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Stamp Duty on Funds

Introduction

In Ireland, authorised investment funds are divided into two categories: undertakings for collective investment in transferable securities (UCITS) and alternative investment funds (AIFs). Funds have been authorised by the Central Bank of Ireland since the Central Bank Reform Act 2010. In recent times, fund structures have become popular methods of holding Irish immoveable property.

Although there is a stamp duty exemption for the transfer, issue, repurchase or redemption of units of a fund, there is no such exemption where the fund is involved in a transaction involving Irish immoveable property.

As with any form of transfer of Irish immoveable property, there will be a charge to Irish stamp duty unless the transfer is exempted or the charge relieved. It is important to understand the legal structure of the property-holding fund, in particular how to identify the acquiring entity within the fund structure, to determine correctly with which entity the liability to stamp duty lies.

This article looks at instances where stamp duty is relevant for a fund, together with the practical issues arising around the related filing and payment obligations. The article also uses a case study to represent a typical acquisition of Irish immoveable property in a fund structure to give a practical demonstration of the associated stamp duty charge and payment obligation and the issues relevant to moving the property within the structure.

Legal Structures of Fund Vehicles

Variable capital investment company

- This is a company set up under the Companies Act 2014, and as all UCITS funds and many AIFs are marketed to the public, most companies are set up as public limited companies.
- A public limited company has a separate legal personality; is run by a board of directors; and has the capacity to enter into contracts, to be sued and to sue. One benefit for funds set up as investment companies is that shareholders have limited liability.
- The investment company collectively invests its funds and property with the intention of diversifying and avoiding financial risk.
- Variable capital companies can also repurchase their own shares, but the issued share capital must remain equal to the net asset value of the assets at all times.

Irish collective asset-management vehicle (ICAV)

- The ICAV is a relatively new corporate vehicle that is used exclusively for Irish investment funds and provides scope for both UCITS funds and those using the AIF structure.
- The ICAV is a tailor-made corporate vehicle operating under its own simplified statute, the Irish Collective Asset-management Vehicles Act 2015, rather than the more cumbersome Companies Act 2014 (relevant for variable capital investment companies, outlined above).
- ICAVs are becoming the most popular structure for holding Irish immoveable property.

Unit trust

- The unit trust is a contractual fund structure set up between a trustee and a management company by way of a trust deed.
- As a unit trust is not a separate legal entity, the trustee acts as the legal owner of any assets held by the fund on behalf of the investors.
- A major drawback of the unit trust is that it cannot enter into contracts in its own right.
- Unit trusts also require a separate management company.

Investment limited partnership (ILP)

- An investment limited partnership is a partnership of two or more persons comprising at least one general partner and at least one limited partner.
- A partnership is not a separate legal entity and is transparent for tax purposes (i.e. assets, liabilities and income of the fund belong to the partners, and each partner is entitled to use any tax reliefs and allowances available to them).
- The principal business of an ILP, which is set out in its partnership agreement, is the investment of its funds in property or securities.
- The general partner would usually enter into contracts on behalf of the ILP.

Common contractual fund (CCF)

- A CCF is a contractual arrangement that allows investors to become co-owners of the assets belonging to the fund.
- The ownership interest of each investor is signified by “units”.
- The CCF is an unincorporated body and is therefore not a separate legal entity: it is transparent for Irish legal and tax purposes.

- Investors in a CCF are treated as if they directly own a proportionate share of the underlying investments of the CCF rather than shares or units in an entity that itself owns the underlying investments.

As investment limited partnerships and common contractual funds are tax-transparent vehicles, there is no tangible tax benefit to a non-resident from holding Irish property in this manner. These structures are therefore not generally used for the acquisition of Irish immoveable property.

Charge to Stamp Duty

Units of a fund

Under s88 of the Stamp Duties Consolidation Act 1999 (SDCA 1999), there is an exemption from stamp duty on the issue, redemption, transfer or repurchase of units of an investment undertaking. It should be noted that this exemption does not apply to a redemption of units where Irish-locus immoveable property is distributed *in specie* to the unit-holder (including to a non-resident), i.e. where an interest in Irish property is distributed in place of cash.

Section 88B SDCA 1999 provides on an exemption from stamp duty for any instrument made for the purposes of a scheme of reconstruction or amalgamation under which a foreign fund transfers its assets to a domestic fund, with the consideration comprising shares in the domestic fund being issued to the foreign fund. The Finance Act 2010 extended the exemption further to cover units in the domestic fund that are issued directly to the foreign fund.

Acquisition of Irish immoveable property

Section 2 SDCA 1999 sets out the charge to stamp duty:

> "(1) Any instrument which –
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> (a) is specified in Schedule 1, and
>
> (b) is executed in the State or, wherever executed, relates to ***any property situated in the State*** or any matter or thing done or to be done in the State,
>
> shall be chargeable with stamp duty [emphasis added]."

The current rates of stamp duty on residential property are 1% on the first €1m and 2% on any excess over €1m. The current rate of stamp duty applicable to non-residential property is a flat rate of 2%. Stamp duty is levied on the market value of the property at the time of the transfer and is payable by the "accountable person", which, in the case of the acquisition of immoveable property, is the acquirer/purchaser.

There is no exemption for funds from the charge to stamp duty on the acquisition of Irish immoveable property, even where the fund is non-resident or otherwise not subject to tax.

Payment and Filing Requirements[1]

An instrument chargeable to stamp duty must be stamped within 30 days of the execution of the instrument.[2] All stamp duty payments must be accompanied by an electronic return through the Revenue Online Service (ROS).[3]

Section 14 SDCA 1999 provides for the following penalties:

- 1–6 months late: 10% of duty payable;
- 6–12 months late: 20% of duty payable; and
- over 12 months late: 30% of duty payable.

Interest is charged at the rate of 0.0219% on a daily basis from the date of execution to the date of payment (inclusive). If you file the stamp duty return or pay the stamp duty late,

1 See http://www.revenue.ie/en/tax-professionals/tdm/stamp-duty/file-and-pay/3-tax-reference-numbers/tax-reference-numbers.pdf.

2 Section 2 SDCA 1999.

3 See http://www.revenue.ie/en/tax-professionals/tdm/stamp-duty/stamp-duty-manual/t-pre-self-assessment-stamp-duty-manual.pdf.

Revenue will not issue a stamp certificate until the penalty and interest charges are paid.[4]

Registration on ROS

The entity within the fund structure that will be the legal owner of the property will be the accountable person for stamp duty. This will depend on the legal structure the fund, and the usual property-holding structures are:

- variable capital investment company: as the public limited company is a separate legal entity, it will be the accountable person;
- ICAV: as the ICAV is a separate legal entity, it will be the accountable person;
- unit trust: as the unit trust is not a separate legal entity, the trustee acts as the legal owner and will therefore be the accountable person.

The accountable person should ensure that it is registered for stamp duty on ROS and has a ROS digital certificate specific to stamp duty. Accountable persons can register for ROS only if they have a business tax registration.[5]

If the accountable person does not have a ROS business digital certificate that is specific to stamp duty, the tax, cannot be paid through ROS. Instead, it can be paid by electronic funds transfer (EFT) or by sending a cheque or bank draft to the National Stamp Duty Office.[6] Alternatively, accountable persons can use their solicitor or agent to pay the stamp duty and file the return on their behalf.

Once the return is filed and the stamp duty liability is paid, a stamp certificate will be issued from ROS.

To file a stamp duty return, the following details are required:

- the tax reference numbers of the parties to the instrument;[7]
- the consideration;
- details of the property transfer – for example, the:
  - date of transfer;
  - parties involved;
  - folio numbers;
  - local property tax property ID number; and
  - details of any entitlement to relief or exemption.

Tax reference numbers

Irish-incorporated fund not within the charge to Irish tax

This will arise where the accountable person is not liable to Irish tax and therefore is not registered for any other tax. In this circumstance, the accountable entity should contact the National Stamp Duty Office to obtain a tax reference number, enclosing the company's certificate of incorporation and a copy of the company's constitution.

Irish-incorporated fund within the charge to Irish tax

Where the accountable person is liable to Irish tax (e.g. Irish corporation tax), the entity should use that tax reference number to file its stamp duty return. Tax reference numbers can be found on documents or letters confirming registration or previous notices of assessment issued by Revenue.

4 See http://www.revenue.ie/en/online-services/support/documents/help-guides/stamp-duty/completing-a-return-online.pdf.

5 Income tax (but not PAYE), corporation tax, capital gains tax, value-added tax and PREM (employers' tax registration).

6 National Stamp Duty Office, Cross Block, Upper Castle Yard, Dublin Castle, Dublin 2; tel. 1890 482 582; email Stampdutytaxnumbers@revenue.ie.

7 It is a legal requirement that the tax reference numbers of all of the parties to the instrument be included in stamp duty returns. It is not possible to file a return without having these tax reference numbers.

Irish tax-resident accountable persons that should be registered for tax but are not yet registered should register for the relevant tax (e.g. corporation tax, value-added tax) and, after registration, enter that tax reference number on their stamp duty return.

Non-resident fund within the charge to Irish tax

Non-resident accountable persons that are registered for tax in Ireland should use that tax reference number to file their stamp duty return.

Non-resident accountable persons that should be registered for tax but are not should register by completing Form TR2 and returning it to the appropriate Registration Unit in Revenue.[8] Once registered, that tax reference number can be entered on the online return.

As the issuance of tax reference numbers can take up to four weeks, it is advised that applications be made well before the execution of the stampable instrument. There is no provision for an extension of the filing deadline, either in statute or by concession, regardless of extenuating circumstances, including a delay in the issuance of a tax reference number. The interest-and-penalties clock runs regardless, and these can be high where the stamp duty liability is large.

Non-resident fund not within the charge to Irish tax

If the accountable person is not registered for tax in Ireland, the National Stamp Duty Office should be contacted to obtain a tax reference number.

If the non-resident fund is not trading in Ireland or has no Irish tax liability other than stamp duty, it may request that an agent apply on its behalf for a tax reference number to file the return. A form is available for download, which must be completed and emailed or posted to the National Stamp Duty Office, with the required supporting documentation.[9]

At a minimum and where the requisite form is not used, applications for a tax reference number for a stamp duty return must include:

- confirmation from the foreign body corporate that it is not already trading in Ireland; that it has no taxable source of income (for example, rental income from property in Ireland); that, at the time that the application for a number is made, it is not registered for tax; and that it needs a number only for the purpose of filing a stamp duty return;
- the foreign body corporate's name, the address of its registered office and its date of incorporation;
- the name, email address and phone number of the responsible party; the responsible party is a director, company secretary or agent and is the person to whom correspondence should be addressed if contact needs to be made;
- documentary evidence of the foreign body corporate's name, address and date of incorporation, for example, a copy of the company's certificate of incorporation, articles of association or other documentary evidence;
- if the documentary evidence is in a language other than English or Irish, a certified translation (by a registered translator) of that portion of the document that contains the foreign body corporate's name, address and date of incorporation; and
- where the application is being made on behalf of the foreign body corporate, confirmation by the foreign body corporate that the person is authorised to make the application.

A tax reference number for filing a stamp duty return is usually issued within five to ten working days.

8 The addresses of the various Registration Units are given at the end of the form.

9 See http://www.revenue.ie/en/tax-professionals/tdm/stamp-duty/file-and-pay/3-tax-reference-numbers/tax-reference-numbers.pdf, appendix, p. 15.

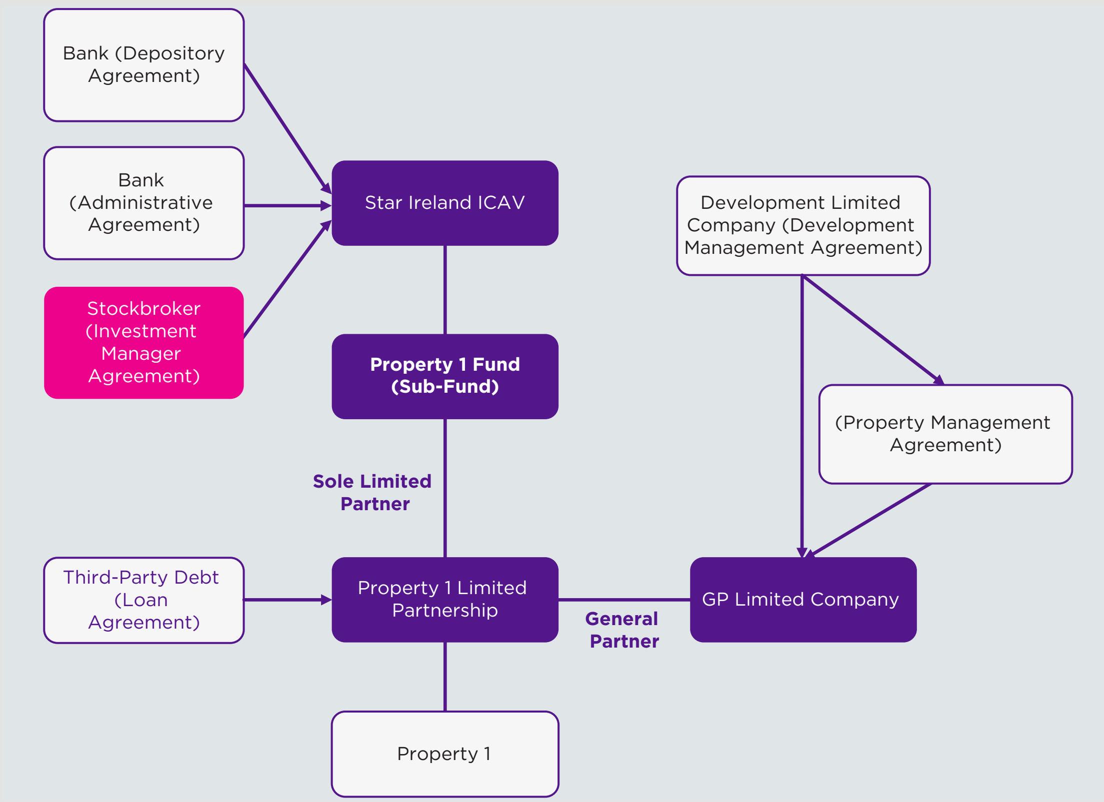
Case Study

Structure

The Star Ireland ICAV ("the ICAV"), through one of its sub-funds, the Property 1 Fund, and using a limited partnership, the Property 1 Limited Partnership, is investing in a property referred to as Property 1. The GP Limited Company "GPCL" is acting as the general partner to the partnership, and the ICAV (sub-fund) is the sole limited partner. Where any additional property is acquired, the ICAV will act as the sole limited partner, with a separate limited company used as the general partner.

GPCL has entered into a property management agreement with the Development Limited Company (DLC). There is a development management agreement between GPCL and the DLC. Meanwhile, the ICAV has both a depository and an administrator agreement with the bank. Furthermore, the ICAV also has an investment manager agreement with the stockbroker.

Fig. 1: Typical acquisition of Irish immoveable property in a fund structure



Stamp duty on acquisition of property

In this instance, each individual property acquisition is held through a separate limited partnership[10] within the same sub-fund rather than there being a separate sub-fund for each property. This structure achieves the segregation of liabilities without the expense of running two or more separate sub-funds. In this structure the ICAV is the limited partner in each limited partnership, with a new limited company acting as the general partner in each limited partnership.

As the general partner is the contracting party in a limited partnership, it is the general partner that will purchase any immoveable property and be registered as the legal owner of the property. Therefore, the general partner is the accountable person for stamp duty purposes and must pay the stamp duty and file the return.

Where the general partner is receiving income, it must also pay corporation tax, and therefore it will pay stamp duty using its corporation tax registration number. Where the general partner is not registered for tax, the National Stamp Duty Office should be contacted to obtain a tax reference number, enclosing the company's certificate of incorporation and a copy of the company's constitution. The National Stamp Duty Office usually provides the requisite number within five to ten working days.[11]

Stamp duty on transfer of property

Any transfer of the property itself from one limited partnership to another will constitute a transfer of immoveable property for stamp duty purposes and, according to first principles, will be chargeable to stamp duty under s2 SDCA 1999.

Any transfer of a partnership interest rather than the property may be caught under s31(1)(a) SDCA 1999 as a transfer of an equitable interest in land and within the charge to Irish stamp duty.

As there is an exemption for the issue, redemption, transfer or repurchase of units of an investment undertaking under s88 SDCA 1999, it is advisable that any change be achieved by way of a redemption and subscription of the units in the sub-fund (i.e. the relevant share class of the ICAV) rather than a movement of the property itself.

Stamp duty on transfer of property between sub-funds of an ICAV

There may also be structures where no limited partnership is involved; rather, the ICAV is the umbrella, with sub-funds directly underneath the ICAV, each sub-fund identifiable using different share classes. Assets are purchased by the ICAV acting solely in respect of sub-fund "A", with the legal title registered in the name of the ICAV. The assets owned by the ICAV acting solely in respect of sub-fund "A" are then held on a segregated basis from the assets attributable to any other sub-fund of the ICAV. Moving an asset to another sub-fund in circumstances where the parties holding shares in each sub-fund are not identical may result in a change in beneficial ownership or a transfer of an equitable interest. Where there is a change in beneficial ownership, a charge to stamp duty would arise under s31 SDCA 1999 on any instrument seeking to document the transfer, albeit that there is no actual movement of the legal title (which would continue to be registered in the ICAV's name).

Similarly a view may be taken that it is the ICAV that holds the legal and beneficial interest in the property with the sub-fund holders' entitlement restricted to the profits or losses generated by reference to that particular property rather than an interest in the underlying property itself. In circumstances where this view is the more correct view, then there should be no charge to stamp duty as there is no movement of an interest (legal or beneficial) in property. As there is no published precedent or guidance in this regard either view is arguable and the

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10 Within the meaning of the Limited Partnerships Act 1907.

11 It is recommended that the number be sought before the stampable instrument is executed to ensure that there is sufficient time to file the stamp duty return and pay the stamp duty.

author understands that practitioners have adopted both views.

As there is an exemption for the issue, redemption, transfer or repurchase of units of an investment undertaking under s88 SDCA 1999, it is advisable that any change be achieved by way of a redemption and subscription of the units in the sub-fund (i.e. the relevant share class of the ICAV) rather than a movement of the property itself between sub-funds.

Section 79 SDCA 1999 operates to exempt transfers between associated bodies corporate. The term "body corporate" is not defined by legislation but would appear to include both limited and unlimited companies under the Companies Act 2014 and bodies such as building societies and industrial and provident societies. Arguably, it extends to an ICAV, but it is not clear, by the author, that it could be extended to include sub-funds of the ICAV. A sub-fund is segregated only for the purposes of participating in the benefit of a particular class of asset rather than forming a separate legal identity in its own right, and therefore it is difficult to see how one would claim relief on the transfer from one body corporate to another where there is only one body corporate.

Similarly, the test of association under s79 SDCA 1999 uses share capital as its measure, and where a body corporate does not have a share capital or a structure comparable to share capital, it is difficult to see how the relief could apply. It is the view of the author that, for this reason, it would be difficult to apply the relief to transfers between limited partnerships.

Conclusion

There is no debate on the fact that the acquisition of Irish immoveable property by a fund is liable to Irish stamp duty, including the acquisition of property by one fund from another fund.

It is the transfer of property, and the documentation/instrument transferring an interest in property, within a fund structure that raises issues. If a property is moved within a fund, it will usually be for the purposes of different parties taking an interest in the property. As noted above, this may amount to a change in the beneficial interest, and it is difficult to see how an argument could be made that there should be no charge to stamp duty on any such transfer.

As has been suggested in this article, consideration should be given to keeping the property itself stationary and achieving the desired result using subscriptions and redemptions of units, which should be exempt from stamp duty under s88 SDCA 1999.

In determining who is liable to pay stamp duty and file the return, it is important to ascertain the legal form of the fund and then identify the accountable person within that particular structure. It is advisable that this exercise be performed as early as possible in the process, to allow adequate time to apply for a tax registration number using the appropriate registration process[12] and thereby ensure the ability to file and pay within the 30-day stamp duty window before interest and penalties are applied.

Read more on taxfind From Irish Tax Institute *Law of CAT, Stamp Duty and LPT, Finance Act 2016; The Law and Practice of Irish Stamp Duty, 2013*

12 Standard tax registration: up to four-week turn-around; or National Stamp Duty Office: five- to ten-day turn-around.