

Intellectual property regime update

New relief for expenditure on intangible assets

Introduction

A new scheme has been introduced, with effect from 7 May 2009, to provide relief for expenditure by companies on “specified intangible assets”. The new provisions are clearly a further attempt to increase Ireland’s attractiveness as a knowledge-based economy. Coupled with the improved R&D regime, there is now a suite of tax reliefs that can enable groups to drive their effective tax rate below the headline 12.5% rate.

To claim the tax relief, it is noteworthy that companies must actively “trade” with their newly acquired intangible assets, thereby ensuring that there is an active involvement with the assets and, presumably, a resultant increase in learning/knowledge.

What type of intangible assets are covered?

The definition of specified intangible assets is quite broad, and includes patents, patent rights, design rights, trade marks, brand names, licences, copyright, computer software, know-how and goodwill associated with the foregoing. In the case of know-how, computer software and patent rights, the existing reliefs for these asset classes can continue to be claimed for a limited period by way of a separate election.

What is the relief?

The allowances available for tax purposes will generally follow the standard

accounting treatment applicable to the acquisition of intangible assets; however an election can be made to instead spread the expenditure over a 15 year period (7% in years 1 to 14 and 2% in year 15).

No balancing allowance/charge event will occur once the intangible assets are sold 10 years after acquisition, provided that the intangibles are not acquired by a connected company itself entitled to a deduction for the intangibles under this section.

Is there a cap on the allowances available?

There is a restriction on the amount of allowances available, together with a new restriction on interest incurred to acquire the intangibles used in the trade. The aggregate of the allowances and any related interest incurred on acquisition of the intangibles cannot exceed 80% of the trading income from the “intangibles” trade (which is treated as a separate trade). The objective here is to ensure that the acquisition of the intangibles results in a net increase in the taxable income of the company, as opposed to merely reducing taxable profits.

Where either allowances or interest is restricted, the excess can be carried forward and treated as incurred in the following period, with any excess in that period carried forward to the next period

and so on for each succeeding accounting period.

Can the intangibles be acquired from an existing group company?

Expenditure on specified intangible assets acquired from a group company will qualify for the new allowances. It is worth noting that intangible assets acquired from another Irish group company will only qualify for the new allowances if the companies jointly elect to disapply the capital gains tax group relief provisions, thereby triggering a potential CGT event for the transferor. However, if there are losses available in the group, it should be possible to mitigate the CGT exposure.

Anti-avoidance

The section provides that the acquisition of the intangible assets must be for an arm's length amount and must be done for bona fide commercial reasons. The acquisition of the intangibles must not have the avoidance of tax as its main purpose, or one of its main purposes.

Restriction on interest for investing companies

There is a new restriction introduced in respect of interest incurred on borrowings used by a company to invest (by way of loan or equity) in another company, which itself uses the funds to acquire specified intangible assets. The restriction is calculated by reference to the interest that would have been allowed if the company acquiring the intangible assets had itself taken out the loan.

Some initial observations on the proposed new rules

Given the existing 12.5% corporate tax rate, the new rules offer potential to drive the effective tax rate down to 2.5% (assuming maximum deduction for allowances and funding costs).

Both companies and individuals holding specified intangible assets should consider the tax merits of transferring the assets to an appropriate trading company in order to access the benefits of the new regime. Given the tax losses that have arisen in recent times, there may be little or no tax cost associated with such a transfer, while there will be ongoing tax deductions in the transferee company.

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