Question 1

A Tax Consultant Ltd
Address

Caroline & Peter
Dublin

10 June 2015

RE: Tax Matters

Dear Caroline and Peter.

Further to our meeting please find attached a schedule setting out my responses to your queries. If you have any questions please don't hesitate to contact me.

Yours sincerely

A Tax Consultant.

Schedule

Part 1: Caroline and Peter's residence and ordinary residence position for 2015 and thereafter

Section 818 TCA 1997 defines residence.
A person is deemed to be resident in Ireland for a year of assessment if either:

i) They are present in the State for 183 days or more in a calendar year; or

ii) They are present in the State for 280 days or more in aggregate for the current year and the prior year (subject to the condition that they will not be resident for a year in which they have not been present for a minimum of 30 days).

Present in the State for a day means being present in the State for any period of time during a day.

The prior 'midnight' rule having been abolished.

Section 820 TCA 1997 defines ordinary residence. A person shall be ordinary resident in Ireland if they were resident in Ireland in the prior three years of assessment. Once a person obtains ordinary resident status they will retain that status until they have been non-resident for three successive years (and then they would become non-ordinary resident in the fourth year).

Caroline & Peter's residence status

- Caroline proposes to remain in Ireland until September 2015. Therefore she will be Irish resident in 2015, having satisfied the 183 day test (and also the 280 day test).

- Peter will also be Irish resident in 2015 on the same basis.

Caroline & Peter's ordinary residence status

The facts state that Caroline has been living in Dublin since circa 2000. Caroline is therefore ordinary resident in Ireland.

Peter has been living in Dublin since December 2010, therefore I assume he would have been resident in 2011, 2012 and 2013, which would have made him ordinary resident in Ireland from 2014.

They are both therefore resident and ordinary resident in Ireland in 2015.

The facts provide that they intend to live in France for the next four years (2016-2019 inclusive) before returning to Ireland).

They propose to be out of Ireland in 2016. If they spend less than 183 days and, have less than 280 days in aggregate between 2015 and 2016 then they will not be resident in Ireland in 2015. If they spend less than 30 days in Ireland in 2015 they will certainly not be resident. They will however be Irish ordinary resident.

On the assumption that they will manage their days in Ireland to stay below the 183 and 280 day test for 2016 - 2019, then they would not be resident in Ireland in each of the years 2016 -2019.

They would then cease to be Irish Ordinary residence from 2019 onwards.

Part 2: Exposure to Irish income tax from 2015 and filing obligations

2015, they are both resident and ordinary resident but not domiciled. They will be subject to tax on:

- their Irish source income; and
- any foreign income which they remit to Ireland.

The Irish rental income will be subject to Irish tax. A deduction for the mortgage interest (capped at 75% of the interest will be allowed as it is residential property). If they are already claiming mortgage tax relief at source they will have to notify their bank that the property is not being let out and cancel the TRS claim.

The Dividend from the Irish company will also be subject to tax. As Caroline is Irish resident, the company must withhold 20% of this dividend (but she can claim a credit for this tax withheld on her tax return).

They will be subject to Irish tax at the marginal rate on this income.

The Irish deposit account income will be subject to tax.

The UK account interest will be subject to tax if it is remitted to Ireland (i.e. to help pay the mortgage).

2016-2018, they are both ordinary resident in Ireland only (not Irish resident, nor domiciled).

They are only subject to Irish tax in respect of Irish source income.
The rental profit will be calculated as above.

As they are non-resident landlords, the tenant will have to withhold tax at the rate of 20% on payments to them.

Their liability to Irish tax will be capped at 20%.

They can apply from a relief from DIRT in respect of the Irish bank account as non-residents. As a non-resident (but resident in another EU state, France) Caroline can complete a form (V2A) which will allow her to receive the dividend from Genome gross.

2019 - they are both not Irish resident, ordinary resident nor domiciled. They are only subject o Irish tax in respect of Irish source income.

Filing obligations

As they hold Irish rental property, they will be deemed to be a chargeable person and must file a Form 11 income tax return. As they have no Irish PAYE income they can't use the informal reduction in credits method to absolve themselves of filing. As they will be non-residents they can't apply for joint assessment.

Part 3: CGT

The gain on Peter's shares would be subject to Irish tax if he sold the shares in 2015 (when he was resident) and remitted the proceeds to Ireland. However since he intends to use the proceeds to fix the Belfast house, and since he has a Belfast bank account, it would be possible for him to move the funds from the broker (which I assume is also in the UK) directly to the Belfast account. That way the funds would not be remitted to Ireland and would not fall within the Irish charge to tax.

If the broker is an Irish broker, it would be better to wait until 2016 when he is no longer Irish resident.

The shares are not Irish source / situate assets as the situs of shares is where the company is registered (here the UK).

The disposal by Caroline of her shares in 2015 would lead to a charge to Irish CGT. The shares are Irish situate, and so she is within the charge to tax even if she does not remit the proceeds to Ireland.

If she waits until 2016 she would again be prima facie within the scope of Irish CGT (Irish source asset) but Article 13(5) of the DTA with the France should relieve this charge to tax meaning it is only taxable in France. She should seek French advice.

Part 4: Annual gift of €25,000 to sister

Irish CAT applies where one of the following three factors is present:

i) The donor is Irish resident or ordinary resident;
ii) The recipient(beneficiary) is Irish resident or ordinary resident; or
iii) The gift consists of Irish situate property.

Note that a non-domiciled person will not be considered to be Irish resident/ordinary resident, unless they have been Irish resident in the preceding five years.

Here Caroline, as the donor, is Irish ordinary resident and so any gifts from her to Jennifer will be within the charge to Irish CAT.

Jennifer is entitled to an annual small gift exemption of €3,000. The balance would be subject to tax. A person is entitled to exemption thresholds based on group. Jennifer as a sister stands in Group B in respect of Caroline. The life time threshold is c. 25,000 at present. Jennifer would stand in group C in relation to Peter.

Assuming that both Caroline and Peter each make €17,500 each to Jennifer, each year then the first €3,000 of each would be exempt as SGE, and the balance would first reduce the threshold and then be taxable at 33%. There would be sufficient threshold (assuming Jennifer has no prior aggregable group B or C gifts) so no tax should arise in 2015 gift.

In 2016, some CAT would arise, as the thresholds would be exceeded.

In 2017-2018. Caroline would be Irish ordinary resident but she would be non-domiciled, and non-resident in one of the prior 5 years (2016) therefore the gift would be outside the scope of Irish tax. This assumes that the gift comes from Peter, and gift-splitting does not apply.

From 2019 Caroline is no longer Irish ordinary resident, so the gift would be outside the scope of Irish CAT.

Question 3

To: Chicago office
From: Ireland office
Date: June 2015
Re: Digital Solutions Group - Irish Tax Considerations.

Part 1: Residence of Digital Solutions (International) Holdings Ltd

DSIH is an Irish incorporated company. Per section 23A TCA 1997, it is deemed to be resident in Ireland under an incorporation test. Finance Act 2014 introduced new rules which apply to companies incorporated as and from 1 Jan 2015. As DSIH was incorporated before 1 January 2015, these new rules will not apply to it until after 31 December 2020 (unless there is a change in ownership/ major change in the nature of the business before that date).

As such, DSIH's residence is decided by the pre FA 2014 rules. Those rules contained an exemption from the incorporation test where a subsidiary of the company was trading in Ireland and also where the company is ultimately held by a company quoted on a recognised stock exchange (i.e. NASDAQ, as in the current facts).

Accordingly, the incorporation test does not apply to DSIH, and its residence must be determined on the basis of the Central Management and Control test.

This CMC test is not set out in legislation, and we must look to case law to determine the factors. In the De Beers case the court looked at the overall composition of the board of directors, where they met, what matters of business were discussed at those meetings, where the strategic business decisions were made (as to the business and its financing), and held that a mining company with diamond mines in South Africa was resident in the UK as all the important strategic decisions were made from London and the SA directors were answerable to the London directors.

This dicta was echoed in subsequent cases, New Zealand Shipping, Woods v Holden, Bollock, cases.

In Trevor Smallwoods Trust, the court distinguished the CMC test from the Place of Effective Management test, and said the latter looked more to the place where the key decisions regulating the business were made.

On the current facts the board of DSIH meet in Cayman, and that is where decisions are made. Its books and records are most likely also kept in Cayman at the offices of its service provider. Therefore, although all three directors are US residents, on balance it is my view that the company would be considered to be Cayman resident (if Caymant has a CMC residence test, presumably since it is paying tax there). At any rate the company would not be considered to be Irish resident.

Residence of Digital Solutions (Ireland) Ltd

For the same reasons outlined about, DSI residence status will be determined by its place of CMC rather than its place of incorporation.

Here board meetings and staff are present and take place in Ireland. On this basis it appears that DSI is Irish resident.

One word of caution, however. In the American Thread case, an American company's board of directors effectively acted on the instructions of its parent company in Manchester, England re Dividend policy. The UK court that it was thus centrally managed and controlled from the UK. Similarly in Bollock, a Kenyan subsidiary's directors acted on the instructions of the UK parents directors. The court in that case held they had no authority of their own, and so that company was resident in the UK.

While there is nothing in the facts provided to suggest that the Irish directors act on the instructions of the Cayman resident company, care should be taken that the Irish directors are regarded as exercising independent control of the company from Ireland.

<u>Part 2: Irish tax exposure of DSIH</u>

2015 -2020 DSIH is not resident in Ireland. It is resident in the Cayman Islands.

It would only be subject to Irish tax if it had a branch or agency in Ireland (per section 25 TCA 1997).

From 2021, DSIH will become Irish resident under the incorporation test introduced in Section 23A by Finance Act 2014. As such it would become subject to Irish tax on its worldwide income. Ireland doesn't currently have a DTA with Cayman (and is unlikely to have one in 2021 either). Therefore no provision of DTA will overrule the incorporation test.

DSIH would be subject to Irish tax at the rate of 12.5% on trading income. In order for the activity to be classed as an Irish trade there would have to be real substance in Ireland. If DSIH made no changes to its operations before 2021, it is unlikely to qualify for the 12.5% rate, and so would be subject to the higher 25% rate. DSIH should therefore reconsider its position in advance of 2021.

<u>DSI</u>

For the reasons set out above, DSI is currently regarded as Irish resident. This position will not change when the incorporation test comes into effect for it from 2021.

DSI currently licences royalties from DSLUX.

Under Irish domestic tax law DSI is obliged to withhold tax at the rate of 20% on payments in respect of patents. However domestic law provides that no WHT need be withheld where the payment is made to a company in relevant territory (which here would include Luxembourg).

Also Article 12 of the OECD Model Convention provides that no WHT is to be withheld on the payment to Luxembourg (provided it is the beneficial owner of the royalty).

Ireland does not withhold tax on other (non-payment) royalties.

DSI will not get a trade a deduction for the expense of the patent royalties which it pays to DSLux. But it can claim these as a charge against its total income.

It should be able to claim a trade deduction for the other royalties provided the prices are not in excess of market value (standard deduction rules).

Ireland has Transfer Pricing rules. These do not apply to Small or medium enterprises (<250 employees, and balance sheet of €50m or turnover of €43m), collated on a group basis. Assuming that

DSI does not qualify as a SME, then it will have to prepare TP documentation to support the values paid for the royalties. Ireland does not set out specific documentation requirements, instead reference is made to following the OECD's TP guidelines.

Part 3: Suggestions for reorganisation

Following on from the comments already outlined above:

- From 2021, DSIH will become Irish rather than Cayman resident, unless it can be made to be resident in another jurisdiction with which Ireland has a DTA. For example Ireland's treaties with Malta and Cyprus allow for Irish incorporated companies to be Maltese / Cypriot resident if they are Centrally managed and controlled from there.

- Otherwise, if DSIH is to become Irish resident, then it should take on full substance in Ireland in order to benefit from Ireland's 12.5% rate on trading activities. Per the Noddy case, the management of IP will qualify for trading status if it is actively managed or developed by employees in Ireland.

- Ireland does not withhold tax on other (non-payment royalties). Therefore agreements should separate out payments for patent royalties and other royalties (copyright, Trade Marks, etc.)

Question 6

It is assumed that Dutch Co. is resident in the Netherlands, I have not broached this in the report below. Please see my answer to Question 3 regarding Central Management and Control rules.

To: Finance Director, Property Holdings BV
From: A Tax Consultant
Date: 10 June 2015
Re: Irish Property Proposal - Irish Tax Consequences

Scope

This report considers the Irish Direct Tax consequences of a proposed investment by Property Holdings BV ('PHBV')in Irish Property. This report does not consider Irish VAT issues.

Property Type:
Commercial / Industrial

Acquisition of Property

Stamp Duty:

- Irish Stamp Duty at the rate of 2% will arise on the acquisition of the property. The tax is charged on the value of the consideration passing. It is not possible to 'rest in contract' to delay the charge to tax, as it will arise once a contract is signed and more than 15% of the purchase price is paid to the Vendor.

Capital Gains Tax:

- The consideration paid for the Irish property , together with Stamp Duty and other acquisition costs (legal fees) will form the base cost of the property for Irish CGT purposes.

Commercial Rates:
- On the acquisition of ownership of the property, the new owner becomes responsible for ongoing local authority commercial rates.

Holding of Property

Rental profits from the property will be subject to Irish tax.

Income from Irish properties is regarded as Irish source and is always within the charge to Irish tax. Rental profits are calculated as rental income less allowable rental deductions.

Interest on borrowings is allowed as rental deduction in full in respect of commercial property (it is restricted to 75% of the interest expense for residential properties).

The estate agents fees, being as they relate to the service of acquiring (rather than managing) the property will not be allowed as a deduction (but may qualify as an acquisition cost for CGT purposes).

The cross charge, if structured as a management fee paid by the subsidiary, should be allowed as a management charge against investment income of the subsidiary. Irish Revenue have published specific guidance on this, and there is a percentage cap (I believe it is c. 15% of the investment income managed.)

Taxation of the Profits

If the property is held through an Irish resident company (i.e. a subsidiary of PHBV) then the rental profits will be subject to Irish Corporation tax at the rate of 25%. The 12.5% only applies to trading income.

If the property is held directly by PHBV then the rental profits will be subject to Irish income tax in the hands of PHBC at the rate of 20%. Further, if the income is paid by the tenant directly to the PHBV then the tenant will be obliged to deduct tax at the rate of 20%. PHBV would get a credit for this tax against its Irish liability (and the excess would be repayable).

If the tenant instead paid an Irish collection agent (i.e. the estate agent) then it has no need to withhold tax. However the responsibility then passes to the estate agent.

Interest

If the property is held by a subsidiary, then that subsidiary will be paying interest to PHBV in the Netherlands.

Per section 246 Irish domestic law requires 20% withholding tax on annual interest (which would be the case here), however there is an exception for *inter alia* interest paid to a bank.

Disposal of Property

The disposal of Irish property will lead to a charge to Irish CGT on any gain arising on the disposal (at the rate of 33%).

It would be necessary to get a CG50 tax clearance certificate in advance of the disposal to avoid any withholding tax being withheld by the purchaser (15% of consideration).

If instead the shares in a subsidiary which held the property was sold, then it could be possible to avoid the CGT charge by using Article 12 of the DTA. This assumes that Article 12(4), which preserves taxing rights in respect of company's which derive the majority of their value from Irish land, has not been implemented in the particular treaty. I note that the assumption is that the treaty is based on the OECD's model convention, however in practice, many Irish treaties do not implement 12(4) (e.g. Ireland-Cyprus).

Other

Irish anti avoidance legislation contained in s806 and s590 TCA should not apply to the current facts, as the ultimate individual shareholders are Dutch (rather than Irish) residents.

Conclusion and recommendation

It would be best if the property was held directly by PHBV. That way it would only be subject to tax at the rate of 20% (rather than 25% if held by an Irish subsidiary).

Question 7

A Tax Consultant Ltd
Address

Ms Florence Maguire
Cookstown
Co. Tyrone
Northern Ireland

Re: Irish Tax Considerations

Dear Florence,

I refer to the above matter and to our recent telephone conversation.

I note that you wished me to set out the Irish tax considerations of your operations in Ireland as well as your Irish tax compliance obligations.

Scope of Irish Tax

VAT

For VAT purposes, you have a fixed place of establishment in Northern Ireland. However you also carry out sales in Ireland at the various market fares. As a 'non-established' trader you have a 'nil' threshold in respect of the sales of goods in Ireland.

You are therefore obliged to register for, charge, and account for Irish VAT in respect of the sale of your products in Ireland.

However since your goods consist of cheese, the VAT rate will be zero percent. Accordingly, you should mostly be filing nil returns (unless you have some deductible VAT which you incurred in Ireland) to reclaim.

Strictly speaking, the transport of the cheese across the border from Northern Ireland to the Republic is also an intra-community acquisition, in respect of which you will account for on your period VAT 3 return in the E1 and E2 boxes.

Income Tax

You are sole trader, in Northern Ireland. You make sales in the Republic. Under Irish domestic tax law you would therefore be obliged to account for Irish tax in respect of the income earned from the Irish sales.

However, ultimately, whether you are obliged to account for tax in Ireland will depend on whether you are considered to have a Permanent Establishment (PE) in Ireland.

PE is an international tax law concept.

For a PE to exist, there must be present a fixed place of business. In a Canadian tax case, Toronto

Blues, it was held that locker rooms and stadiums were not a PE of a sports team, because none of the core activities of the business (buying/selling players, etc.) were conducted there. In the Societe Touristika case, a German company based in Munich was held not to have a PE in France simply because it occasionally had access to the offices of an unassociated travel agent in Paris.

The courts have emphasised that there must be permanent place available to the business. In R v Dudney, the court held that an American contractor who provided training to clients on site in Canada did not have a PE in Canada despite the fact that in one year he had spent 300 days there (and 80 days the next year). The Court placed emphasis on the fact that while the Canadian Client provided the contractor with a desk and phone facilities, it (a) would move him about; (b) only gave him access during its normal business hours; and (c) only allowed him use the phone in respect of its contract with him. Therefore it was held that Dudney did not have a fixed place of business.

The issue of a fixed place of business is important as since sales arise, it would not be possible to argue that the activity is only preparatory or auxiliary.

If no PE is held to exist, then your Irish sales are only taxable in the UK.

If an Irish PE is held to exist then your Irish sales are taxable in Ireland, and also in the UK. However, the UK should grant you a credit for tax paid in Ireland in respect of those sales so as to eliminate double taxation.

On balance, following Dudney I would form the view that you don't have a PE in Ireland, even with the extended stay in Donegal in December of 23 days. However the situation is far from doubt, and so in the circumstances I would suggest that you seek a ruling from the Irish Revenue Commissioners. In the event that the ruling is that you have an Irish PE, and you dispute this then you can seek that the matter be resolved through the Mutual Agreement Procedure set out in Article 25 of the Treaty

<u>Residence</u>

Question 1 above sets out Irish residence rules and exposure to tax for non-domiciled individuals.

Section 818 TCA 1997 defines residence.

A person is deemed to be resident in Ireland for a year of assessment if either:

i) they are present in the State for 183 days or more in a calendar year; or

ii) they are present in the State for 280 days or more in aggregate for the current year and the prior year (subject to the condition that they will not be resident for a year in which they have not been present for a minimum of 30 days).

Present in the State for a day means being present in the State for any period of time during a day. The prior 'midnight' rule having been abolished.

Section 820 TCA 1997 defines ordinary residence. A person shall be ordinary resident in Ireland if they were resident in Ireland in the prior three years of assessment. Once a person obtains ordinary resident status they will retain that status until they have been non-resident for three successive years (and then they would become non-ordinary resident in the fourth year).

Since you and Richard regularly visit Ireland they should keep an accurate count of their days to ensure that they don't become Irish resident.

If you exceed the days, and become Irish resident, then you will be Dual Residence in Ireland and the UK.

In such a situation residence is decided by the tie breaker provisions contained in Article 4 of the DTA.

The result would be that you would be considered UK resident and not Irish resident because your permanent home is the UK (it is also the place of your nationality and centre of vital interests).

Compliance

VAT3 returns every two month.

Annual return of trading details every year.

Income tax

If you have a PE, then you would be a chargeable person and would have to file an annual form 11 income tax return.

PAYE if Richard works in Ireland more than 60 days in the year, application to revenue in 21 days.