

## **Opening Statement by Mr. Niall Cody, Chairman of the Revenue Commissioners**

### **Introduction**

Thank you, Chairman, for giving me the opportunity to make this opening statement.

As the members of the Committee are aware, and are well used to, I am constrained for reasons of taxpayer confidentiality in discussing the tax affairs of any taxpayer. Section 851A of the Taxes Consolidation Act 1997 specifically provides for such confidentiality. Further constraints arise in this case due to the fact that it is the subject of ongoing legal proceedings in the European Courts and I am very conscious of legal limitations on what I can discuss in public as a result of those legal proceedings.

Your letter of invitation indicated that the Committee wishes to engage specifically on the Commission's Decision in this case and wishes to explore the factors underpinning it, in the context of State aid Rules.

Having received legal advices on the matter, it is my understanding that there are significant limitations on discussion of pending legal proceedings in any public forum. Specifically, I am advised that I should not discuss—

- the substance of the legal case,
- the State aid analysis in the Commission Decision, or
- the legal grounds relied upon by the State in support of its annulment application.

Having said that, I want to be as helpful to the Committee as possible and I understand that the EU State aid investigation raises broader international tax issues including in relation to tax administration.

### **Revenue's Position**

When the Apple decision was announced last August, and prior to the Government's decision to appeal the decision, I issued a statement responding to the decision and I think it is important that I recap on the content of that statement again now.

*'Revenue cooperated fully with the Commission's investigation.*

*We provided all relevant information and explanations to the Commission to demonstrate that Revenue collected the full amount of tax due from Apple in accordance with Irish tax law.*

*Apple has confirmed on the public record that the relevant companies were not tax-resident in Ireland and under Irish tax law, non-resident companies are chargeable to Irish corporation tax only on the profits attributable to their Irish branches. The profits of non-resident companies that are not generated by their Irish branches – such as profits from technology, design and marketing that are generated outside Ireland – cannot be charged with Irish tax under Irish tax law.*

*The issue of international tax planning, involving mismatches between different countries' tax rules, is well known and is the subject of the OECD BEPS Project. Those mismatches go to the heart of what the case is about.*

*And while I cannot otherwise comment on the specific facts of this case, I can confirm that -*

- *there was no departure from the applicable Irish tax law by Revenue;*
- *there was no preference shown in applying that law; and*
- *the full tax due was paid in accordance with the law.'*

### **Government Decision to Appeal**

As you know, the Government decided to appeal the European Commission's Decision and an annulment submission has since been lodged with the General Court of the European Union.

While I am not free to discuss the detail of Ireland's appeal of the Decision, the main lines of argument in Ireland's annulment application have been published by the Department of Finance and I would like to take this opportunity to read the key elements of those arguments:

*"The Commission Decision of 30 August 2016 (the Decision) wrongly asserts that two Opinions given in 1991 and 2007 by the Irish Revenue Commissioners "renounced" tax revenue that Ireland would have otherwise been entitled to collect from the Irish branches of Apple Sales International (ASI) and Apple Operations Europe (AOE). The Opinions involved no departure from Irish law. The ordinary tax rules applicable to branches in Ireland of non-resident companies are in Section 25 of the Taxes Consolidation Act 1997. The Opinions simply applied Section 25, which in accordance with the territoriality principle, taxes only the profits attributable to the branch, not the non-Irish profits of the company.*

*The Decision also mischaracterises the activities and responsibilities of the Irish branches of ASI and AOE. These branches carried out routine functions, but all important decisions within ASI and AOE were made in the USA, and the profits deriving from these decisions were not properly attributable to the Irish branches of ASI and AOE.*

*The Commission's attribution of Apple's intellectual property licences to the Irish branches of AOE and ASI is not consistent with Irish law and, moreover, is inconsistent with the principles it claims to apply, as is its stated refusal to take into account the activities of Apple Inc."*

As you know, Ireland submitted its annulment application to the General Court of the European Union in November 2016. In terms of the next steps in the legal process, my understanding is that the European Commission now has until mid-March to make a submission to the Court in response to Ireland's annulment application. Ireland will then have a further opportunity to respond to the Commission's submission— and following Ireland's response the Commission will make a final submission. Other interested parties also have the opportunity to apply to the Court to make submissions. The case will then be considered and adjudicated by the General Court, with a further right of appeal to the Court of Justice of the European Union available to both parties. The process is therefore likely to take a number of years.

### **Broader tax issues raised by the decision**

Turning now to the broader issues raised by the Commission's Decision, I think the European Commission's State aid investigations into the taxation of multinational companies reflects a broader international policy focus on the ability of companies operating cross-border to exploit gaps between the tax laws of different jurisdictions to reduce the amount of tax that they pay.

Part of the international tax policy focus in recent years has been on tax rulings (or tax opinions as they are called in Ireland) and their use by multinational companies to gain certainty in respect of their cross-border tax structures.

In particular:

- The Commission launched their investigations into ruling practices in all EU Member States in 2013

- EU Member States agreed amendments to the Directive on Administrative Cooperation in 2015 to provide for rulings with a cross-border impact to be exchanged between all Member States from 1 January 2017 onward. OECD BEPS Action 5 contained a similar initiative which already came into effect on 1 April last year.
- OECD **BEPS Action 5** also introduced **best-practice guidelines** for the issuing of rulings and the EU recently finalised its best practice guidelines on 6 December this year.

I would like to set out the position in relation to the Revenue practice on issuing opinions.

In providing opinions, Revenue's role is to set out our view of the correct interpretation and application of the law so that taxpayers can understand and comply with their obligations. Unlike the situation in some other countries, Revenue does not issue legally binding tax rulings. Revenue opinions cannot and do not depart from the tax law that applies in any case.

Revenue has published detailed guidelines on the provision of opinions or confirmations in respect of tax matters. Guidelines on opinions/confirmations relating to cases dealt with by Revenue's Large Cases Division (LCD) were previously contained in a Tax Briefing published in 2002. These guidelines were subsequently updated in 2014 and again more recently in 2016. There are separate guidelines which cover requests for opinions submitted for non-LCD cases through the Revenue Technical Service.

These guidelines set out in detail the procedures to be followed by taxpayers in requesting an opinion from Revenue. Opinions are only issued where the matter is complex or where there is genuine uncertainty regarding the applicable tax rules. Liability to tax should not be left uncertain. So Revenue will provide an opinion on how the law should be applied to complex situations. Almost all tax administrations around the world do this and any taxpayer can request an opinion from Revenue.

Revenue opinions are specific to the particular case and the law provides for confidentiality of taxpayer information. For that reason, Revenue opinions are not individually published.

As I have already mentioned, the use of tax opinions by multinational companies is an issue that has been discussed at international level, both OECD and the EU, in recent years. The outcome is that last year, both the OECD & EU designed exchange of information mechanisms so that that all rulings that have a cross-border dimension will be automatically exchanged with other countries from now on. Revenue is participating fully in these initiatives and has recently implemented both the OECD initiative and the EU Directive and has published a detailed manual setting out the new procedures.

The sharing of such information between tax administrations should help reduce the opportunities for multinational companies to exploit gaps between different countries' rules in the future.

In light of these international developments, we have been reviewing our practice for the issuing of opinions and we have recently updated our practices in a number of respects. At the time of the Government Decision to appeal the Apple Decision, we committed to reducing the maximum period for which opinions can apply from 7 years to 5 years in line with best practice and, going forward, we will publish the number of opinions provided each year in our Annual Report.

## **International Tax Developments**

### **BEPS**

More generally, in relation to international tax developments, I know that Members of the Committee are familiar with the OECD's Base Erosion and Profit-Shifting initiative which has specifically targeted aggressive tax-planning by multinational companies, recognising that it is a global problem that requires countries to work together to address it.

Ireland has responded quickly to a number of the BEPS recommendations which were made in October 2015, notably as an early mover in introducing Country by Country Reporting.

The EU Anti-Tax Avoidance Directive which was agreed in 2016 was a significant milestone in terms of implementation of a number of other BEPS recommendations and Ireland will be implementing the Directive in legislation in accordance with the agreed timelines set out in the Directive.

Ireland is also fully engaged in the work to create what is referred to as the multilateral instrument or MLI. This will be used to implement the tax treaty-related changes resulting from BEPS to tax treaties globally. Countries, including Ireland, are now finalising their analyses of the various provisions in their existing treaties to prepare for the MLI. Revenue is playing an active part in this work given its role in the negotiation of Double Taxation Agreements. The MLI is a key part of the OECD's effort towards the quick and consistent implementation of anti-BEPS measures into existing tax treaties.

### **Exchange of Information**

Revenue has invested significant resources in international tax in recent years. We play a full role in both OECD and EU taxation discussions and a number of the policy developments relate specifically to exchange of tax information between tax administrations. Tax administrations are working more

closely than ever before and we are learning from each other in order to combat both tax evasion and tax avoidance more effectively.

The Panama Papers were a reminder that offshore evasion has not gone away. This is something that Revenue is well aware of as we continue to finalise legacy cases arising from older investigations into tax evasion using offshore accounts and other financial products. These have yielded some €2.8 billion in additional tax, interest and penalties to date. While offshore evasion is clearly not a new issue, the international environment has, however, changed significantly.

Closer co-operation and information sharing between tax authorities worldwide is helping to identify those who hide their profits or gains offshore. Initiatives such as FATCA and the consequent *Inter-Governmental Agreement* to share financial account information with the United States, the OECD *Common Reporting Standard*, and the EU *Directives on Administrative Co-operation*, are ensuring that tax administrations have greater visibility of the offshore assets and income of their residents.

In order to ensure that Revenue can maximise the impact of information shared under these agreements, significant changes were made in the 2016 Finance Act in relation to the disclosure regime for Revenue audit, to ensure that tax defaulters whose default includes offshore matters will be unable to avail of the benefits of the current disclosure regime. There is however still an opportunity, if they do come forward to regularise their affairs with Revenue before 1 May 2017. We issued a press release in January, and have set out full details regarding this change on our website. We have a dedicated team within our Investigation and Prosecutions Division assigned to assist any taxpayer who wishes to make a disclosure before the deadline. We are also planning our communications strategy to ensure that taxpayers will be aware of the change well in advance of the May 1 deadline.

## **Conclusion**

In conclusion, in relation to the specific subject of the State aid investigation, I would reiterate that Revenue can only operate within the law, Revenue opinions do no more than provide clarity on the application of the law and there was no departure from the applicable Irish tax law by Revenue in this case.

In accordance with the law, Revenue attributes profits to branches of non-resident companies by reference to the individual facts and circumstances of the branch. We consider the economic reality and activity of the branch to determine the profits generated by the branch: What is it that *the branch* does? Revenue can only tax on the basis of the economic reality of what is being done in Ireland.

As I mentioned at the outset, I am very conscious of the legal limitations on what I can discuss due to the ongoing Court proceedings but I will make every effort to respond to questions that Members of the Committee may have, within that constraint.