

Ireland - A hub for developing, holding and exploiting technology

The low 12.5% Irish corporation tax rate, and the previous beneficial 10% tax rate for manufacturing in Ireland, have long been seen as the principal tax factor in attracting inward investment projects to Ireland. Over time the types of investment into Ireland have become more technology intensive with particular focus on the IT, life sciences and pharma industries.

A variety of incentives have been introduced into Irish tax law which encourage the carrying on in Ireland of activities at all stages of the IP lifecycle, and not just in relation to exploitation of the rights. In addition to Ireland's low corporate tax rate, these IP related incentives were improved recently and have bolstered Ireland's position as a premier tax friendly jurisdiction in which to both develop technology and exploit its potential.

Why locate research and development activities in Ireland?

R&D Credits

In addition to the 12.5% tax rate which is available in respect of royalties generated from the active exploitation of IP, in order to encourage activities in Ireland at the earlier stage of the IP lifecycle when the IP is actually being developed through carrying out of certain R&D activities, there is a generous tax credit system which is available at a rate of 25% of the qualifying expenditure on an incremental basis over a 2003 base. This form of relief further provides that a R&D tax credit is available on the first €200,000 of qualifying expenditure incurred on a volume basis (i.e. excluded from the incremental basis referred to above). While the intention behind the provision is the encouragement of R&D activity in Ireland, in order to qualify for the tax break, the R&D activity may take place anywhere in the EEA (the European Economic Area, which is the EU plus Iceland, Liechtenstein and Norway) but the company must not qualify for tax relief on the expenditure in any other country outside of Ireland.

The tax credit can result in an effective 37.5% (12.5% + 25%) deduction, taking into account the normal corporation tax deduction, for revenue expenditure on certain R&D activities and on plant and machinery used for such activities. As an alternative to taking a deduction in a startup operation it is possible to claim a refund of these "credits" over a three year period where the company concerned is not making profits sufficient to enable it to otherwise use the credit. The refund is limited to the greater of the corporation tax payable by the company in the previous ten years or the payroll (PAYE, social insurance contributions and levies) liabilities of the accounting period in which the R&D expenditure is incurred and the preceding accounting period. In essence, this credit regime reduces the "above the line" cost of carrying out the R&D using an Irish company. It is also possible to claim credits in respect of

expenditure on buildings to be used for the R&D activities.

The qualifying expenditure must be on R&D activities as defined in the Irish legislation. Essentially the activities must be systematic, investigative, or experimental activities in a field of science or technology, involving basic research, applied research or experimental development. The activity must seek to achieve scientific or technological advancement and must involve seeking the resolution of technological uncertainty. The Irish Revenue has issued detailed guidelines setting out its view as to what constitutes R&D activity for the purpose of the relief. The types of activity which qualify may be wider than what one would initially consider would be the case and it is worthwhile for companies to review their activities in order to determine whether they qualify for the relief. No relief is available for any element of the expenditure that is grant aided.

Recent provisions introduced a key employee reward mechanism which allows a company to surrender all or a portion of its R&D tax credit to 'key employees', subject to certain requirements being met. To qualify, a key employee must spend at least 50% their time actively working on R&D activities and at least 50% of their emoluments must be qualifying expenditure for the purpose of the relief. This development allows the R&D tax credit to be utilised by companies to attract and retain key R&D talent and gives flexibility in how such companies may utilise its R&D tax credit.

Why exploit IP from Ireland?

12.5% rate

One of the principal factors for deciding to locate IP in Ireland has been the ability to avail of the 12.5% rate of corporation tax on profits generated from the active exploitation of IP. In order to qualify for the 12.5% rate of tax, there must be sufficient activities carried out in Ireland by or on behalf of the exploiting company. A company in receipt of a mere passive income stream from the IP it owns, or which carries out an insufficient level of activity in relation to the exploitation of its IP, would be subject to the 25% rate of corporation tax on the income from the IP. The success of the low 12.5% rate of corporation tax is evidenced by the significant number of multinationals who have established structures in order to exploit their IP resources from Ireland.

Tax depreciation for acquisition costs

In addition to the benefits that can be obtained where the development of IP is carried on in Ireland, where the IP is "bought in" by an Irish company, the tax regime has recently been improved in that a tax deduction can now be claimed in respect of the capital expenditure on the acquisition of a wide variety of intangible assets. The deduction either follows the relevant accounting depreciation

of the IP concerned or alternatively follows a 15 year write down (7% over 14 years, and 2% in year 15). This tax depreciation is available in respect of capital expenditure incurred on intangible assets such as patents, trade marks, brand names, know how, domain names, scientific processes and goodwill directly relating to such. There is an 80% restriction on the deduction such that only 80% of the profits of a business exploiting these rights can be reduced but any excess can be carried forward. This can result in an effective rate of tax of 2.5% (12.5% of 20%) on income arising from the exploitation of IP where tax depreciation for the capital spend on the acquisition of IP is fully utilised.

Expenditure on scientific research

Deductions are also available for certain expenditure on scientific research even if the expenditure incurred is not related to the particular trade carried on by the company.

Investing in R&D

There is also a tax provision aimed at encouraging venture capital investments in R&D activities. This provides a reduced rate of tax on the "carried interest" portion of the return to an Irish resident VC investor. Generally to date it has been possible to structure VC funds such that carried interest would be treated for Irish tax purposes as a capital gains tax receipt subject to a lower rate (33%) in the hands of an investor than an income tax receipt (41%). The new regime reduces the capital gains tax rates even further to 15% (as opposed to 33%) for an individual and 12.5% (as opposed to an effective 33% rate) for a company. These incentives have been introduced with the intention of attracting VC investors to Ireland.

Recent measures were introduced to further incentivise VC activity in Ireland. Established companies may now avail of the relieving measures relating to carried interest accruing to certain VC fund managers, which was previously confined to startup phase companies. Also, the minimum retention period for investments to be held in qualifying companies was reduced from 6 years to 3 years. These and other changes apply retrospectively to investments in qualifying companies held as at 1 January 2009.

Will the technology be adequately protected?

Tax benefits alone are of little practical use if the technology to be developed or acquired is not adequately protected under the laws of the relevant country. On the legislative side, there is arguably no other country in Europe that can say it has a better statutory framework than Ireland when it comes to IP. All of the core Irish legislation in relation to trademarks, patents, copyright and related rights have been introduced in the relatively recent past. The Copyright and Related Rights Act 2000, dealing with copyright in all the different technologically advanced forms, as amended on an ongoing basis since its introduction, is one of the most sophisticated pieces of legislation in Europe. The Irish legislative framework gives significant comfort to companies considering creating and managing their IP assets in Ireland.

When it comes to enforcement, Ireland is ahead of the game on that front too: a Commercial Court was established in 2004 and with its introduction came a new IP disputes forum. A division of the High Court, the Commercial Court was set up to deal with major commercial and IP cases. Historically, cases that would have taken between two and three years to get to full trial are now generally disposed of in less than one year – offering a much more speedy litigation process than many of our EU neighbours. Given the speed with which cases are dealt with, and the fact that IP disputes are often multijurisdictional, this enables companies to strategically choose Ireland as the jurisdiction in which to enforce their rights, based on the likely completion date for trial. In relation to interlocutory applications, costs are often awarded at the interlocutory stage, providing a very powerful mechanism in the fight against IP infringers.

KEY CONTACTS



Paul Fahy

Partner, Tax
T: +353 1 649 2717
C: +1 650 223 3931
E: pfahy@algoodbody.com



John Whelan

Partner, IP & Technology
T: +353 1 649 2234
C: +1 650 646 1441
E: jwhelan@algoodbody.com

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