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The Domicile Levy: Relevance to Tax Returns 2022

Introduction

Under s150 Finance Act 2010 a new part (Part 18C, s531AA to s531AK) was introduced to the Taxes Consolidation Act 1997 (TCA 1997) to provide for the domicile levy, which applies for 2010 and subsequent years. Individuals meeting certain criteria are subject to an annual levy of €200,000. Taxpayers and practitioners need to be mindful of this levy when filing income tax returns as the circumstances in which it can apply are much broader than one might initially expect.

When the levy was introduced, in the depths of the financial crisis in 2010, it appeared from the Budget speech of the Minister for Finance at the time, Brian Lenihan, that the levy was aimed at non-Irish-resident Irish-domiciled individuals. Mr Lenihan stated on 9 December 2009: "our treatment of non-resident individuals is broadly in line with that of most OECD countries but we must ensure that every wealthy Irish domiciliary who pays little or no income tax makes a contribution to the State". It seemed reasonable, therefore, to assume that the domicile levy legislation was never intended to apply to Irish-tax-resident individuals but, rather, to a small number of wealthy Irish-domiciled individuals who were resident abroad but still retained significant ties with the Irish State, e.g. with regard to ownership of Irish property assets.

To come within the ambit of the domicile levy, an individual must fulfil all of the following conditions:

- be domiciled in the State in the tax year,
- have “worldwide income” for the tax year of more than €1m,
- have a liability to income tax in the State for the tax year of less than €200,000 and
- have Irish property with a market value in excess of €5m.

There was initially also a requirement for the person to be an Irish citizen, but this was removed from 2012.

It is notable that there is no mention of tax residence being relevant to whether the levy applies. The approach taken by Revenue in applying the domicile levy to date has, however, been to apply the levy to both resident and non-resident individuals.

I will discuss each condition separately below.

Domicile

The concept of domicile is well established and originates from general law. Your domicile is essentially the country where you intend to live permanently, and it may be different from your country of residence or nationality.

Domicile of origin is determined when an individual is born and is usually determined by the domicile of the individual’s father. This will remain the person’s domicile until there is sufficient evidence to suggest that he or she has moved to another country with the intention of living there permanently. This will be a question of fact. To demonstrate that a domicile of origin has been abandoned, there must be evidence of abandoning the intention of ever returning to the country of domicile of origin. When a new domicile is acquired, this is known as domicile of choice.

It can be quite difficult to prove that a person has abandoned his or her domicile of origin. The burden of proof regarding domicile changes rests with the individual claiming that a change has taken place. Some factors to consider when looking at whether a change in domicile has taken place are:

- length of residency in the country;
- quality of residence, i.e. purchase a house or occupy rented accommodation;
- presence of spouse and children;
- business interests;
- political involvement;
- education of children;
- membership of clubs;
- number of return visits to the country of domicile of origin;
- holding of passports;
- letters of wishes – i.e. outlining an individual’s wishes to be buried in the new country, purchase of a grave plot in the new country, etc.; and
- disposal of all property in the country where the domicile of origin arises.

With regard to the last point, relating to the disposal of property, given that the domicile levy applies only to persons with property in Ireland valued at €5m or over, it is likely to be difficult to argue that a domicile of origin has been abandoned if property assets in excess of €5m have been retained in the State.

If an individual is to acquire a domicile of choice, he or she must also:

- establish a physical presence in the new country,
- have an intention to reside there permanently and
- actually reside there.

It has been held on occasion that even where individuals have spent many years in another country, they have retained their domicile of origin. Individuals do not cease to be domiciled in a country merely because they leave it temporarily.

Worldwide Income

“Worldwide income”, in relation to an individual, means the individual’s gross income without regard to any reliefs, exemptions or deductions.

However, a deduction will be allowed for payments made on foot of legally enforceable arrangements made in the State, or in any other jurisdiction, under which payments are made by an individual to another individual by virtue of the annulment or dissolution of a marriage, or a separation that is likely to be permanent, or where a civil partnership has been dissolved or a relationship between cohabitants ends. A deduction will not be allowed for payments made under maintenance arrangements where permanently separated and, in certain circumstances, divorced couples, or couples whose civil partnership has been dissolved, or where a relationship between cohabitants ends, where the parties elect to be assessed jointly for income tax purposes.

The interpretation of "worldwide income" has proved the most contentious aspect of the domicile levy legislation, with Revenue taking the view from the introduction of the levy in 2010 that "worldwide income" is income before the deduction of losses or capital allowances (either current-year or carried forward). This issue has been the subject of a number of appeals to the Tax Appeals Commission, some of which are currently ongoing. An analysis of the concepts discussed in the appeal cases is outside the scope of this article, these have been discussed in the article by JMcGovern and SJO'Brien "Recent Issues in Residence, Domicile and Double Taxation Relief" in this issue. As a response to the debate that arose on the definition of "worldwide income", s79 Finance Act 2017 introduced an amendment to the domicile levy legislation specifically to deny a deduction for capital allowances and losses forward, which suggests to this author that before this amendment it was arguable that these items were deductible in calculating worldwide income. At a minimum, the position was unclear, and this is the reason for the tax appeal cases that have been taken in relation to periods before the legislative amendment contained in s79 FA2017. Section 79 FA 2017 is effective for tax years from 2018.

Revenue eBrief No. 112/18, issued on 25 May 2018, advised of an update to Part 18C-00-01 of the Tax and Duty Manual to include a "clarification" that capital allowances or losses forward are not allowed as a deduction in computing an individual's worldwide income for the purposes of the domicile levy. The fact that the legislative amendment mentioned above was required would suggest that this was not the legislative position before that. In an update to the Revenue Technical Service Manual in July 2019 it is specifically stated in paragraph 7 (TDM Part 37-00-00a) that "taxpayers are not bound by an opinion given by Revenue or by Revenue Guidance if they can show that the approach that they adopt is in line with the legislation". It is the author's view, therefore, that there is a strong argument that losses and capital allowances were deductible before 2018, but this position has not been upheld in the tax appeal cases that have been decided to date.

The current position after Finance Act 2017 is that "worldwide income" includes all income (even income exempt from Irish tax) before deductions for capital allowances or losses. Expenses that are deductible within the meaning of s81 TCA 1997 are allowed as a deduction for the purposes of the domicile levy. Taxpayers who may have believed that they had no tax liability due to the availability of capital allowances and losses can be unpleasantly surprised to find that they may in fact subject to a domicile levy of up to €200,000.

Liability to Income Tax Less than €200,000

Irish income tax paid by an individual in a tax year can be used as a tax credit against the €200,000 levy when calculating the amount of domicile levy payable. Neither PRSI nor USC is allowable as a credit against the levy, as the view is that these taxes are not considered to be income tax.

Irish Property in Excess of €5m

Irish property refers to all property located within the State to which an individual is beneficially entitled in possession, excluding:

- shares in a company that exists for the purposes of carrying out a trade or trades and
- shares in a holding company that derives its value from subsidiaries that carry out a trade or trades.

No deduction for debts is allowed from the market value of property held personally; therefore a situation such as the property's being in negative equity would not remove the requirement to pay the domicile levy. An important point to note, however, is that if a property is held in a trading company, the relevant asset will be the shares, as opposed to the property itself, and in that instance any debt in the company will operate to reduce the overall value of the asset, i.e. the shares.

It should be noted that if property is located in the State and shares are deriving their value from that property, the shares are treated as Irish property.

The legislation contains anti-avoidance provisions that treat property that was transferred by an individual on or after 18 February 2010 for less than market value to that individual's spouse, civil partner, minor children, the minor children of the civil partner, a discretionary trust or a foundation as the transferor's property on each relevant valuation date. It is therefore not possible for taxpayers to reduce their assets below the €5m limit by transferring them to the connected parties listed above. However, the limit applies on a per individual basis, so it is possible for a husband and wife to have €5m each in assets, as long as the transfers mentioned above were not effected to achieve this.

It would be advisable to keep independent property valuations on file at the valuation date, particularly where a view is taken that the domicile levy does not apply due to the asset limit not being exceeded.

Compliance Requirements

The domicile levy must be paid via self-assessment on or before 31 October in the year after the valuation date (subject to extension to match the pay and file deadline for income tax when the tax is paid and filed through ROS). The valuation date is a point-in time-test and is set at 31 December each year.

If taxpayers cannot access ROS, they can download the return, Form DL1, and:

- post the completed form to the Collector-General and
- pay through myAccount if they are a PAYE worker or by electronic funds transfer (EFT) if they are non-resident.

Failure to pay the levy, or failure to pay it on time, can result in enforced collection through the sheriff, court proceedings or attachment. Interest will be charged on outstanding domicile levy at the rate of 0.0219% per day or part of a day. Penalties may also apply.

Conclusion

The number of taxpayers who have been subject to the domicile levy has been relatively low. However, the domicile levy is broader in application than one might expect. It is not applicable solely to the wealthy non-resident Irish-domiciled individual but may also apply to the more unsuspecting Irish-tax-resident individual. Taxpayers, in particular those who have losses and capital allowances available to shelter their taxable income, should be cognisant of the domicile levy as they may find themselves unexpectedly falling within the parameters for the levy to apply. If the domicile levy applies, the taxpayer may be dismayed to discover that whereas they had assumed that their income tax liability would be sheltered by their losses or capital allowances, these items will be ignored for the purposes of the domicile levy, resulting in an unexpected tax liability of up to €200,000.