NON-DOM TAXATION: IRELAND AS AN ALTERNATIVE TO THE U.K.

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INTRODUCTION

Ireland has long been overlooked as a destination for non-domiciled ("Non-Dom") individuals. With changes to the U.K. Non-Dom regime scheduled to take effect in 2017 for long-term Non-Doms, mobile taxpayers are looking for alternatives and Ireland should be considered.

This article will look at the Irish legislation and how its Non-Dom regime operates. The statutory residence test is simple to apply and planning opportunities are possible for Non-Dom individuals living in Ireland.

An individual's domicile is relevant for determining the extent of exposure to Irish taxation. In this context, individuals living in Ireland can be broadly classified into two categories: Irish domiciled or non-Irish domiciled.

An individual who is resident in Ireland but who is not Irish domiciled is liable to Irish tax on all income and gains arising in Ireland. However, there is no Irish tax on foreign income and gains provided that the proceeds of the income or gain are not remitted into Ireland. This is known as the *remittance basis of taxation*.

We will start by explaining how an individual becomes tax resident in Ireland. Legislative references are bracketed and each reference is to the Taxes Consolidation Act 1997.

TAX RESIDENCE IN IRELAND [§819 TCA 1997]

Tax residence in Ireland is determined by reference to the amount of days that an individual spends in Ireland in each tax year. The tax year runs from January 1 to December 31. An individual is resident in Ireland under Irish domestic tax rules if either of the following tests is satisfied:

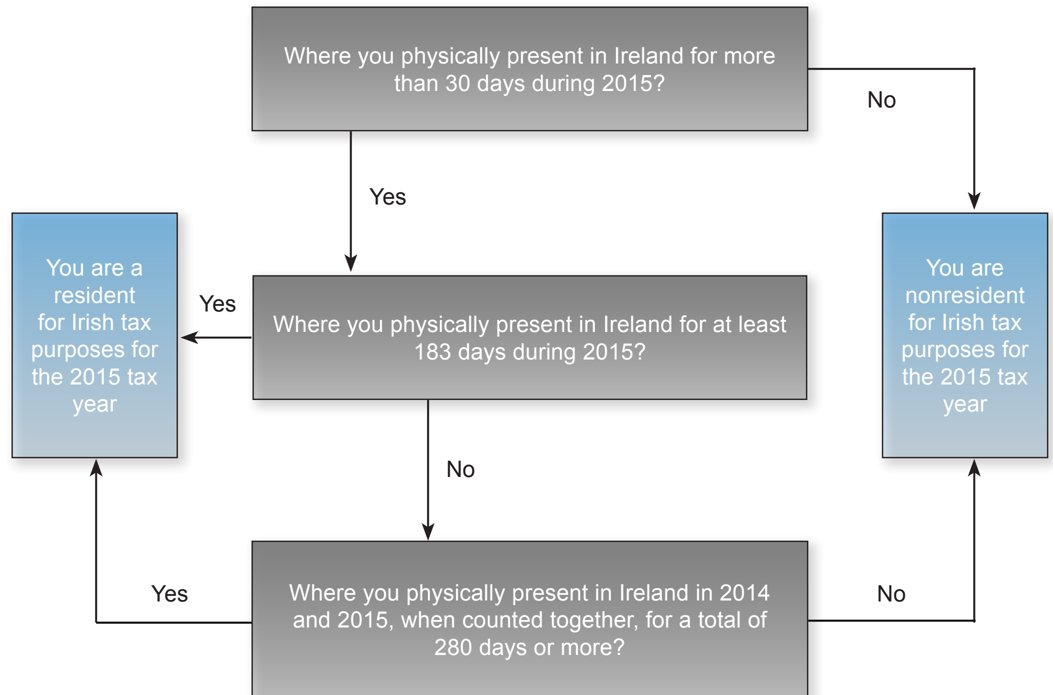
- The individual is physically present in Ireland for 183 days or more in a calendar year
- The individual is physically present in Ireland in the calendar year concerned and the previous calendar year for a total of 280 days or more, with the proviso that if the individual is in Ireland for not more than 30 days in a calendar year, Irish tax residence cannot be established under the 280-day test for that year

An individual who does not meet either the 183-day test or the 280-day test is regarded as non-resident for Irish tax purposes. Therefore, on a continuous basis, an individual who spends fewer than 140 days in Ireland in each tax year will be

nonresident. Conversely, an individual only needs to spend 140 days or more in Ireland on a continuous basis in each tax year in order to remain Irish tax resident.

An individual is deemed to be present in Ireland for a day if present in Ireland at any time during that day (regardless of the purpose of the stay).

Decision Tree for Determining Residence Status[1]



DOMICILE

The domicile of an individual is relevant for determining the level of Irish tax due.

The Irish definition of "domicile" is the same as that used in the U.K. In short, domicile is the country which is considered to be a person's permanent home and is distinct from legal nationality and from residence. At birth, a person acquires a domicile of origin, normally the domicile of the father. No person can be without a domicile and it is not possible to have more than one domicile at the same time.

A domicile of choice can be acquired by making a permanent home away from the individual's domicile of origin and by severing all ties with the original country so that it is clear that the individual has abandoned the idea of ever returning to live in their country of birth. There has to be clear evidence that the individual has a positive intention to permanently reside in another country.

For a foreign national moving to Ireland who wishes to maximize their Irish tax situation, the key is to retain foreign domicile status. This allows the individual to access the benefits of remittance basis of taxation.

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[1] This example is based on the 2015 tax year.

Evidencing a Foreign Domicile – Practical Points to Note

A detailed discussion on the meaning of domicile is outside the scope of this article, but some practical points are set out below.

In order to become Irish domiciled, a Non-Dom individual would need to take up permanent residence in Ireland with the intention of remaining there indefinitely and not returning to the country where previously domiciled before moving to Ireland.

It would be extremely difficult for any revenue authority to argue in the first few years of residence that a Non-Dom individual has become Irish domiciled. This is because any person moving to a new country will naturally take a number of years to ascertain whether or not this is the place where the individual wishes to live for the rest of his or her lifetime.

"Once a Non-Dom individual has been living in Ireland for a number of years (say 20 or 30 years) it will be necessary to take some steps to demonstrate the retention of foreign domicile and the absence of an Irish domicile of choice."

However, once a Non-Dom individual has been living in Ireland for a number of years (say 20 or 30 years) it will be necessary to take some steps to demonstrate the retention of foreign domicile and the absence of an Irish domicile of choice. Some of the suggested actions a Non-Dom individual should consider taking include one or more of the following:

- Maintaining a burial plot in the country of foreign domicile
- Having a last will and testament prepared in the country of foreign domicile
- Maintaining ties with the country of foreign domicile, such as frequent visits to family and friends or membership in business organizations or clubs in the country of foreign domicile
- Having economic ties with the country of foreign domicile, such as investment interests, business dealings, and similar items

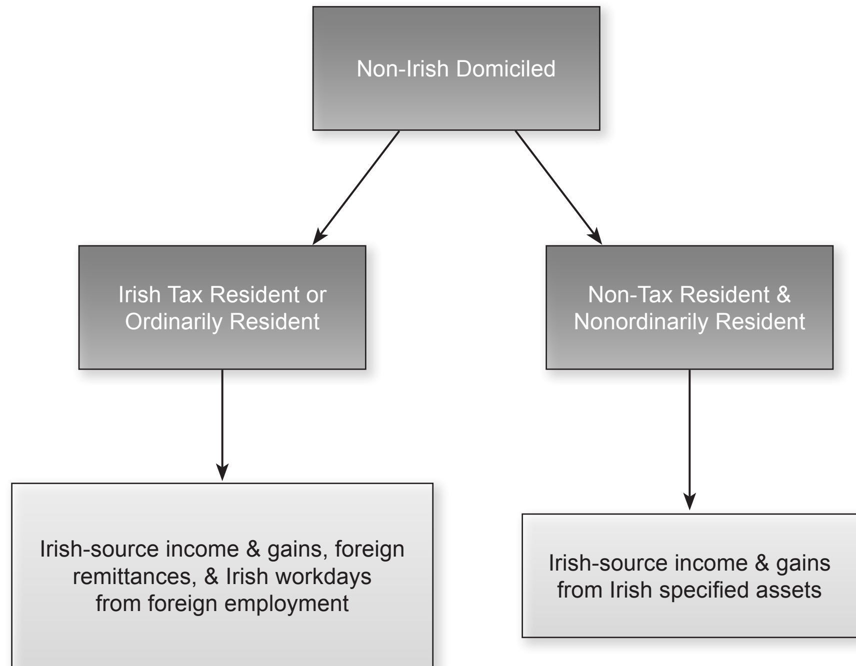
Based on a 2011 U.K. case, *Perdoni v. Curati* (2011 EWHC 344), the above conditions may not in themselves be sufficient to demonstrate domicile. There must be an intention to return to the country of foreign domicile on the happening of a "clearly foreseen and reasonably anticipated contingency." In other words, this means that although a Non-Dom individual may be living in Ireland at the moment, the individual must be able to identify a point in time when a return to the country of origin is anticipated. Examples include

- the event of a spouse's death (particularly where the individual is significantly younger or in better health than the spouse),
- retirement,
- graduation of children/grandchildren from the Irish school system, or
- a change of regime in the individual's home country.

It is good practice for Non-Dom individuals to review the domicile position with a tax adviser every few years and have the adviser note the review findings on the individual's file. As the question of domicile is based on subjective intent of the individual at any point in time, this exercise will result in a third party's documented report that identifies and evaluates the individual's specific intentions. This would be useful in the event that Revenue were to ever challenge domicile.

The mechanics of claiming a foreign domicile are simply to tick the "non-domiciled" box on the tax return and to file the return on that basis. There is no automatic process of agreeing upon an individual's domicile position with the Revenue, unless an individual wishes to do this for personal reasons or in the unlikely event of a Revenue audit.

The Charge to Irish Tax for a Non-Dom Individual



An individual becomes ordinarily resident after being resident in Ireland for three consecutive tax years, and does not lose this status until a period of non-residence exists for at least three consecutive tax years.

As can be seen from the above diagrams, an individual who is resident in Ireland but not Irish domiciled is liable to Irish income tax on all income arising in Ireland. However, Irish income tax on foreign income is limited to the extent that such income is remitted into Ireland. Again, this is known as the *remittance basis of taxation*.

REMITTANCE BASIS OF TAXATION [§71 TCA 1997]

An individual who is Irish resident but Non-Dom is taxed in Ireland on Irish-source income or gains and on the proceeds of any income remitted to Ireland. The remittance basis of taxation in Ireland means individuals are taxable on foreign income only when that income is brought into Ireland. All Irish income or gains remain subject to full Irish taxation.

Application of Rules to Proceeds of Income and Gain

Once an individual qualifies for the remittance basis, tax is assessed on foreign-source income on the full amount of **actual sums received** in Ireland from the following items:

“If a Non-Dom individual has funds built up out of non-employment income prior to the tax year of arrival in Ireland, these are treated as capital.”

- **Money brought into Ireland** – for example, foreign employment income that is deposited in an Irish bank account
- **Property imported into Ireland** – for example, a painting that is purchased from foreign earnings and brought into Ireland
  - There is a technical difference between the treatment of income and capital gains. For the proceeds of income to be remitted, the painting would have to be sold in Ireland. In comparison, for the proceeds of capital gains to be remitted, it would be sufficient to bring the painting to Ireland.
- **Money or value arising from property not imported** – for example, a painting that is purchased with the proceeds of foreign income and then disposed of abroad with a following remittance of the proceeds to Ireland
- **Money/value received on credit** – for example, a foreign credit card that is used in Ireland
  - The use of a foreign credit card to obtain cash from an A.T.M. is a remittance. Furthermore, the use of a foreign credit card to purchase goods in Ireland also gives rise to a remittance.

Taxation Triggers

In determining whether sums received in Ireland are taxable remittances of income or gain, three factors must be present:

1. There must be income or gain.
2. The income or gains must arise from a foreign security or possession.
3. The proceeds of the income or gain must have been sent from that foreign source to Ireland.

Effect of a Change of Domicile

Over time it is possible that a Non-Dom individual may acquire an Irish domicile while accumulating foreign income abroad. Subsequent remittances of this accumulated foreign income are not taxable once an Irish domicile has been acquired. This contrasts with the position for foreign gains, which still cannot be remitted without a tax charge after a change of domicile. However, deciding if and when an individual has acquired a domicile of choice can be a difficult matter. The facts of each particular case need to be reviewed on their own merit.

Practical Points

The legislation and case law governing the remittance basis is complex and extensive. Remittances must be planned carefully. If not, a remittance may result in an additional tax liability.

The following points should be noted:

- Only remittances out of income are liable to income tax. Remittances out of capital are not liable to income tax. If a Non-Dom individual has funds built up out of non-employment income prior to the tax year of arrival in Ireland, these are treated as capital.

- Any income earned from a foreign employment up to the date of arrival in Ireland is not taxable if remitted to Ireland. Relief known as split-year residence may be applicable.

- Where there are remittances from a "mixed fund" (*i.e.*, capital and income), the income is considered to be remitted first in the Revenue's view. When all income has been fully remitted, the Revenue will accept that subsequent remittances are capital. To ensure that money remitted to Ireland is not considered income, separate bank accounts should be maintained for income and for capital.

- With a view to avoiding this problem of having mixed funds, an individual who has capital accumulated at the time of arrival in Ireland should keep that capital separate from any foreign sources of income earned while the individual is resident in Ireland. For bank accounts or cash, this can usually be achieved in a relatively straightforward way by keeping two separate accounts in a foreign bank. This makes it possible for an individual to choose the account from which funds are remitted.

- Foreign-source income does not lose its character as income simply because it is invested in a capital asset. For example, a liability to income tax might arise where a valuable car/racehorse/yacht is purchased abroad using foreign income and imported into Ireland. When the asset is sold in Ireland, the proceeds of sale are treated as a remittance of income. The same adverse result is achieved when the asset is sold outside of Ireland and the proceeds of the sale are remitted to Ireland. This is a deemed remittance of income.

- It is not only remittances of money that are subject to tax. The importation of property and loans borrowed abroad can also be regarded as remittances of gains, as discussed below.

- Use of a foreign credit card or debit card to pay for items in Ireland may constitute a remittance.

- Where an individual has an Irish tax liability that is settled out of the proceeds of untaxed foreign earnings maintained abroad, the settlement is considered to be a taxable remittance.

- A Non-Dom individual that has paid foreign tax on a source of income should consider remitting the proceeds of the taxed income first. This allows the individual to claim a foreign tax credit in Ireland. This suggests that highly taxed foreign income should be maintained in a separate foreign bank account from low taxed or no taxed income.

- Where Non-Dom individuals report income on the remittance basis of taxation and repay loans of any sort, the loan repayment will be considered a remittance and §72 TCA 1997 must be considered in detail, as discussed below.

- Income from offshore fund investments benefit from the remittance basis of taxation. On the other hand, gains derived from investments in offshore funds do not benefit from the remittance basis of taxation. They are taxed even if the money is not brought into Ireland. Applicable tax law specifically states that gains derived from offshore funds are taxed under Schedule D

Case IV, and the remittance basis is available only for items taxable under Schedule D Case III, which covers almost all other sources of foreign income. Many European investment funds are treated as "offshore funds" for Irish tax purposes. Therefore, it is important for a foreign-domiciled individual to have an Irish tax adviser review his or her investment portfolio to ensure it only contains investments that benefit from the remittance basis of taxation.

ANTI-AVOIDANCE MEASURES AND POSSIBLE TRAPS [§72 TCA 1997]

Section 72 TCA 1997 is a complex piece of anti-avoidance legislation. The section is aimed at preventing Non-Dom individuals from obtaining loans or overdrafts to meet current expenditures, while at the same time using unremitted foreign earnings to repay loans abroad. In simple terms, the repayment of a foreign loan by a Non-Dom individual out of the proceeds of foreign income may be considered a remittance to Ireland.

Types of transactions that may give rise to a remittance under §72 TCA 1997 include

- foreign income used or provided by a Non-Dom person to repay any loan in Ireland or any interest on such loan, such as an Irish loan repaid by French rental income;
- any loan that was granted outside of Ireland to a Non-Dom person and received in or brought into Ireland, such as a French loan granted to a Non-Dom individual, which is repaid out of French rental income and in turn the proceeds of another loan are remitted to Ireland;
- any debt incurred in satisfying in whole or in part any of the above loans; and
- any foreign loan repaid out of foreign income before the proceeds of the loan are brought into Ireland, such as a French car loan repaid out of French rental income where the car is subsequently sold in France and the proceeds are remitted to Ireland.

GIFT AND INHERITANCE TAX

A foreign domiciled individual who moves to Ireland will come within the Irish gift and inheritance tax net after completion of five consecutive years of residence. The tax exposure begins in the sixth year.

Up to that point, only gifts or inheritances of Irish assets gifted or received by that individual will be liable to Irish gift or inheritance tax, provided that the person who makes the gift or receives the gift is not within the Irish gift or inheritance tax net.

After five consecutive years of tax residence, however, the foreign-domiciled individual will be within the scope of Irish gift and inheritance taxes. This means that

- all gifts or inheritances received are liable to Irish gift or inheritance tax, and
- all lifetime gifts or bequests under a will cause the recipient to be liable to Irish gift or inheritance tax.

The current rate of gift and inheritance taxes is 33% of the value of the assets. Several exemptions exist, notably those for

- spouses, which is a complete inter-spousal exemption not dependent on the domicile of either spouse;
- the first €280,000 per child, which tends to be increased periodically;
- gifts or inheritances of a parcel of real property that is the recipient's main home;
- gifts or inheritances of business property, which qualify for a 90% relief; and
- gifts or inheritances of agricultural land, which qualify for a 90% relief.

"Ideally, a Non-Dom individual should take Irish tax advice before becoming resident in Ireland."

The tax reliefs for gifts or inheritances of a main home, business property, and agricultural property come with certain conditions or restrictions which are outside the scope of this article.

A foreign-domiciled individual can minimize the amount of the estate that comes within the scope of Irish gift/inheritance tax by

- making significant gifts before the beginning of the sixth year, or
- terminating Irish residence.

The threshold period for imposition of gift or inheritance tax is five consecutive years of Irish residence. If a Non-Dom individual limits presence in Ireland during a two-year period, the 280-day test of residence that covers presence over two consecutive years would not be met. Residence would be terminated and a new five-year period would begin.

PLANNING BEFORE MOVING TO IRELAND

Ideally, a Non-Dom individual should take Irish tax advice before becoming resident in Ireland. An individual becomes resident in Ireland on January 1 of a tax year (depending on how many days are spent in Ireland during that year). Consequently, an individual could move to Ireland in April 2016, and spend the rest of the year in Ireland. The individual would be resident in Ireland from January 1, 2016. In that case, the Non-Dom individual must take advice well before the first day of the calendar year in which the move to Ireland occurs. Conversely, if an individual were to move to Ireland on August 1, 2016 (not having spent any previous time in Ireland during the year), he or she would not be Irish resident for 2016. The key date for this person will be January 1, 2017.

The planning that a foreign-domiciled individual should consider prior to taking up Irish tax residence includes several steps:

- Identifying capital accumulated prior to becoming Irish tax resident and placing this capital into a separate, designated bank account or investment account
- Setting up the bank account/investment account containing capital in such a way that any income paid on the capital is credited to a separate account so that remittances can be made to Ireland from the capital account, free of tax

- Setting up separate bank accounts for highly taxed and low taxed income in order to maximize foreign tax credit relief in Ireland upon remittance
- Reviewing an investment portfolio to eliminate any investments that do not qualify for the remittance basis of taxation, such as non-euro currency accounts and certain, primarily European, fund investments
- Reviewing an investment portfolio for purposes of stepping up the base investments in appreciated investments
    - For example, if an investment has been held for 10 years and has a basis of €1,000 but a value of €100,000, it should be sold prior to the establishment of residence in Ireland in order to avoid taxable remittances of the gain. The same investment could be repurchased, increasing the basis to €100,000 prior to the time residence is established. Of course, home country tax rules must be considered before implementing this strategy in order to avoid surprises.
- Assessing future needs for spending in Ireland and future income sources, in order to ascertain the most tax efficient ways of funding spending in Ireland
    - Generally, the best way to fund spending in Ireland is through a mixture of remitting accumulated capital prior to becoming Irish resident (which is not taxable), and foreign income (which is taxable if remitted to Ireland, but at lower levels may be covered by personal allowances or taxed at low rates). It is generally preferable to bring in a small amount of income and a small amount of capital each year in order to preserve the individual's capital, rather than living purely from capital in the first number of years and then finding that large amounts of income must be remitted in later years once capital has been exhausted.
- Gifting assets to children or other family members prior to becoming Irish tax resident or within the first five years of Irish tax residence
- Taking advantage of differences in residence status between spouses, such as where one spouse may be Irish resident while the other is nonresident
    - This could occur, for example, if significant business travel by one spouse delays the start of Irish residence. If there are differences in residence/domicile position between spouses, perhaps assets should be transferred from one spouse to the other in order to maximize the tax position.

CONCLUSION

In conclusion, Ireland offers the opportunity for foreign-domiciled individuals to assume tax residence in a country where little or no income tax is imposed. Ireland has a number of benefits for foreign-domiciled individuals which include

- remittance basis for non-Irish source income;
- remittance basis for non-Irish source gains;
- gift and inheritance planning possibilities for Non-Dom individuals;

- a common law system, so there is no difficulty in recognizing existing trust structures;
- access to all E.U. Tax Directives by virtue of being an E.U. member state;
- an extensive double tax treaty network;
- clear rules on how to become and cease to be tax resident;
- low rates of stamp duty on residential property purchase – 1% up to €1 million and 2% thereafter; and
- good international air links.

Ireland is currently named as the best country in the world by the Good Country Index and was rated by Forbes as the best place in the world to do business in 2013.