KEEP; Tax Appeals Commission remarks on expert evidence; gig economy workers

In this month's roundtable the updating of Ireland's share option scheme for SMEs, KEEP, to make its use more attractive for companies and employees, is examined as are the latest determinations of the Tax Appeals Commission including remarks on the usefulness of some expert opinion for its determinations. The functioning of the updated Revenue Compliance interventions also feature as do recent tax cases in the UK and Irish Courts that centre around the status of so-called 'gig' economy workers.

Share options

Following approval by the European Commission, updates to Ireland's KEEP regime have recently commenced. Can you outline the changes and their implications for SMEs and employees utilising the share option scheme?

Sarah Conry, Director, Global Employer Services, Deloitte and Niall Dunleavy, Senior Manager, Global Employer Services, Deloitte

The recently commenced changes to KEEP include:

- The extension of KEEP from the end of 2023 to the end of 2025.
- To allow shares that are acquired on foot of a KEEP option and that are subsequently redeemed, repaid or purchased by the company to qualify for KEEP in certain circumstances.
- An increased limit allowing for €6m of unexercised KEEP options (up from €3m).
- Changes to the types of shares that qualify for KEEP, allowing existing rather than newly issued shares to be used.


Sarah Conry


Niall Dunleavy

The introduction of KEEP was heralded as a mechanism to help SMEs retain and reward staff, but the KEEP legislation has presented a number of difficulties in operating the scheme effectively which has put SMEs on the backfoot when competing in the labour market.

Whilst the above changes will be welcomed by companies who can operate KEEP, the continued complexity of KEEP means that the changes may not actually increase the uptake of KEEP.

The November Roundtable Panel consisted of:
Sarah Conry, Director, Global Employer Services, Deloitte; Niall Dunleavy, Senior Manager, Global Employer Services, Deloitte; Lynn Cramer, Partner, Maples Group; Pat O'Brien – Senior Consultant, Employment Taxes, BDO; Edwina Enright, Assistant Manager, Corporation Tax, Deloitte; Fiona McLafferty, Managing Director, Tax Controversy, Deloitte; Tatiana Kelly, Senior Manager, Tax Policy & Technical, Deloitte.

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For example, it is difficult to see the new buy-back provisions having a real impact due to the 5-year holding requirement which would mean an employee would have to exercise their option, paying market value on the grant date for the shares, and hold for 5 years to avail of the buy-back relief. In the UK EMI scheme, the holding period commences from the date of grant of the option which is a more workable solution. Other challenges also remain in such as the definition of a holding company for KEEP and the lack of a safe harbour or Revenue guidance regarding the valuation of shares. We welcome the announcement of a public consultation on share-based remuneration at a time when companies need to offer competitive remuneration packages to attract and retain talent in a challenging global talent market.

Lynn Cramer, Partner, Maples Group: KEEP Scheme

Defining a staff incentive strategy is an important activity for any business, but particularly for SMEs in start-up or early growth phase. In response to stakeholder feedback, the Key Employee Engagement Programme (KEEP) was introduced in 2018. KEEP is a tax efficient share-based remuneration scheme for SMEs and start-up businesses which is designed to support and incentivise those businesses in their effort to attract and retain key employees. SMEs were traditionally at a disadvantage when hiring skilled workers as they have had to compete with salaries and benefits offered by larger companies and KEEP has been seen as a welcome means of tackling this issue.


Lynn Cramer

"Employees and directors can face difficulties in funding the tax liability where they do not immediately dispose of the shares received on exercise of the option. Under the KEEP regime, there is no tax charge when the share options are exercised."

Under general tax principles, where an employee or director exercises a share option, they are subject to income tax on the difference between the market value of the shares acquired and any price paid for those shares. Employees and directors can face difficulties in funding the tax liability where they do not immediately dispose of the shares received on exercise of the option. Under the KEEP regime, there is no tax charge when the share options are exercised. A capital gains tax liability will arise when the shares are actually disposed of. This provides the individual with a significant liquidity advantage in that it defers taxation until the time of share sale at which point, they can fund their tax liability using the proceeds of sale.

"What isn't entirely clear is whether a scheme which was implemented in 2021 and which complied with the proposed amendments set out in Finance Act 2019 is considered compliant if those amendments are only introduced from 1 January 2023."

Enhancements to the Scheme

While the KEEP scheme was broadly welcomed on introduction, stakeholders and practitioners have continued to liaise with Irish Revenue and the Department of Finance to offer feedback on practical and technical issues with the scheme. As a result of that ongoing feedback process, KEEP was amended most recently in the Finance Act 2022. Certain of those amendments took effect on 1 January 2023 while others were subject to European Commission State Aid approval and a Ministerial Commencement Order. Those amendments were commenced on 20 November 2023 and offer additional enhancements to the KEEP regime.

Extension of the Scheme

The first change implemented allows for a time extension beyond the end of 2023 when the scheme was due to expire. KEEP is now available for qualifying share options granted before 31 December 2025.

Increase in Market Value Limit

There are a number of conditions which are required to bet met in order for a scheme to qualify for KEEP. Prior to the 2023 commencement order, one of those conditions was that the total market value of issued but unexercised qualifying share options was limited to €3 million. That limit has now been increased to €6 million giving SMEs an opportunity to share more value with employees.

Type of Shares

Another of the original conditions required to be met in order for KEEP to apply to share options was that the shares over which the KEEP options are granted were required to be "new" ordinary fully paid-up shares which required a new issuance before any additional grant of KEEP options. That administrative burden has now been eased that shares no longer need to be "new" and existing fully paid-up shares can now qualify for the regime.

Share Buyback

The commencement order also confirms the ability of a KEEP option holder to access capital gains tax treatment where the company itself redeems, repays or repurchases the KEEP shares. That allows for a more immediate return to the employee whereas otherwise they would have to wait for an opportunity to sell to a third party on the open market.

Date of Application and Potential Confusion for Companies

It is important to note that the commencement order specifies 20 November 2023 as the date on which the enhancements set out above come into effect. In addition to the enhancements mentioned above, there are a number of further amendments being made to the KEEP regime through the Finance (No.2) Act 2023 (the "2023 Act"). Those amendments were originally included in Section 11 of Finance Act 2019 subject to commencement order but Section 11 of Finance Act 2019 is repealed by Section 14 of the 2023 Act and those amendments are replicated and introduced directly in the 2023 Act with effect from 1 January 2023.

The approach to commencement for the two different sets of provisions contained in the 2023 Act has the capacity to cause some confusion for taxpayers. What isn't entirely clear is whether a scheme which was implemented in 2021 and which complied with the proposed amendments set out in Finance Act 2019 is considered compliant if those amendments are only introduced from 1 January 2023.

Pat O'Brien – Senior Consultant, Employment Taxes, BDO: The Ministerial order commencing a number of provisions contained in S.16 of the Finance Act 2022 was signed on 20 November. These provide for a number of key changes to the Key Employee Engagement Programme ('KEEP') following approval by the European Commission under state aid rules.


Pat O'Brien

The amendments provide for the following:

- The extension of the scheme to the end of 2025. The scheme was due to terminate at the end of 2023.
- Shares acquired through company buyback of shares can now qualify for KEEP.
- A change that will permit existing shares to qualify for KEEP (previously only new ordinary fully paid up shares could qualify)
- An increase in the limit for the total market value of issued but unexercised qualifying share options from €3 million to €6 million.

KEEP is a tax efficient share option scheme designed to facilitate the use of share based remuneration by unquoted SME companies to attract key employees. Employees who exercise KEEP options are exempt from Income Tax, USC and PRSI on any gain arising on the acquisition of the shares. Capital Gains Tax is only paid when the shares are disposed of.

"In many cases, an internal market such as a company buyback, will be the only mechanism that allows participating employees to cash in on their shareholding in unlisted SMEs."

The extension of the sunset date for the scheme by a further two years will give certainty for companies considering granting tax efficient KEEP share options. The remaining changes will help to provide liquidity in the shares by permitting existing (as opposed to newly issued) shares to be used for the scheme. A related change will allow KEEP shares to qualify for CGT treatment on a company buyback of shares. Finally, the total number of KEEP share options that can be granted has doubled from €3 million to €6 million.

In many cases, an internal market such as a company buyback, will be the only mechanism that allows participating employees to cash in on their shareholding in unlisted SMEs. The

recent changes will facilitate this and will be welcomed both by companies currently operating KEEP schemes, as well as by those that are considering introducing one.

Tax Appeals Commission - latest Judgements

Can you comment on the most noteworthy determinations from the Tax Appeals Commission made so far in the second half of 2023?

Fiona McLafferty, Managing Director, Tax Controversy, Deloitte: In the period from July 2023 to date, the Tax Appeals Commission (TAC) published 58 determinations. The majority of the determinations are document based appeals relating to the recurring theme of statutory time-limits.


Fiona McLafferty

In terms of noteworthy, in Determination 128TACD2023 it was determined that the taxpayer was entitled to a deduction under section 81 of the Taxes Consolidation Act, 1997 for foreign royalty withholding tax as an expense wholly and exclusively expended for the purposes of the trade in circumstances where the taxpayer was not entitled to avail of relief from double taxation under Schedule 24. It was remarked in the determination that the expert accounting evidence did not assist in determining the availability or otherwise of section 81.

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In Determination 108TACD2023, expert valuation evidence was proffered by the taxpayer and the Revenue Commissioners on the market value of trees growing on woodland to ascertain if an amount should be excluded from the capital gains computation on the disposal of the woodland. The TAC found that the expert witness for the Revenue Commissioners was not particularly objective or impartial in his approach and that the evidence was of 'little persuasive value'. In contrast, the TAC found the approach and evidence of the expert witnesses for the taxpayer to be reasoned and objective.

In Determination 147TACD2023, there was a preliminary issue of whether the taxpayer was entitled to introduce a ground of appeal which had not been specified in the Notice of Appeal. The taxpayer maintained that the assessment was void as it was issued outside the four-year time-limit. The Revenue Commissioners objected on the basis that section 949(I) of the Taxes Consolidation Act, 1997 does not permit reliance on a ground of appeal not specified in the Notice of Appeal unless the TAC are satisfied that the ground could not reasonably have been stated in the notice. The TAC concluded that the taxpayer could not rely on the new ground of appeal.

Tax Compliance

The Revenue Commissioners' updated Code of Practice for Revenue Compliance Interventions has been in effect since May 1st 2022. Referencing your own firm's advisory and compliance experience, can you comment on how the new system has been functioning to date?

Edwina Enright, Assistant Manager, Corporation Tax, Deloitte: The updated Code of Practice for Revenue Compliance Inventions has brought clear guidelines to a number of areas:

1. What to expect where there is non-conformity to best practice,
2. The process for the correction of mistakes/errors,
3. The steps/actions a taxpayer may take where action is taken against them.


Edwina Enright

The new code is structured in a 3-tier system whereby the seriousness of the intervention and penalties increase as the levels progress.

Level 1 (Green) deals with self-corrections, unprompted disclosures and other minor offences. Under the new code, Revenue requires advance notification of self-corrections, outlining the following items:

1. Schedule of the changes,
2. Total additional tax due/repayable,
3. Interest calculation up to the date of filing where additional tax is due,
4. Copy of the updated tax computation.

Taxpayers must also pay any additional tax and interest on filing of the amended return for the self-correction to be deemed valid.

"The new Code is not the only change we have seen in the Revenue controversy space, as Revenue have implemented data analytics to identify inconsistencies, fraud and increased levels of risk. From a practitioner's perspective, these changes have led to a notable increase in activity by Revenue, particularly in the form of Level 1's."

Level 2 (Amber) subjects' taxpayers to a risk review or audit. Taxpayers may avail of the prompted disclosure pathway, with potential penalties ranging from 10% to 100% based on percentage underpayment and number of prior offences.

Level 3 (Red), the highest level of interventions subjects' taxpayers to an audit for suspected tax evasion and fraud. Penalties ranging from 20% to 100% may be imposed, coupled with potential publication and criminal prosecution.

Taxpayers at Level 2 and Level 3; receive 28-days' notice of the intervention, however, this may be extended to 60-days where a notice to submit a qualifying disclosure is submitted within the first 21-days. For a purpose of a qualifying prompted disclosure, the taxpayer must consider the entire tax head under review and not just the specific topic/area which has given rise to the audit/review. Where the entire tax head is not reviewed and further inconsistencies are identified by Revenue the prompted disclosure may be deemed non-qualifying.

The new rules provide Revenue with more scope to review taxpayers' positions and seek the collection of any taxes owing. The new Code is not the only change we have seen in the Revenue controversy space, as Revenue have implemented data analytics to identify inconsistencies, fraud and increased levels of risk. From a practitioner's perspective, these changes have led to a notable increase in activity by Revenue, particularly in the form of Level 1's. Revenue are utilising Level 1's to notify taxpayers of inconsistencies and to gather facts before determining to pursue a Level 2/3 intervention.

Overall, the new Code highlights the burden of responsibility and the importance of on-going self-reviews. Where underpayments/errors are identified, the Code incentivises taxpayers to utilise self-corrections or unprompted disclosures to correct their position, however, both options are labour intensive. As a final takeaway, Revenue have made it clear that inaction is not an option, and they retain the right to escalate an issue to an increased level intervention where they are not satisfied.

Taxation of 'gig economy' workers

Independent Workers Union of Great Britain v. Central Arbitration Committee [2023] UKSC 43 & Revenue Commissioners v. Karshan (Midlands) Ltd T/A Domino's Pizza [2023] IESC 24: Can you outline the similarities and differences in methods of approach in both countries and the potential impact on future Irish gig economy cases?

Tatiana Kelly, Senior Manager, Tax Policy & Technical, Deloitte: Both cases concern workers in the gig economy, yet the Supreme Courts in Ireland and UK have reached different outcomes regarding their working status. While the Irish Court held that delivery drivers for Domino's Pizza were employees under the Irish tax legislation and not contractors as claimed by Domino, the UK Court held that the Deliveroo delivery riders were not in an employment relationship for the purposes of Art. 11 European Convention on Human Rights. To note, Deliveroo riders in UK were seeking recognition of riders as "workers" which is an intermediate employment status for many people whose working relationship has some features of an independent contractor and some features of an employee. This worker status in the UK confers some limited employment protections on the worker. In Ireland, an individual is either an employee with full employment law protections or a contractor with no employment law protections, other than equality law.

In terms of similarities, both Courts repeatedly stated that they will not be bound by the wording of the contract alone. The contract should only be a starting point in any analysis of the relationship between the parties. Therefore, we always need to look at the facts and circumstances to see how the relationship actually operates and whether the contractual provisions genuinely reflect the true relationship.


Tatiana Kelly

As for differences, the UK Court relied on three key indicators to determine the status of individuals:

- power to appoint a substitute;
- right of termination; and
- other employment.

The UK Court found that the contract between the riders and Deliveroo gave riders a virtually unfettered right to appoint a substitute to take on their jobs. This right, on its face, according to the UK Court, was "totally inconsistent with the existence of an obligation to provide personal service which is essential to the existence of an employment relationship within article 11". Furthermore, Deliveroo did not terminate riders' contracts for failing to accept a certain percentage of orders or failing to make themselves sufficiently available and Deliveroo did not object to riders working simultaneously for Deliveroo's competitors.

In the Domino's drivers' contracts, by contrast, the substitution clause did not involve an unqualified power to delegate the work contracted for. The right of substitution was very limited and was seen as more akin to swapping shifts between co-workers. Therefore, in Ireland, Murray J. decided that the question of whether a contract is one "of service" (i.e. an employment relationship) or "for service" (i.e. an independent contractor relationship) should be resolved by reference to the following five questions:

1. Does the contract involve the exchange of wage or other remuneration for work?
2. If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?
3. If so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement?
4. If these three requirements are met the decision maker must then determine whether the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.
5. Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing.

The Irish Court concluded that Revenue was entitled to conclude that the drivers were employees, that the evidence disclosed close control by Karshan over the drivers when at work and that the drivers were obliged to attend for work when they agreed to be rostered.

"UK case law is very often quoted in arguments as persuasive before Irish courts, so we may see the UK ruling and its arguments to potentially be referred to in later Irish gig economy cases by taxpayers or Revenue."

Also, of a particular interest was a comment by Murray J on para. 284 that "… Revenue must account for any income tax already paid by Karshan's drivers [in their capacity as self-employed] and, if necessary, abate the assessments to take account of such payments".

UK case law is very often quoted in arguments as persuasive before Irish courts, so we may see the UK ruling and its arguments to potentially be referred to in later Irish gig economy cases by taxpayers or Revenue. Those who regularly use contractors in their business in Ireland should review and consider the Irish Supreme Court decision from a risk evaluation and risk mitigation perspective, as recommended by Revenue in its Press Release on the case. Both cases are facts and circumstances specific.