

Apple Tax– Five practical and important reminders for Irish Company Directors.

This note is a practical, politically non-judgemental reminder to Irish Directors. It highlights Boardroom issues arising from the publication of the EU Commission’s investigation of Ireland and Apple Inc. Actionable lessons for clients include that:

- Boards need to have a formal, robust and defensible tax strategy.
- The traditional assumption of “Tax Confidentiality” is dead and should be replaced by a working assumption of “Transparency”.
- The principle of “Tax Certainty” is further eroded and “Retrospection” is heightened as a risk.
- Boards should generally treat tax as a ‘cost’ and a ‘risk’, rather than ‘an opportunity’ and assess political risks very carefully when making decisions.
- Many Irish Directors will soon be asked to sign a new ‘Directors Compliance Statement’ covering tax and this will lead to interesting, and in some cases overdue, Boardroom focus on tax.



Navigo can help to steer your Board and its Directors through this complex area.

1. **Boards should have a formal, robust and defensible tax strategy in place.** In the current environment, when approving the strategy Directors should take particular care that it includes clear direction on:
 - Organising, locating and measuring the value added pieces of your business. This kind of understanding is a vital ingredient in the area of tax in the context of OECD’s Base Erosion and Profit Shifting (BEPS) process to reshape international tax rules and also the impact of BREXIT.
 - A Control Framework to ensure tax compliance, including resources to manage the area
 - Risk Appetite and Risk Management Framework for tax
 - Active engagement of the Audit Committee, if one is in place, on tax strategy and issues
 - Keeping the Board knowledgeable and up to date on relevant changes
 - The process and authority levels for making good decisions about handling tax interactions, issues and controversies that may arise with Revenue authorities

- Communication strategy. As part of this, clients should compute and have readily available its “total annual tax contribution” to include payroll taxes, in the event the external communication strategy is enacted.
2. **In setting strategy in practical terms, the traditional assumption of “Tax Confidentiality” is dead and should be replaced by an assumption of transparency.** Fittingly when tax developments are the stuff of news pages rather than business pages of newspapers, company Directors should return to the reliable test of “would we be embarrassed if our tax approach was published on the front page of the newspaper?” Though many will regret the passing of old style confidentiality, it is now wise to prepare for the possibility that everything about your company’s tax and its dealings with tax authorities will be more freely available. This assumption is driven by rapid technological change. Inside Revenue authorities, better data analytics tools are driving more and better risk identification, auditing and communication with other countries. This will soon be enhanced by country-by-country reporting of overseas activity, automatic exchange of tax rulings and closer scrutiny of transfer pricing documentation. The resulting picture of businesses is very extensive. While tax authorities retain their historically tight-lipped stance, sources like WikiLeaks and the Panama Papers have put vast amounts of ‘private’ tax information into the public domain. In the Apple case, the driver of disclosure was the EU Competition Directorate, not the Revenue authorities. We live in an age when political candidates are generally expected to publish their tax returns, as British PM Theresa May recently did and is common in US Presidential elections.
 3. **Directors should bear in mind that the principle of “tax certainty” is also eroded. Accordingly, Boards should generally treat tax as a ‘cost’ and a ‘risk’, rather than ‘an opportunity’.** The principle of “Tax Certainty” is being replaced over time not only with uncertainty but, in light of the Apple case, we can now see a much higher risk of “retrospection”. In any event, ‘Tax Certainty’ needs to be evaluated in the context of Ireland’s general anti-avoidance legislation which helps to tip the balance in favour of the Irish Revenue authorities and, in respect of planned structures and transactions, (as a 2011 Supreme Court judgement puts it) *“requires the Revenue to engage in an exercise, if not of discretion, then at least of evaluation and judgment.”* Therefore, Directors should observe caution in this area. Tax rules are complex and the pace of change in tax rules is very high. As the Apple case shows, broader developments in competition law and enforcement and the political sphere, for example, are also relevant to tax strategy. In our view, leaving aside issues of morality and social contribution, tax is best seen as a mandated cost and a risk. For important items (and tax is one of these items), businesses will not aggressively seek to bring the cost to zero without fully understanding and managing the risks involved. For tax, such risks include more public and regulatory scrutiny, reputational loss and falling foul of general anti-avoidance provisions.
 4. **One interesting aspect of the Apple case is that it is not a “tax case” at all – it is, on the face of it, a Competition/ “State Aid” investigation.** Tax has become a significant social and political issue.

Historically there have been famous examples of governments and regulators seeking to outflank opponents on various issues by focusing on the issue of the opponent's tax position. This is perhaps the reverse where the real underlying issue is tax and it is widely speculated that there is a broader agenda at play outside of ensuring fair competition. Nevertheless, this investigation will have transatlantic political implications. The EU is using its powers in these areas to look in the rear view mirror for much longer than we would think as 'normal' in the tax area. It underlines that, however difficult, **Directors need to assess political risks very carefully when setting strategy and making decisions.** This point is consistent with one we made in June about the post BREXIT environment, where uncertainty is increasingly attributable to political factors. In addition, clients should seek advice and guidance from beyond their normal 'tax' advisers.

5. The Apple case brings into sharp focus a new requirement under the 2014 Companies Act that **all Directors of 'large' Irish companies will be required to personally sign the "Directors Compliance Statement"** for all accounting periods ending after 31st May 2016. ("Large" in this context means having turnover of €25m and a balance sheet value of €12.5m). Although the focus of this advisory note is not on the detail of this requirement, the wording in the Act has a particular emphasis on tax compliance. There are likely to be a number of Directors faced with such statements to sign, starting from this Autumn. These include some bemused overseas Directors who are not familiar with Irish law. This will lead to interesting (perhaps overdue) Boardroom discussions. The perspectives in this note may be useful to prime these discussions.

Navigo is supporting and facilitating change in this area so please talk to us if we can assist. Contact our Managing Director, Brendan Lenihan on (01) 477 3404 or at www.navigo.ie.

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Navigo Consulting specialises in business planning, strategy, governance and change. Our consultants are experienced professionals and have seen business from a number of perspectives including both as executive and non-executive Directors of very significant international businesses as well as many years as professional consultants. If we can help your organisation to succeed with a business objective that is important to you, contact our Managing Director, Brendan Lenihan on (01) 477 3404 or contact us through www.navigo.ie