transaction including all transactions to which a trustee of a discretionary trust is a party unless the transaction is of a type specified in the Schedule to regulations made under section 817Q (e.g. section 189A TCA 1997 trusts and trusts listed in section 17 CATCA 2003).
- In addition, a new requirement that the Revenue assign a unique transaction number to each scheme notified will be introduced which must be disclosed by persons entering a transaction which is disclosable or seeking a tax benefit from such a transaction in their annual tax return.
- Revenue published new Mandatory Disclosure Guidelines in respect of the Finance Act 2014 changes on 28 January 2014. Revenue have included in an Appendix to the Guidelines examples of what Revenue would consider as routine day-to-day tax advice and the routine use of statutory exemptions and reliefs for bona fide purposes (and therefore not included in mandatory disclosure).

THE KEY QUESTIONS

- Consider whether transactions you have/are developed/ing or implemented/ing are potentially within the regime?
- Is there a tax planning element to work you are doing?
- Could you be a “promoter”?
- Could the work be considered a “transaction”?
- If a transaction, could the work be a “disclosable transaction”, i.e. does the work

  (i) fall within one of the specified descriptions (hallmarks) and is not excluded under the legislation or Revenue guidelines;

  (ii) enable a person to obtain a tax advantage; and

  (iii) is such tax advantage one of the main benefits of the transaction?
- Is legal professional privilege relevant?
- Get advice on your obligations if required
- Record reasoning as to why reporting/not reporting

FOREIGN ACCOUNTS TAX COMPLIANCE ACT ("FATCA") AND TRUSTS

- FATCA is a U.S. tax law that has created a very extensive and complex tax information reporting regime. FATCA has a global reach and FATCA's main objective is to address perceived abuses by U.S. taxpayers with respect to their offshore accounts and indirect investment income through non-U.S. entities by introducing mandatory reporting obligations on foreign financial institutions ("FFIs"). FATCA may also apply to certain Non-Financial Foreign Entities ("NFFEs"). Failure to comply with FATCA may result in a 30% withholding tax penalty on certain US sources of income.
- Ireland entered into an Inter-Governmental Agreement with the US in December 2012 (the "Agreement") with regard to the implementation of FATCA. The Agreement has also been given force of law in Ireland through section 891E TCA 1997 and implementing Regulations. The Agreement provides for the automatic reporting and reciprocal exchange of information between Ireland and the US. The Agreement is a Model I agreement which means that Irish financial institutions will report directly to the Revenue in respect of accounts held by US persons. The Revenue will in turn exchange the information received with the Internal Revenue Service ("IRS") in the US.
- The definition of FFIs goes beyond pure financial institutions and can extend to trusts. Even where a trust is not a FFI is may be classified as a NFFE giving rise to obligations under FATCA.
- Trusts resident in Ireland may have obligations under FATCA even where there is no US settlor, no US assets, no US trustees and no US beneficiaries.

FOREIGN ACCOUNTS TAX COMPLIANCE ACT ("FATCA") AND TRUSTS

- Certain charitable and pension trusts are excluded from FATCA but the following should consider the extent of their obligations under FATCA:
  - Any individual / trust company which acts as a trustee;
  - Any firm providing trustee services who comes within the definition of a FFI; and
  - Any solicitor / accountant who has clients in the categories above.
- Revenue has confirmed that a trust will be a FFI where the trust is professionally managed i.e. has a corporate trustee; and where the trustee has engaged a financial institution to manage the financial assets of the trust.
- A trust which is a FFI is obliged to register with the IRS. A trust which is a FFI will need to complete due diligence to determine whether the financial accounts managed by the trustee are reportable to Revenue under FATCA.
- FFIs must register with the IRS directly to obtain a Global Intermediaries Identification Number ("GIIN"). Registration with the IRS can be completed online by completing Form 8957 (http://www.irs.gov/pub/irs-pdf/fw8bene.pdf).
- Trusts which are not FFIs are not outside the reach of FATCA and are classified as NFFEs. Unlike FFIs, a trust which is an NFFE should not have an obligation to register with the IRS or to report to the Revenue. Instead, NFFEs will need to provide a self-certification to any relevant FFIs with which they hold accounts (passive income accounts) to ensure that 30% withholding tax is not applied.

CASE STUDY 1

- John Smyth died on 15 December 2009 aged 80. John was Irish domiciled and was resident in Ireland for the majority of his life with the exception of the period between 1989 and 2002 when he was resident in the UK. He was married twice and there were children of both marriages. He is survived by his second wife Anne.
- John established a discretionary settlement governed by Irish law for estate planning purposes in 1998 and appointed three trustees of the settlement – Anne, his solicitor Jack Smith and his accountant Mary Brown. Jack and Mary are and have always been Irish resident, ordinarily resident and domiciled. The beneficiaries of the settlement are all of John's children, all of John's grandchildren and Anne. Any spouses of John's children or grandchildren are specifically excluded as beneficiaries of the settlement under the terms of the settlement deed.
- Under the terms of John's will, the majority of his estate excepting joint assets held with Anne passed to the settlement established by John in 1998 including a villa in Marbella, Spain valued at the date of John's death at €2,000,000 (two million euro).
- Outline the difficulties which might arise from a legal and a tax perspective with regard to the property in Spain passing to the settlement under the terms of John's will.

CASE STUDY 2

- Aodh O'Malley wishes to meet with you to discuss queries he has with regard to his succession planning. In advance of the meeting, Aodh has provided you with the following details in relation to his personal circumstances and he has asked that you focus particularly on issues relevant to his personal circumstances. He also tells you that several acquaintances of his have put in place discretionary trust structures and he also wants to put in place one of these, preferably in another jurisdiction, although he wants to remain 100% in control of his assets at all times.
- Aodh provides you with the following detail:
  - He married his first wife, Eileen in 1975, and there were two children of the marriage – both children are now over 18. Eileen died in 1995.
  - He married again in 2000 to Eleanor and there are two children of that marriage, aged 8 and 5. His youngest child has down syndrome. His two elder children do not get on with Eleanor.
  - Aodh and Eleanor are both Irish domiciled, resident and ordinarily resident and the younger children reside with them. His elder children are Irish domiciled but resident in the US and UK respectively.
  - Aodh's parents are dead and he is estranged from his siblings.
  - Aodh has Irish and foreign property interests. The Irish properties are held personally and although the debt exceeds the current market value of those properties, they are currently let and the rent roll meets the borrowing repayments. However, he has given personal guarantees to an Irish bank in relation to the debts secured on these properties. The foreign properties are mainly European and are held through different structures – personally, partnerships and corporate and despite the climate, due to some clever investment these properties are worth more than the debt attached and will give rise to considerable return in the short term. He estimates his overall net worth at Euro 200m. However, for the moment his cash flow is tight and he would not have funds to discharge a personal debt if it was called in.
  - Aodh is about to get involved in a new property venture in Australia which he expects to do very well.
  - Consider the trust establishment related legal and tax topics for discussion at a meeting with Aodh.