<u>Question 1</u>

Memorandum to American SoftwareCo Inc

To: VP American SoftwareCo Inc

From: Irish Tax Manager, Worldwide Adviser Co

Date: 15 June 2016

Re: Investing in Ireland and impact of recent changes from BEPS

Ireland as a HoldCo Location - advantages and disadvantages from a tax perspective

Other European countries/ OECD countries such as Belgium, Netherlands and Luxembourg are often favoured as Hold Co locations and the UK also, due often too generous participation exemption regimes which Ireland doesn't have (well applies only to capital gains), but there are many other advantages to selecting Ireland as a HoldCo location as follows:

CAPITAL TAXES
1. There are no Capital taxes in Ireland.
2. Stamp Duty will typically not apply to transactions between group companies due to exemptions in s.79 and s.80 SDCA99.

REPATRIATION OF PROFITS:
Due to exemptions for Dividends, Interest and Royalties in Irish domestic legislation, subject to certain conditions, but in all cases where the payment is to a country with which Ireland has a DTA i.e. USA, then there is no requirement to charge WHT.

Dividends

Under s.172D there are exemptions for withholding taxes from certain non-residents including those in a DTA country.

Interest

There are similar exemptions from WHT and interest incurred wholly or mainly for the purpose of the trade can be deducted in the tax comp. (provided not considered a distribution under s.130(2)(d)(iv).

Interest incurred for rental can also be deducted.

Relevant interest under s.247 can be allowed a charge in the tax computation once it meets the conditions i.e. interest in current from a loan to invest in a subsidiary.

Royalties

There are similar exemptions from WHT and royalties incurred wholly or mainly for the purpose of the trade can be deducted in the tax comp.

PARTICIPATION EXEMPTION:
s. 626B TCA 1997

This section provides for an exemption from capital gains tax only in relation to disposals of shares provided certain conditions are met:

1. The deposing parent company holds at least 5% of the share capital of the subsidiary (for at least 12 months).
2. Both companies are in the EU or a DTA State
3. The subsidiary company is a trading company of when taken together the activity of the parent company, the subsidiary company and any other subs in the group taken together are trading

In this case, the disposal of the shares will not be liable to CGT. This is relevant for a US Investor and is an important relief in Ireland.

Some disadvantages of choosing Ireland are:

* Limited participation exemption regime
* Negative publicity which has led to international suggestion that Ireland is a tax haven, but the Irish Government has fought very hard to defend its reputation and has remained committed to fair tax competition based on our rate, regime and reputation.

Some additional advantages of Ireland as a location to invest are:

* No CFC legislation (though this may change pending the outcome of the EU Anti-tax avoidance Directive - ATAD)
* No thin capital legislation (ditto for ATAD)
* Transfer pricing legislation relates to trading transactions only
* KDB and R&D tax credits
* A member of the EU
* A large network of tax treaties with low or no withholding tax rates as the treaty policy (72 treaties with 70 in force)
* Domestic law exemptions for repatriation of profits abroad - interest, royalties and dividends - where to a DTA country like the USA.
* Participation exemption regime, but only applies to Capital Gains.

Changes to Irish domestic legislation as a result of the OECD BEPS project

The Irish Government represented by Revenue and Dept. of Finance officials were very engaged in the OECD BEPS project and worked hard to influence the outcomes in a positive way for Ireland while still very much supporting and understanding the objective of the project to tackle Base Erosion and Profit Shifting.

This commitment is evident in the output at this stage from the BEPS project. The actions can be categorised into 3 main buckets - Best practice, Common Approach and Minimum Standard Actions.

Best practice and Common Approach actions e.g. CFC rules and Hybrid Mismatch arrangements are effectively guidelines and there is no real expectation at this stage for countries to adopt the proposals.

The OECD is a consensus organisation and cannot "direct" its members to change their domestic law like the EU can. However, where actions are categorised as minimum standards, there is an expectation for countries to act on the recommendations.

Ireland has changed its domestic law in 2 areas and both of these are minimum standards.

(Note: The other actions representing min stds are the treaty related actions on treaty abuse, artificial avoidance of PE and dispute resolution which Ireland is committed to implement through the multilateral instrument at the end of the year).

The domestic law changes have been in the area of:

1. Country by Country reporting (CbCR)
2. Introduction of a Knowledge Development Box.

Detailed outline re Knowledge Development Box (KDB):

The KDB was introduced into legislation in the last finance bill and is in s.769G-R TCA 1997. It was part of the minimum standard on Action 5, though arguably this minimum standard wasn't exactly required to be implemented, it was just that it you were going to have a patent box regime in your domestic law, it should comply with the Modified Nexus Approach set out by the OECD.

The Irish Government have declared that the KDB legislation is fully compliant with BEPS and both the OECD (Pascal St-Amans) and the EU have stated that they have no reason to believe it doesn't comply, but at the same time, they haven't examined it.

The main features of the legislation are as follows:

* it came into effect from 1 January 2016
* the effective corporation tax rate for qualifying expenditure on development of IP is 6.25%.
* however, the normal 12.5% rate is applied - a deduction is allowed for 50% of the qualifying profits.
* The company in relation to its specified trade, must have qualifying profits from qualifying assets for the relief to apply. These terms are all defined:

* A qualifying asset is IP however, marketing IP is not included.
* Qualifying profits are calculated using a formula which effectively is a % of the qualifying expenditure (defined) over the overall expenditure x the qualifying asset.
* Revenue may consult with an expert to determine the correct amount of the qualifying profit.
* Strict documentation is required to back-up a claim and should be prepared on a timely basis and failure to have the documentation will result in a company not qualifying for the beneficial treatment under this section.
* there is also an anti-avoidance provision requiring that the transaction is for bona fide commercial reasons.

Question 2

Tax issues before moving to Ireland

Taxation status for income tax purposes:

Aidan - not resident, not ordinarily resident, but domiciled in Ireland. Ireland is his domicile of origin and it is not clear if he adopted a domicile of choice, but as he is retiring to Ireland, it is likely to revert to his domicile of origin in any case.

Therefore, Aidan is taxable on his worldwide income excluding any income from foreign employments and any foreign income less that €3,810.

However, as Aidan is moving in May 2017, he will become resident (>183 days under s.819 TCA 1997) and then will be taxable on his worldwide income. He won't become ordinarily resident until he is resident for 3 years, but his ordinary residence status has no impact.

In 2017, Marion will become resident in Ireland also (same basis as above), but will be no ordinary resident and non-domiciled. Assume Marion's domicile is in the UK.

Therefore Marion will be taxable on the remittance basis as she is non-domiciled and will be liable to income tax on Irish source income and any employment duties carried on in Ireland.

Income and Assets:

1. Income from Construction Company Assets:
1. 15% holding in Construction Company (Aidan)
2. Share Portfolio (owned jointly)
3. London Apartments (owned jointly)
4. House in UK countryside (owned jointly)
5. Savings account (Aidan)
6. Saving account (owned jointly)

As Aidan will be taxable on his worldwide income, he will be liable to tax on the income from the construction company.

Any rental income from the London apartments will also be liable to tax. Aidan could transfer the apartments and the family residence to Marion before they move and then there would be no Irish tax provided that Marion does not remit any of the rental income.

Any dividends from the shares will be liable to tax in the hands of Aidan. However, he could consider also transferring the shares to Marion.

Other taxes:

Capital acquisitions tax - as Aidan and Marion are retiring and have already passed on most of the business to their son, it is possible that they may be considering stepping back from the business completely in the coming years as they relax into their retirement and the son gets to grips with the running of the business.

Therefore, any gift / inheritance of the Company once they move to Ireland, bu Aidan, would be within the charge to CAT under s. 6 or s.11 of the CATCA03.

Even though the company is not situate in the State and the donee is not resident in the State, because, Aidan as the disponer is resident in the State, it would be within the charge to Irish CAT.

Aidan could consider transferring the business to his son before moving to Ireland as there is no gift tax in the UK provided there is no death within 7 years. Alternatively, he could transfer the property to Marion for a subsequent transfer to their son.

As Marion is non-domiciled, she must be resident in the state for 5 consecutive years before she is treated as resident for the purposes of the CATCA. Therefore, they must keep this 5 year date in mind and not let it pass if Aidan decides to hold the Company until he moves to Ireland. The same issue arises for the apartments and the house if the ultimate goal is to transfer these to the children, Aidan should transfer them to Marion in the meantime, however, as above, she has only 5 years to gift them on before they will come within the charge to CAT.

In any event, as above, it would be better not to be liable to tax on the rental income, so if they are transferred to Marion before they come to Ireland, then the income will only be taxable in Ireland if remitted.

Stamp Duty also needs to be considered as if Aidan e.g. transferred the company to his son after he comes to Ireland, the stamped document could be within the charge to Irish stamp duty. Therefore, he should avoid this situation.

There should be no VAT exposure in relation to any of the income or assets.

In relation to the savings accounts, these should be kept in Marion's name as they are capital accounts and therefore if not remitted, will not be within the charge to Irish tax.

2. Ongoing tax issues as residents of the republic of Ireland

Aidan and Marion will have filing obligations in Ireland. Aidan will have to file a Form 11 in relation to any income and tax liability and file and pay by the deadline in October each year.

If any gifts or inheritances are made, returns will have to be filed for these also under the CATCA 2003.

Additional issues may arise depending on what decisions they make based on what I have advised they should consider before they move.

PRSI will not be relevant as they will not be working in Ireland.

In relation to any transfers between the spouses and subsequent transfers, they should be aware of anti-avoidance legislation in place.

Aidan and Marion are also likely to continue to have tax obligations - in terms of compliance in the UK also which they will need to take care of.

Question 3

Part 1

(a) Tail Co.
There are a number of considerations as follows:

1. Even though the domestic tax withholding tax obligation in Country A is 30%, there is a treaty in place which is identical to the OECD Model Tax Convention. Therefore, under Article 10, the treaty rate is 15%. Note: there is a 5% rate in the treaty, but this does not apply as HeadCo only owns 20% of TailCo. The requirement for the 5% rate is a 25% holding.

2. Domestic tax rate in Ireland: as we know that TailCo is a trading company and is OECD resident and has a DTA with Ireland, the applicable rate on the dividend in Ireland could be 12.5% under s.21B TCA 1997. This section of the legislation arose as a result of the FII GLO ECJ Case on the UK legislation which highlighted the Ireland was in contravention of EU law, by having a different rate for foreign dividends of 25%.

3. Relief is therefore double tax relief under the treaty, but limited to 12.5% of the Net Foreign Income according to Schedule 24, para. 4. Either way, Sch. 24 provides for unilateral relief and for dividends, it is calculated in the same way.

4. Pooling of unutilised credits is allowed and these will go into the 12.5% bucket which can only be used against other 12.5% dividends.

(b) Bear
There are no WHT implications for the Branch operations as the interest payment is not related to the branch.

HeadCo, however, is in receipt of interest payments from an unrelated third party in Country B, with which it has a DTA. The domestic law rate is 20%, but the treaty rate is 10% according to Art. 11(2) of the OECD MTC i.e. the treaty between Ireland and Country B.

Therefore, double tax will arise, and it is the country of residence i.e. Ireland that must provide the credit as is the case with the dividend above.

Pooling is allowed for credits, but no carry forward is permitted.

However, if it was the case that HeadCo was incorrect and the interest was effectively connected with the PE in Country B, which may very well be the case as there is already blurring of the lines with HeadCo employees working for the branch in Country B. Then, Art 11(4) of the DTA provides that para 1 and 2 of Art 11 will not apply is the loan is effectively connected with a PE and in that case the business profits article would apply. Therefore, there would be no exposure to WHT, instead there would be exposure to Corporation Tax under Art 7. Therefore, no WHT relief would be required.

Art 11(6) does not apply as the payer of the interest is an unrelated company and therefore, no special relationship exists.

(c) Foot Co.
If the treaty between Ireland and Country C is identical to the OECD Model tax convention, then there is no source taxation of royalties under the treaty in Country C. Therefore, even though the domestic

legislation provides for a 15% WHT rate on the payment, the treaty does not allow country C to take up that taxing right.

Therefore, no double taxation arises and there are no withholding tax implications for FootCo. There are however, apparent TP issues. Refer to Part 2 for details.

Part 2

This is a Transfer Pricing adjustment following a transfer pricing audit proposed by the tax authorities of Country C. Head Co should discuss the adjustment with Foot Co to get an understanding of whether the adjustment appears to be justified.

If the companies believe that the adjustment is not arm's length and that there is rationale for a higher royalty being charged to the group company based on, for example, additional functions performed, then Foot Co should apply to the Competent Authority in Country C, to instigate a MAP.

Note: Under Art 25 of the current OECD model, MAP can be instigated by applying to the CA in the country of residence. However, this is about to change as part of Action 14 of the OECD BEPS project where the taxpayer can apply to either competent authority to enter into MAP.

The main point here, is that an adjustment for double taxation suffered (which will be the case here as the profits have now been taxed in both jurisdictions as a result of Country C disallowing the deduction for a portion of the Royalty) is not automatic. The taxpayer must apply for it.

Another option available to Head Co, is to apply to the competent authority in Ireland for a corresponding adjustment which is provided for in Article 9 of the OECD Model Tax Convention. Again, the Irish CA will have to satisfy themselves that this adjustment is justified and are not obliged to make a corresponding adj to relieve the double tax if they believe that it is not justified. In these circumstances, they are likely to suggest that they would be willing to enter into MAP negotiations to discuss the case with Country C.

Irish domestic legislation allows for correlative adjustments, however, any secondary adjs that might arise if the income is reclassified by Country C, cannot be relieved in Ireland.

It is important that adequate documentation is maintained to support the Correlative adjustment claim. The Irish legislation in s.835A under Part 35A of the TCA 1997 requires documentation, and Irish Revenue have issued guidance noting that any documentation that satisfies the OECD Transfer Pricing Guidelines requirement will be sufficient. The documentation that should be submitted to support the correlative claim should include:

x The group companies impacted and how they are associated.
x The nature of the transaction
x The transfer pricing report justifying the price charged for the royalty
x Any additional information / support to justify the price
x The transfer pricing analysis including the method selected, the benchmarking study etc.

Question 5

Irish tax implications for each transaction advising how any tax liability may be minimised:

1. Snowdrop Ltd
The proposal is for Snowdrop to migrate its residency to Jersey which is a country with which Ireland does not have a DTA.

Under the TCA, there is an exit charge imposed under s.627 TCA 1997. This exit charge would impose a CGT charge whereby the company would be deemed to have disposed of all its assets and immediately reacquired them on date of migration giving rise to a CGT charge. As there are no rules on entry into Ireland, it is possible that the gain relates to a period before the company was even resident in Ireland.

However, as Snowdrop is owned 100% by a German resident Company which is owned 100% by a UK resident company, it meets the definition of excluded company under s.627 and therefore the exit charge does not apply. i.e. 90% of the shares of Sweetpea are owed by a foreign company.

Company Law - if Snowdrop was incorporated in Ireland, even changing its residency will not impact on its requirements to comply with Irish company law including filing accounts with the CRO.

Stamp Duty - there should be no charge to Stamp Duty on the transaction as the SDCA provides an exemption.

Before the migration takes place, snowdrop should consider transferring its Irish situs assets to another group company. This transfer within a group would not come within the charge to CGT and otherwise these assets would remain in the charge to Irish CGT if subsequently disposed of as Irish specified assets.

They would also be within the charge to Irish CAT if a later disposition took place.

2. Sweetpea GmbH

It is very important that the migration date is confirmed as this will impact the tax status of the payment of the dividend out of trading profits to Crocus.

Ordinarily, under s.129 TCA 1997, there is no corporation tax payable on dividends paid from an Irish resident company.

However, s.129A TCA 1997 deals with dividends paid out of foreign profits. s.129A(2) requires that a company was resident in the state for 10 years if it was resident elsewhere before the provisions of s.129 apply.

s.129A(5) disapplies s.129A(2) if before Sweetpea became resident it was not controlled by Irish resident persons. This is not the case as it is owned 100% by Crocus which is Irish resident.

Therefore, the migration date is less than 10 years and CT would apply on the transfer of the dividend.

Sweetpea should establish the date of migration and wait until s.129 applies before making the distribution.

3. Lavender Ltd

Stamp Duty will apply on the lease as it relates to a property in Ireland and the lease itself is entered into in Ireland, regardless of the fact that the owner is not resident in the State. The applicable rate is 1%.

As Lavender Ltd is a non-resident Landlord, the tenant will be required to withhold tax at 20% from the payment of the rent. One way that Lavender Ltd could remove the WHT obligation is to appoint an Irish collection agent to collect the lease payments on its behalf.

<u>Question 8</u>

Advice for Michael

The relevant sections in the TCA for residence and ordinary residence of individuals are s.819 and s.820 TCA 1997.

s. 822 - split year relief - is also relevant in relation to employement income and will need to be considered.

<u>Michael's Irish residence position</u>

As Michael commenced employment in Luton in July 2014, he was resident in Ireland for approx. 181 days from 1 Jan - 30 June 2014 and we know that at the beginning, he returned home every weekend, so it is very probable that Michael was in Ireland for more than 183 days in 2014 (as any part of a day that he is present in the State is counted as day for the purposes of these sections of the legislation).

Therefore, Michael is Irish resident. He is also ordinarily resident under s.820 as he has not been not resident for 3 years i.e. it takes 3 years to lose.

It is unlikely that s.822 split year residence will apply as if he takes the job in Shannon, it's not clear that his intention is that he will not be resident in the State in the following year.

<u>Michael's UK residence position</u>

The UK rules to determine residence are similar to the Irish rules, but I am not in a position to advise on the UK rules.

As the UK Company has employed Michael since July 2014 and all of his earnings are paid under deduction of UK tax, it is likely that the UK consider Michael to be UK resident under their domestic law.

<u>Double taxation</u>

Therefore, as Michael is Res, Ord. Res and Domiciled in Ireland (this is his domicile of origin and there is no case to suggest he changed it and in fact, he would have a hard case to prove), he is taxable in Ireland on his worldwide income.

We know that they UK are also taxing Michael on his UK income, therefore, he is liable to double tax on his UK employment income.

<u>Treaty residence</u>

Under Art 4 of the Ireland/UK DTA, there is a tie-breaker test to determine where Michael is resident of, for the purpose of the treaty.

It is the PIANA test.

P = permanent home. As Michael has a small property that he acquired in UK and the family home in Ireland, it could be argued that he has a permanent home in both countries.
Then look to where his Centre of Vital Interests are:

I = as he has his family and community connections in Ireland, it is here. It could be argued that he has integrated well in the Community in the UK, but I think it is clear that he is treaty resident of Ireland.

However, in 2015, he may become resident in the UK and not be resident in Ireland under domestic rules and in this case the tie-breaker wouldn't apply. It depends on how many days he spends. On the basis that he is likely to spend at least 30 days between his new part time job and visiting family, he should be resident in Ireland under the look back test in 2015 if greater than 280 days between the 2 years.

Now that we know he is resident of Ireland, the treaty sets out the taxing rights e.g. under the employment article, Art 15 of the Irl/UK treaty, both states have the right to tax the employment income carried out in the UK, but Ireland as the residence country must give the double tax relief for the double tax suffered.

PRSI - in relation to PRSI, Michael should apply to the Dept of Social Protection for a A1 cert so that he can continue to pay PRSI in Ireland. As he will have part time work, he is likely to be on the PAYE system in Ireland and the PRSI can be paid through this.

One final consideration is the potential application of the provision for Cross border relief.