This technical query paper was submitted to Revenue via the TALC Direct/Capital Taxes Sub-committee following a request for feedback on the Draft TDM on Foreign Entity Classification for Irish Tax Purposes. The matter was discussed at the June 2022 TALC Direct/Capital Taxes Sub-committee meeting and the discussion will be reflected in the Minutes.

Institute feedback on Draft TDM on Foreign Entity Classification for Irish tax purposes

21 June 2022

1. **Paragraph 2: Entity Classification – Ireland**

   Paragraph 2 of the draft TDM sets out the broad principles around the taxation of companies and partnerships. It would be helpful if the guidance were expanded out to clarify the tax treatment of the members of these foreign entities as well as the application of key provisions and reliefs to transactions involving these entities depending on their classification as either transparent or opaque including matters such as payments to and from such entities, applying ownership tests etc. We note that helpful guidance is included in the draft updated anti-hybrid guidance for the purpose of applying the 'associated enterprises' test to Irish partnerships.

   We have set out in **Appendix I** the areas on which guidance would be welcomed. Such guidance would assist taxpayers in forming an opinion on the correct treatment to apply to a particular foreign entity depending on its classification for the purposes of specific Irish tax provisions without the need to request an opinion from Revenue.

   We note that certain Tax and Duty Manuals currently contain specific confirmations in relation to the treatment of US LLCs including the application of the withholding tax provisions to interest paid to US LLCs. Given that US LLCs are a key feature in many multinational corporate structures, it would be helpful if Revenue's position on the treatment of US LLCs be brought together in a standalone Tax and Duty Manual. Suggested content for this manual is set out in Appendix II.

2. **Paragraph 2.2 - *"Therefore, in broad terms, apart from those bodies that are registered/ formed with a separate legal personality, all other persons carrying on a business in common with a view to profit are considered a partnership'***
   We would like to explore the intended meaning of this statement. Is it intended that separate legal personality is required so as not be regarded as transparent. We note the words 'in broad terms' but wonder how trusts/ unit trusts and foreign equivalents might fit in and Scottish partnerships which we believe have separate legal personality?

Also, clarification would be welcome as to how trusts fit with the comment at para. 2.3 that essentially there are two entity classifications, and it is companies that are tax opaque? We believe that this statement may be overly broad.

3. **Paragraph 2.2.2**
   We would like to explore what is meant by the statement *"transparent for Irish income and corporation tax purposes"*. For example, the guidance is silent on withholding taxes application. Does Revenue regard a partnership as a person to which for example, an interest payment is made?

   It would be helpful if the draft TDM addressed the application of withholding taxes to payments to transparent entities such as Irish partnerships and their foreign equivalents as this is an important issue in the overall context.

4. **Paragraph 4.1 - Quigley v Harris**
   In our view, the description included of the Quigley v Harris case may be misinterpreted.

   Firstly, the case concerned a Cook Islands limited partnership (LP) rather than an LLP which typically have different considerations. We believe that this could cause confusion.

   Secondly, while the case affirmed that Memec applies in Ireland, the application of Memec does not appear to be a significant feature of that decision. The focus was not on opaque/transparency characteristics but on whether or not the partnership interest was a general or limited one for Irish tax purposes. The same conclusion could have been reached looking at other lines of case law such as Rae v Lazard which examines the rights/obligations etc. of foreign law.

   This impacts the commentary at paragraph 4.3 of the draft TDM where it is suggested that the decision in Anson v HMRC somehow conflicts with Memec and the approach in Harris. In our view, it does not. One would have thought that the UK Supreme Court was best placed to highlight any divergences from Memec if any such divergences existed. Rather the Anson decision, and indeed the TAC decision in 17TACD2019 (awaiting High Court decision), both focus on the impact of double taxation agreements and the specific wording thereof. The Anson decision looked at who was entitled to the profits (as distinct from the assets) as they arose. Both decisions accepted that treaty provisions are interpreted in a manner consistent with what the court/TAC understood to be the intent of the contracting parties.

   Thus, in our view, there is nothing in Anson that is at odds with the approach in Memec or indeed Quigley. If necessary, a place holder could be created in the TDM to address double taxation treaty/MLI aspects and Anson and the TAC/eventual High Court decision could be placed in that section.

5. **Paragraph 5.2 – Factors to consider**
   Paragraph 5.2 sets out a list factors which would be indicative of a foreign entity being classified as opaque for Irish tax purposes. It would be helpful if the TDM could indicate whether additional weighting should be placed any of these factors or whether there is any order of priority when considering the factors.

   It would also be helpful if the TDM could include a number of practical examples demonstrating the application of the factors in determining the classification of an entity.

Appendix I

Areas on which Revenue guidance would be welcomed by practitioners

1. Tax treatment of Irish members of a foreign entity

The classification of a foreign entity as transparent or opaque is important for the purpose of deciding how the Irish members of that entity should be taxed in Ireland on the income and gains they derive from their interest in the foreign entity. For the avoidance of doubt, we would welcome the following clarification in the TDM:

- If the entity is correctly classified as "transparent" then the member should be charged to Irish tax on their share of the entity's profits as they arise; and
- If the entity is correctly classified as "opaque" then the member should, subject to the controlled foreign companies provisions, be taxed on distributions made by the entity only.

2. Classification of a foreign entity as a "body corporate" or a "company"

a) Clarification that "transparent" and "opaque" are not interchangeable with "partnership" and "company"

Notwithstanding that a foreign entity may be more akin to an Irish partnership, the term "transparent" is not interchangeable with the term "partnership" and, thus, a fiscally transparent entity may not necessarily be a partnership. Similarly, a foreign entity may be regarded as "opaque" for Irish tax purposes but it may not necessarily be a *"body corporate"* or a *"company"* for Irish tax purposes. We would welcome clarification from Revenue on this point in the TDM.

This clarification is important because many provisions and reliefs in Irish tax legislation apply only to an entity which is a *"body corporate"* or a *"company"* including the DWT exemption provisions in s172D TCA 97, participation exemption in s626B TCA 97 and associated companies stamp duty relief in s79 SDCA 1999. While a foreign entity (such as a US LLC which is checked open and taxed as a partnership under the US tax code) may be regarded as transparent for the purposes of determining how its Irish members are to be taxed in Ireland on the profits of that entity, its characteristics could still be reflective of a *"body corporate"* or a *"company"* for the purposes of certain provisions and reliefs.

b) Characteristics of a foreign entity which would be indicative of a "body corporate" and a "company"

We would welcome guidance in the TDM similar to that contained in Part 7 of the Stamp Duty Manual setting out the characteristics of a foreign entity which would be reflective of a *"company"* and those which would be indicative of a *"body corporate"*.

3. Whether the members interests in a foreign entity are analogous to "ordinary share capital"

In order to rely on certain provisions in the TCA 1997 and the SDCA 1999 it is necessary for an to have ordinary share capital. We would welcome guidance from the Revenue Commissioners on the factors which should be considered in determining whether members' interests in a foreign entity would be regarded as

"ordinary share capital" for the purposes of applying various provisions and reliefs within the Irish tax code.

4. Whether a foreign entity which is correctly classified as "transparent" for Irish tax purposes can be "looked through" for the purposes of certain provisions within the Irish tax code

A number of TDMs contain specific statements in the context of Revenue being prepared to "look through" US LLCs in certain circumstances for the purpose of applying a provision. These include Part 08-03-06 on withholding taxes and Part 04-09-01 on Section 110 TCA 97.

Additionally, Part 7 of Revenue's Stamp Duty Manual on Section 79, Associated Companies Relief contains specific confirmations in relation to certain general and limited partnerships for the purpose of applying the association test.

It would be helpful if Revenue whether it would extend the above "look through" concessions to all bona fide foreign entities which are correctly classified as transparent for Irish tax purposes when applying various provisions in the Irish tax code, including:

- Corporation tax loss groups
- Capital gains tax groups
- Participation exemption in Section 626B
- Dividend withholding tax exemptions contained in Section 172D
- Withholding tax exemptions contained in Section 246

5. The residence status of a foreign entity

Depending on the tax provision in question, the concept of residence may be referred to either or both of the following:

- the Treaty residence position i.e. "resident of a Contracting State" (e.g. Section 452(1)(b)(i))
- "by virtue of the law of a relevant territory" is resident for tax purposes in that relevant territory i.e. tax residence "in" a country for domestic tax purposes (e.g. Section 411 of the Taxes Consolidation Act 1997)

Issues can arise in applying the residence requirements where an entity is regarded as "look through" in the *"relevant territory"* in question. The second residence requirement above also poses issues where a territory does not have a general concept of residence (e.g. Hong Kong).

We understand that the residence position of the US LLC in the Tax Appeal Commission determination 17TACD2019 is the key issue of the appeal by the Revenue Commissioners to the High Court. Depending on the decision of the High Court in relation to this appeal, guidance from the Revenue on this matter would be welcomed in due course.

In the context of a territory which does not have a concept of residence, it would be helpful if Revenue were prepared to extend the approach set out at 3.6 in TDM Part

35b-01-01 on Controlled Foreign Company Rules in applying the residence requirements within a particular section of the Irish tax code to a foreign entity.

Appendix II

Standalone Tax and Duty Manual on the tax treatment of US LLCs

The following guidance contains Revenue's views on the treatment of US LLCs for the purpose of specific provisions within the Irish tax code:

- Dividend Withholding Tax (DWT) - Technical Guidance Notes for Paying Companies, Authorised Withholding Agents (AWAs) and Qualifying Intermediaries (QIs) - June 2022
- TDM Part 08-03-06 - Payment and receipt of interest and royalties without deduction of income tax - March 2021
- TDM Part 04-09-01 - Section 110: entitlement to treatment - September 2021

In addition, the current draft TDM Part 35C-00-01 (dated June 2022) sets out scenarios where a US LLC might be regarded as a hybrid entity for the purposes of Ireland's anti-hybrid rules.

We would welcome a standalone TDM covering the tax treatment of US LLCs which would:

- Consolidate the existing guidance on US LLCs; and
- Extend the guidance to cover other tax provisions in the context of a US LLC which is correctly classified as a *"body corporate"* or a *"company"* and is "checked open" for US tax purposes including:
    - Corporation tax loss groups
    - Capital gains tax groups
    - Participation exemption in Section 626B
    - Dividend withholding tax exemptions contained in Section 172D
    - Withholding tax exemptions contained in Section 246