

## TAX

# COVID-19 Practical Considerations: Board Meetings & Corporate Tax Residence

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Due to the outbreak of COVID-19 and resulting restrictions on travel and meetings, it is necessary to find practical solutions to minimise disruptions to business, while ensuring compliance with public health recommendations regarding containment of the virus. This may include changes to arrangements in respect of company meetings which can affect corporate tax residence and impact on governance.

## CORPORATE TAX RESIDENCE

- Companies that were incorporated in Ireland on or after 1 January 2015, are automatically treated as a tax resident in Ireland unless the terms of a Double Taxation Agreement (“DTA”) with Ireland provide otherwise. Prior to the implementation of the Multi-Lateral Instrument (“MLI”), dual residence situations were resolved largely with a “place of effective management” test. Under the MLI provisions many Irish DTAs have moved to a competent authority determination and pending such determination the company will be dual resident.
- Companies that were incorporated in Ireland prior to 1 January 2015 will, if they satisfy a number of tests, largely be regarded as tax resident in Ireland only if their central management and control is located in Ireland. This rule will continue to apply until 31 December 2020 or earlier on the occurrence of a change of control and a major change in the nature and conduct of the business of the company (after which the incorporation test as above will apply).
- A non-Irish incorporated company is regarded as resident in Ireland for tax purposes where it is centrally managed and controlled in Ireland, unless the terms of a Double Taxation Agreement (DTA) with Ireland provides otherwise.

Central management and control is a concept which is determined by reference to the highest level of control of the company (i.e. strategic control) rather than by the day-to-day operations of the company. Central management and control of a company is determined by examining where and by whom strategic control of the company’s operations occurs and this is usually the function of the board of directors. Key factors are usually, where directors’ meetings are held and where directors take decisions formally or informally. In practice, companies that follow normal corporate governance procedures (i.e. strategic decisions are taken by the directors in properly constituted board meetings) will usually have their tax residence where the majority of directors meetings are held (assuming in person meetings).

In the current environment, directors are understandably less willing (and in some case unable) to travel to meetings in Ireland. Accordingly, consideration should be given to the impact (if any) on the tax residence of companies that are currently Irish tax resident holding virtual meetings or in person meetings outside Ireland.

## AGMS / BOARD MEETINGS

Companies with AGMs scheduled over the coming months are considering alternative solutions in the event that their AGM cannot proceed.

Some practical considerations in respect of AGMs are discussed in our briefing [COVID-19: Practical Considerations: Making contingency plans for AGMs](#)

Companies may have provisions in their constitution permitting participation at the AGM via technology that permits shareholders to participate and vote electronically. In some cases, key executives may also attend remotely.

The location of an AGM and remote participation of shareholders or executives at an AGM from different jurisdictions generally should not affect the Irish tax residence of a company. However a board meeting of the company will often be scheduled around the same time as the AGM. In addition to board meetings scheduled around an AGM, companies may be required to hold board meetings during the outbreak of COVID-19 for other business reasons. In many cases it will be necessary for directors to attend by telephone or video conference from different jurisdictions.

As noted above, the location of board meetings is important in determining tax residence for currently Irish tax resident companies wishing to retain Irish tax residence and for currently non-Irish tax resident companies wishing to remain non-Irish resident. There is no guidance or case law in respect of the location of a meeting where directors attend remotely from different jurisdictions.

Therefore under normal circumstances it would be preferable, if possible, for companies wishing to retain Irish tax residence for all directors attend meetings in Ireland in person.

Tax residence is not an annual or year by year test as such, but has an element of continuity. The pattern of meetings in a single year should not alter the substantive fact that, as a historical matter, more meetings have been held in Ireland than anywhere else.

During the Icelandic ash cloud issue of 2010, travel was interrupted for a period and Irish Revenue confirmed that they would not take any point with a change in board meeting pattern as a result of travel restrictions. It is hoped that the Irish Revenue will take a similar view on COVID-19.

Accepting that it may not be possible in the current circumstances for all directors attend meetings in Ireland in person, some practical approaches which may be considered in respect of upcoming board meetings include:

- 1. The historic residence position of a company should be reviewed and tax advice should be taken to assess whether the pattern of past meetings is such that the location of meetings outside of Ireland during 2020 would affect the company's residence.
- 2. Any provision of the company constitution determining the location of meetings or the possibility of virtual meetings should be reviewed.
- 3. Consideration should be given to whether it is possible to have a quorum of directors located in Ireland such that the meeting could be held without participation from outside Ireland.

- 4. Consideration should be given to whether it is possible to have the majority (or if not, a plurality) of directors, including chair, located in Ireland for the meeting.
- 5. Consider whether a board meeting is needed. For example, powers may have been properly delegated to Irish based executives/subcommittees who may not exercise central management and control when acting under delegated authority.

For further information on this topic, please contact a member of the Arthur Cox tax team.



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