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Abstract

There has been extensive criticism of the use of US Bureau of Economic Analysis (BEA) to estimate effective tax rates for US companies operating in Ireland. The BEA data uses place of incorporation as the location of a firm. In contrast Revenue Commissioners data, excludes firms that are incorporated in Ireland but not resident for corporate tax purposes, in estimates of aggregate profits. Omitting profits of firms that are not tax resident (bi-located), reduces measures of aggregate profits and measures of effective tax rates. This exclusion is important. Just two firms incorporated in Ireland but regarded as not resident for corporate tax purposes (subsidiaries of Apple and Google), reported pre tax profits of €22.23 billion in 2011. This paper shows that on several objective criteria these firms are located in Ireland and hence it is reasonable to include their profits in measures of aggregate corporate profits in Ireland.

The possibility of bi-location is an important feature of the tax minimization strategies of multinational companies operating in the digital economy, and in particular for those firms using Ireland as a centre for EMEA (Europe Middle East and Africa) operations.

Low corporate tax payments and tax strategies pursued by multinational companies have attracted considerable criticism. As a result the OECD has developed proposals that are likely to result in change to the corporate tax regime and foreign direct investment in Ireland. The net effect of proposals to reform corporation tax regimes is to underline the risks involved in an industrial policy that is over reliant on tax concessions and low corporation tax rates.

Key Words

Residence for corporate tax purposes; Irish tax regime; corporate tax reform;

JEL: H25, K23, F23, L 52, O25

Corporation Tax Residence: Is Ireland Exceptional ?

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There has been recent extensive criticism of the use of US Bureau of Economic Analysis (BEA) data to estimate effective tax rates for US companies operating in Ireland (Stewart, 2014)¹. The Bureau of Economic Analysis data uses place of incorporation as the location of a firm². In contrast Revenue Commissioners data³ excludes from estimates of aggregate profits, firms that are not tax resident in Ireland for corporate tax purposes, for example subsidiaries of Apple and Google. These firms are deemed not to be tax resident, although they are incorporated in Ireland, are an integral part of group operations in Ireland and may have a substantial operating presence here, on the basis that they fail the test to determine residency and that is “where the company was managed and controlled” (Revenue Commissioners, 2013, p. 1). Omitting profits of firms that are not tax resident, reduces measures of aggregate profits and hence measures of effective tax rates. This exclusion is important. Two of many subsidiaries incorporated in Ireland but not regarded as resident for corporate tax purposes (Apple Sales International and Google Ireland Holdings), reported pre-tax profits of €22.23 billion in 2011⁴.

1. Where is a company Located ?

The place of incorporation is widely used to determine location. For example:

(1). The US and some other countries use place of incorporation to determine residence for corporate tax purposes, (Permanent Subcommittee on Investigations, 2013, p. 23; OECD 2010, Commentary on Article 4 Concerning the Definition of a Resident par. 31). Hence as far as the US is concerned companies are taxed where they are incorporated. Ireland also generally uses place

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¹ The Minister Finance stated (Dail Debates, 20 February, 2014:- “The extremely low effective rate figures that have been quoted over the past week and attributed to Ireland are based on a flawed premise. The figures are estimated by dividing the amount of Irish tax paid by a total profit figure that includes substantial profits made by companies that are not tax resident in Ireland. They are running together the profits earned by group companies in Ireland and in other jurisdictions and incorrectly suggesting that Irish tax does or should apply to both”. See also Department of Finance (2014). MacSuibhne (2014) provides a useful critique and summary of some of the problems and flaws with this latter analysis.

² US Direct Investment abroad is defined as “the ownership or control, directly or indirectly, by one U.S. resident of 10 percent or more of the voting securities of an incorporated foreign business enterprise or the equivalent interest in an unincorporated foreign business enterprise”. Source:- http://www.bea.gov/scb/account_articles/international/. The specific BEA data used in estimating effective tax rates (Stewart, 2014) is defined as majority owned non-bank foreign affiliates with income or sales greater than \$25 million.

³ Revenue Commissioners, Statistical Report 2012, Table CTS1.

⁴ PSI, 2013, p. 21 and Vanessa Holder, Financial Times, 10th October, 2013.

of incorporation to determine residency for corporate tax purposes (Revenue Commissioners, 2013, p. 2), a very important exception being foreign owned subsidiaries where different tests are applied (Revenue Commissioners, 2013, p. 3).

(2). In the case of ‘special purpose entities’ which have no employees and no non-financial assets (“brass plates”) place of incorporation is used by statistical agencies as the test of location and not where a firm is “managed and controlled”. Eurostat rules state (Eurostat, 2013, p. 53), “the SPE residence is determined according to the economic territory under whose laws the SPE is incorporated or registered”. The Revenue Commissioners follow a similar rule. A sample of 82 of 725 Financial Vehicle Corporations (the European Central Bank term for SPEs,) which were incorporated in Ireland, all reported on their Irish corporate tax liabilities (Stewart, 2013c). Another study of 46 treasury management firms, found that 24 had no employees and no non-financial assets, but were incorporated in Ireland and hence reported on their Irish corporate tax liabilities (Stewart, 2008).

(3). The place of incorporation is of considerable legal and other significance. In the case of Eurofoods, a treasury management subsidiary of Parmalat incorporated in Ireland, there was a dispute as to whether Eurofoods should be liquidated in Ireland or Italy. The European Court of Justice ruled that the registered office, (the place of incorporation) was the “centre of main interests”, and where the firm should be liquidated even though this subsidiary had no employees and no fixed assets (Judgement of the Court of Justice in Case C-34/04 Eurofood IFSC 2 May 2006; see also Stewart, 2008, pp. 203-204).

This paper argues that on several objective criteria firms that are incorporated in Ireland but not resident for corporate tax purposes, are located in Ireland, and that this tax treatment by the Revenue Commissioners is exceptional.

In recent years several countries have sought to prove the existence of a corporate tax residence or permanent establishment of multinational company (MNC) subsidiaries and hence liability to corporation tax. PwC report from a survey of 200 companies, 88% of which were MNC’s, located in 12 different countries, an increasing number of disputes with tax authorities. More than one third of respondents reported a tax audit revolving around corporate tax residence (PwC, 2013, p.8). PwC also report “a marked increase in HMRC’s challenges of corporate tax residence in recent years” (PwC, 2012, p. 1)

There is however, no evidence that Revenue has contested the status of not ‘being managed or controlled’ in Ireland or contested the absence of a ‘permanent establishment’ for tax purposes of any MNC subsidiary⁵.

The reason for this is that the taxing authorities in other countries have considerable motivation to prove the existence of corporate tax residence and to contest any claim that firms do not have a taxable residence, in order to increase corporate tax receipts.

⁵ Only one MNC subsidiary was identified in tax settlement lists published by the Revenue Commissioners for the 10 year period 2004-2013 (Air Contractors (Ireland) Ltd.), Defaulters List, Revenue Commissioners, Q2 2006. These lists include penalties “determined by a court”. A possible reason for this is that where “a qualifying disclosure of tax defaults” is made, settlements or penalty determinations are not published. See Revenue Commissioners, Defaulters List, various issues available at <http://www.revenue.ie/en/press/defaulters/index.html>.

However in terms of locational choice there are considerable advantages to not recognizing some subsidiaries of multinational companies incorporated in Ireland as being resident for corporate tax purposes (bi-located)⁶. This is because bi-location is a central feature of the tax minimization strategies of some multinational companies. It enables profits to be centralized in Ireland via an EMEA type structure, but taxed in countries such as Bermuda or the Cayman Islands where the corporation tax rate is zero. The possibility of bi-location in Ireland is thus a major factor in determining location for some multinational companies, in particular in relation to locating EMEA (Europe Middle East and Africa) sales and service operations⁷.

This aspect of Ireland's tax regime (incorporated in Ireland but not corporate tax resident in Ireland) raises issues about industrial strategy discussed later.

For many purposes (corporate taxation, corporate law and production of economic statistics) the place of incorporation is regarded as the place of location of a firm. Applying the same logic, where a firm is incorporated determines location, to US subsidiaries incorporated in Ireland, gives a more meaningful measure of their economic impact and their profits earned in Ireland.

1. Location for Corporate Tax Purposes

In general the two rules, place of incorporation and where a firm is 'managed and controlled', result in the same decision as to where a firm is resident for corporate tax purposes. But there are important exceptions. A central feature of the tax strategy of Apple and other US subsidiaries

⁶ Some subsidiaries of multinational companies may also have benefitted from other favourable Revenue decisions. The Large Cases Division (L.C.D.) which deals with the affairs of subsidiaries of multinational companies has been criticised by the Comptroller and Auditor General (Comptroller and Auditor General, 2013, par. 27.21), because the level of interest and penalties applied was significantly lower for L.C.D. than for other Revenue units examined. Interest and penalties can be applied for a number of reasons including failure to file a return (see:- <http://www.revenue.ie/en/press/2014/pr-140314-defaulters.html>). Interest and penalties were applied to fewer large cases by L.C.D. and represented only 6% of the yield compared to 21% for audits at regional level (Comptroller and Auditor General, 2013, par. 27.21). In five of 28 cases examined, penalties could have been applied but were not (par. 27.27), for a further seven cases "penalties applied were lower than what the documentation on the files indicated should have been charged" (par. 27.29). One of three case studies examined involved subsidiaries of a multinational company, which even though in operation in Ireland for a number of years had not paid corporation tax. In this case "no penalties were applied. The settlement details were not published" (par. 27.43). One implications of not charging penalties, is that the settlement details are not published in the quarterly Defaulters List.

⁷ Apart from the well documented cases of Apple (PSI, 2013) and Google (Public Accounts Committee, 2013), Microsoft also has similar structures. The Vice President for tax stated:- "While the primary objective of our regional structure is to improve our competitiveness and efficiency in each of the three regions, we evaluated available tax incentives when deciding where to locate the ROCs [Regional Operating Centre]." (Sample, 2012, p. 2/3) and "The profits earned from the EMEA software business, after appropriate taxable payments to the U.S. group for technology rights and other support, are earned primarily by the Ireland ROC group. (Sample, 2012, p. 3). A subsidiary of Microsoft (MIR), described as being "located in Ireland" reported \$4.3 billion in profit in 2011, and a wholly owned subsidiary of MIR, Microsoft Ireland Operations Limited (MIOL) earned a further \$2.2 billion in 2011. MIR is an Irish incorporated subsidiary of Microsoft CFC "which operates in Ireland but is headquartered in Bermuda (PSI, 2012, p. 22).

operating in Ireland is that although incorporated in Ireland they are not regarded as being located (resident) in Ireland for corporate tax purposes⁸.

In Ireland Revenue Commissioners' guidelines state that "a company which is incorporated in the State is generally treated as resident in the State for tax purposes", but there are major exceptions which apply to companies controlled in Ireland but resident in the EU or in a country with a double tax treaty with Ireland (Revenue Commissioners, 2013, p. 3). Double Taxation Treaties are bilateral treaties between two countries and are designed for "the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains" (Avi-Yonah 2009, p 99). They have been described "as the most important element in the international tax regime" (Avi-Yonah 2009, p 99)⁹. In the case of MNC subsidiaries incorporated in Ireland, Revenue guidelines state that the principal test of residence of a company is the place where "the company was managed and controlled, subject to the Finance Act changes" (Revenue Commissioners, 2013, p. 1). The central management and control test is applied on "the basis of fact and precedent" (Revenue Commissioners, 2013, p. 1). It is thus determined on a case by case basis. This rule is similar to that used in the UK and is not contained in legislation but rather is derived from case law, as in *De Beers Consolidated Mines Ltd. V. Howe*, 1906, 5 T.C. 198 (Revenue Commissioners, 2013, p. 1) which found that a company is resident where "the central management and control actually abides". The 'management and control' rule may however be ambiguous (as demonstrated below in the case of the Apple subsidiary, ASI), for example Revenue Guidelines state "central management and control is not necessarily located where it appears to be located, for example where the board of directors holds its meetings" (Revenue Commissioners, 2013, p. 1). Revenue Commissioners guidelines also state that "since residence may now also be determined by reference to the place of incorporation a company can also be resident in more than one jurisdiction" (Revenue Commissioners, 2013, p.2).

Hence further rules are used to determine which country is entitled to tax the profits of an enterprise. The OECD Model Double Tax Treaty states (Article 7) that:-

"The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein" (OECD, 2003).

The taxation of branch plants in Ireland are an example of the use of 'permanent establishment' rules to determine liability for corporation tax (Dillon Eustace, 2008, p. 9), because a branch is deemed to be a 'permanent establishment' (PKF, 2012, p. 2), even though management is regulated where the firm is incorporated (Mason, Hayes and Curran, 2011, p. 11)¹⁰.

⁸ The OECD report, "Base Erosion and Profit Shifting", refers to "corporations operating in various countries" (OECD, 2013, p. 9) and the phrase 'operating in' is used in general discussion by the OECD to refer to the location of subsidiaries of multinational companies, see "OCED Guidelines for Multinational Companies, 2011", for example, p. 11.

⁹ Avi-Yonah (2009) gives a succinct and clear guide to double taxation treaties.

¹⁰ One implication for aggregate profits and effective tax rates is that branch profits and corporate tax payments are included in revenue data but omitted from BEA data, as profits are ascribed to the country of incorporation. This omission would reduce tax payments and profits in US BEA data, but not necessarily affect measures of effective tax rates. The use of branch plants appears to be of reduced significance for US owned firms. For US firms operating in Ireland the following branches in recent years for example, are either dormant or closed :- Cisco Systems Netherlands Holdings B.V.; Dell Products (Europe) BV, EMC (Benelux) BV SARL; IBM Global Services B.V.; Lotus Development B.V.; Microsoft International B.V and five other branches; Motorola

The rules relating to whether a 'permanent establishment' exists are very important in terms of international tax planning¹¹. They have evolved through time, are complex and have been subject to considerable criticism (OECD, 2013b, p. 19). The rules relating to a 'permanent establishment' include:-

1. The place of business must be fixed in the sense that it must be established at a distinct place with a certain degree of permanence (OECD, 2012, par. 2 C(5)-1);
2. A place of business "may also exist where no premises are available or required for carrying on the business of the enterprise and it simply has a certain amount of space at its disposal" (OECD, 2012, Par. 4 C(5)-2);
3. The place of business may be situated in the business facilities of another enterprise (OECD, 2012, Par. 4 C(5)-2);
4. A place of business may not be recognized as such where the place of business was maintained for less than six months. However the commentary also notes that a place of business could be a "permanent establishment even though it exists, in practice, only for a very short period of time because the nature of the business is such that it will only be carried on for that short period of time" (OECD, 2012, Par. 6 C(5)-5);
5. Where "intangible property such as patents, procedures and similar property, are let or leased to third parties through a fixed place of business maintained by an enterprise" will, in general, render the place of business a permanent establishment" (OECD, 2012, Par. 8 C(5)-7);
6. Those whose activities create a permanent establishment need not be employees but could be agents, or companies, and "need not have a place of business in, the State in which they act for the enterprise". (OECD, 2012, Par. 32 C(5)-18);
7. The existence of a subsidiary does not make that subsidiary a permanent establishment of the parent, even "though the trade or business carried on by the subsidiary company is managed by the parent company" (OECD, 2012, Par. 40 C(5)-23);
8. In relation to the operation of computer equipment, "the presence of personnel is not necessary to consider that an enterprise wholly or partly carries on its business at a location where no personnel are in fact required to carry on business at that location" (OECD, 2012, Par. 42.6 C(5)-26);

One implication of the very broad nature of these rules is that establishing the existence of a 'permanent establishment' requires a minimal presence in any country, such as Bermuda, Cayman Islands, etc. A 'permanent establishment' could consist of a box where certain documents are filed, and which has been at a fixed address for at least six months¹². The converse also applies and that is

BV; Silicon Valley Group B.V.; United Technologies Luxembourg S.A.R.L. Source: Companies Registration Office.

¹¹ See evidence of Head of Tax, Ernst and Young at the House of Commons Public Accounts Committee Oral Evidence (Q 193), 16th May 2013.

¹² Brookes (2013, p. 116) describes the permanent establishment of the Luxembourg subsidiaries of Pearson PLC as follows:- "a room above a sports shop, near Luxembourg's Central station" which could only be accessed through a "private main door, then up a dimly lit stairwell, where the international financing

that tax authorities may find it difficult to prove the existence of a permanent establishment and hence liability for corporation tax. The absence of a permanent establishment also results in the avoidance of VAT. The OECD (2014, p. 48, par. 144) comment “the mobility of users creates substantial challenges and risks in the context of the imposition of VAT”¹³.

As a result several countries have in recent years taken court cases to restrict these rules. Spanish courts have ruled that maintaining a local web site can trigger a permanent establishment and a taxable presence. This case involved a US firm (Dell) where Ireland was the location of its EMEA (Europe Middle East and Africa) sales¹⁴. The Spanish subsidiary of Dell Ireland, Dell Spain, functioned as an ‘online’ store with no employees or assets located in Spain and the server was located outside Spain. The basis for the court’s decision was that Dell Spain had the authority to conclude “binding contracts” (Martinez-Matosas and Calderon 2012a). This case follows an earlier case (Roche Vitamins Europe, Ltd), which confirmed a decision by the Spanish tax authorities relating to “the formal reallocation of added-value functions within a multinational Group” (Martinez-Matosas and Calderon, 2012b). Disputes between revenue authorities and companies in relation to the existence of a permanent establishment are widespread. A 2012 survey of over 200 firms operating across 13 different sectors and 12 countries most of which were located in the US and Europe, showed that 37% were subject to a tax audit involving the existence of a permanent establishments (PwC, 2012, p.8).

Because of controversy relating to tax minimization strategies¹⁵ the OECD has recommended various changes to the rules relating to international taxation, for example the definition of a permanent establishment “to prevent abuse” (OECD, 2013, p. 19).

3. The Apple Case

The tax strategy of Google and other firms follow from the ability to base group operations in Ireland and to incorporate one or more subsidiaries in Ireland which for corporate tax purposes are resident elsewhere, such as Bermuda or the Cayman Islands (Drucker, 2010). A different tax regime applies for other low tax regimes such as Luxembourg, which has been frequently described as a tax haven (Houlder, 2013, Higgins, 2013). In the case of Luxembourg, companies may remain incorporated in another country but be regarded as being domiciled in Luxembourg for Luxembourg tax purposes

activities of the one of the worlds leading financial publishers was announced by a piece of A3 paper listing eighteen companies, pinned to a tatty hardboard door of the sort that normally marks the entrance to a student bedsit”.

¹³ The OECD state in the context of Base Erosion Profit Switching (BEPS) “concerns are raised by situations in which taxable income can be artificially segregated from the activities that generate it, or in the case of VAT, situations in which no or an inappropriately low amount of tax is collected on remote digital supplies to exempt businesses or multi-location enterprises that are engaged in exempt activities” (OECD, 2014, par 119).

¹⁴ Dell state: “Ireland continues to be a key, strategic location for many of Dell's global and EMEA operations” and “Our innovation centre at Cherrywood, is responsible for a significant portion of Dell's Global and EMEA business in Sales, Services and Marketing with our employees providing an increasingly diverse range of specialist skills, including our new Cloud Engineering Centre of Excellence”, available at <http://www.irishjobs.ie/Recruiters/DELL-1618.aspx> and accessed 19th March 2014.

¹⁵ G8 Leaders Communique, June 18th, 2013, available at <http://www.whitehouse.gov/the-press-office/2013/06/18/g-8-leaders-communique> and G20 Leaders Declaration, available at <http://www.g20.utoronto.ca/summits/2013stpetersburg>.

because of the application of a test “the real seat principle” that is the place of central administration (Ogier Publications, 2013). There are some example of countries allowing companies to be incorporated but not tax resident, for example Gibraltar (Gibralteroffshore.com) and Cyprus (KPMG, 2014), both widely regarded as tax havens (Alderman, 2014, Morgenthau, 2012). However there are some restrictions on tax exemption status in these cases. For example in the case of Gibraltar, tax exemption will not apply to income remitted to Gibraltar (GibraltarOffshore.com).

In the case of Apple, management were asked by the Senate Permanent Subcommittee on Investigations (PSDI), if a subsidiary called Apple Operations International, which was incorporated in Ireland was “managed and controlled in the United States” (PSI, 2013, p. 23). Apple Operations International is the parent company of four Apple subsidiaries in Ireland, Apple Operations Europe, Apple Sales International, Apple Distribution International and Apple Retail Holdings Europe, as well as subsidiaries incorporated in other countries (PSI, 2013, p. 20).

Apple replied in writing:-

“Apple has not made a determination regarding the location of AOI’s [Apple Operations International] central management and control. Rather Apple has determined that AOI is not managed and controlled in Ireland based on the central management and control test under Irish law”¹⁶.

There are two key aspects to Apple’s tax minimization strategy:-

(1). Apple transferred profits to their Irish subsidiaries via royalties. The Senate Report states (p. 19) “Apple Operations Europe owns the intellectual property for goods sold in Europe, Middle East, Africa, India and Asia” and states (p. 25):

“The key roles played by ASI [Apple Sales International] and AOE [Apple Operations Europe] stem from the fact that they are parties to a research and development cost-sharing agreement with Apple Inc., which also gives them joint ownership of the economic right to Apples intellectual property overseas”.

In the recent case involving Apple and Australia it has been estimated that as a result of Apple’s tax minimization strategy, Australian \$7.2 billion (€5 billion) in earnings flowed from Australia to Ireland (Chenoweth, 2014).

¹⁶ However the PSI report (PSI, 2013, p. 24, footnote 101) notes in relation to a key Apple subsidiary which earned profits of \$22 billion in 2011, Apple Sales International (ASI):- “ASI is an operating company that files an Irish corporate tax return and pays Irish corporate income tax as required by Ireland. As we indicated in our response to Question 8(c) of our July 6, 2012 submission, ASI’s location for tax purposes is Ireland because ASI files a corporate tax return in Ireland.”

This statement is at variance with footnote 8 in ASI accounts for 2009 which state “the company is not tax resident in any jurisdiction”. Accounts for previous years show a reconciliation between tax due at the Irish corporate tax rate of 12.5% and the tax charge reported, which provides some evidence that at this time ASI considered itself resident for corporate tax purposes in Ireland. This change coincides with a change in auditor from KPMG to Ernst & Young.

(2). The Irish subsidiary of Apple contracts with a Chinese manufacturer (Foxconn) to assemble Apple products. The products are then shipped to other countries. While on route ownership is transferred to a local subsidiary at a substantial mark up – the product does not enter Ireland (PSI, 2013, p. 27).

The effects of this policy are illustrated in Table (1) which shows dramatic growth in pretax profits and falling effective tax rates (measured as the tax charge/ pretax profits) for ASI (Apple Sales International) for the period 2004-2011.

Table (1)

Profits and Taxes Paid for Apple Sales International (ASI) 2004-2011

Pre-Tax Profits	2004	2005	2006	2007	2008	2009	2010	2011
Pre-Tax profits in \$billions	\$0.268	\$0.725	\$1.18	\$1.844	\$3.127	\$4.794	\$12.0	\$22.0
Tax charge in \$millions	\$2.1	\$3.9	\$6.5	\$8.9	\$14.9	\$3.653	\$7.0	10.0
Effective Tax Rate (T/P) %	0.78	0.54	0.55	0.482	0.476	0.08	0.06	0.05

Source: - PSI, (2013), p. 21, and Apple Sales International Accounts filed with the Australian Securities and Investment Commission.

Three of five Apple subsidiaries incorporated in Ireland were regarded for corporate tax purposes as not being resident in Ireland (PSI, 2013, p. 20), even though their auditors are located in Ireland, their registered office is in Ireland and books of account are located in Ireland

One of the three Apple subsidiaries claiming not to be corporate tax resident in Ireland, Apple Operations Europe (AOE), employs nearly 2500 in Cork and has therefore substantial management structures in place. Another subsidiary Apple Sales International (ASI), was assigned 250 employees in 2012, and in prior years used and paid for employees of its immediate parent located in Cork, Apple Operations Europe¹⁷.

Thus both subsidiaries would appear to meet the test of ‘permanent establishment’ in Ireland for corporate tax purposes. The fact that they are not so regarded gives these and other ‘bi-located’ firms a very valuable tax advantage. It is also the case that while both subsidiaries are treated as not being resident for corporate tax purposes, they are resident and liable to pay employer’s PRSI, and are subject to the residency rules relating to VAT payments¹⁸. The Minister for Finance announced a change in the Irish tax code in the Budget (2013) so that non residence in any jurisdiction that is

¹⁷ Accounts of Apple Sales International for 2009, footnote 7 state:- “The company had no direct employees during the year. The company is cross-charged by its immediate parent company, Apple Operations Europe, for time spent by its immediate parent company on the company’s activity”.

¹⁸ Accounts of Apple Sales International lodged with the Australian Securities and Investment Commission show value added tax payable for each of the years 2006-2009.

'statelessness' for corporate tax purposes would no longer be allowed¹⁹, but the same non taxation of corporate profits can be achieved, as in the Google case, by declaring residence for corporate tax purposes in a state other than Ireland, for example, Bermuda.

4. The case of Google and other bi- located companies

Google Ireland is the main operating subsidiary of Google in Ireland. Google Ireland is owned by Google Ireland Holdings which received €8.8 billion in royalties from Google Ireland Ltd. in 2012 (Houlder, 2013b). This subsidiary is incorporated in Ireland but regarded as being resident for tax purposes in Bermuda.

As in the Apple case, there are good grounds for arguing that this firm is more accurately described as being located in Ireland: It is incorporated in Ireland and hence the auditors must be located in Ireland; the registered office is in Ireland hence the books of account are located in Ireland.

Filings with Companies Registration Office state that the company is located in Bermuda at Clarendon House, 2 Church Street Bermuda (Microsoft and Synopsys are also located there). This is the address of a legal firm called Conyers, Dill and Pearman. This firm specialises in company secretarial and other work. Its web site lists in excess of 80 employees. Any work done for Google is performed as an agent²⁰. There are no Google employees.

The address of the company secretary is in California.

These facts are strong grounds for considering that Google Ireland Holdings is located for corporate tax purposes in Ireland.

Table (2) shows similar data for bi-located subsidiaries incorporated in Ireland. This is not a comprehensive list²¹.

¹⁹ In the budget statement (15th October 2013) the Minister for Finance stated "I will be bringing forward a change in the Finance Bill to ensure that Irish registered companies cannot be 'stateless' in terms of their place of residency" (Budget Statement 2014, p. 5). This was enacted in the Finance (no. 2) Act, 2013, section 39. This change could be introduced because it applied to companies incorporated in Ireland.

²⁰ Article 5, section (6) of the OECD model treaty states that "An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business". This clause is repeated in the Double Tax Treaty of Ireland with Australia, the UK, U.S. and other countries. Source: Revenue Commissioners, available at:- <http://www.revenue.ie/en/practitioner/law/tax-treaties.html>.

²¹ In answer to a Parliamentary Question (30th May 2013) the Minister for Finance stated in relation to companies that are registered in Ireland but not resident for corporate tax purposes, that the Revenue Commissioners would "seek confirmation from a company as to how it is structured and would verify that all relevant corporation tax rules have been correctly applied". Hence it is surprising that the Minister for Finance stated two days earlier (May 28th) that the numbers of companies registered in Ireland but not resident for corporate tax purposes and their names "are not available as they are not separately compiled" (Minister for Finance written answers 28th May 2013).

Table (2)
Some Features of subsidiaries that are Bi-located¹

	Location	Location of Secretary	Additional stated Location of accounting records	Other tax payments	Employees
Abbott Laboratories Vascular Enterprises Ltd.	Bermuda	Illinois, U.S.	Abbot Park, Illinois, U.S.A.	Refers to VAT payments; Refers to social welfare costs	228
McAfee Ireland Holdings Ltd	Bermuda	Goodbody Secretarial, Dublin		'Turnover excludes VAT'	
Synopsys Ireland Ltd.	Bermuda	Company accounts states "operates from its Business address Clarendon House, 2 Church St. Bermuda" ²	2, Church St. Hamilton Bermuda. 'Supplemental records' are kept at 800, East Middlefield Road, Mountain View California	Refers to 'social welfare costs.	not disclosed
Google Ireland Holdings Ltd	Bermuda	1395, Marinovitch Way, Los Altos, California		No accounts published	not disclosed
BMC Software European Holdings	Cayman Islands	N. Gray, Cayman Islands	2101, City West Boulevard, Houston, Texas	Refers to social welfare costs for 2010	0
Overture Search Services Holco Ltd.	Cayman Islands	N. Gray, Cayman Islands, Intertrust Trustees, Cayman Islands ³ .	Pinacle 1, Block B8, East Point Business Park, Dublin, 3.		0
LinkedIn Technology Ltd.	Isle of Man	Isle of Man			0
Symantec Holdings Ltd	Jersey	Ogier Corporate Services (Jersey) Ltd ⁴ .	Company Hq, 350 Ellis St., Mountain View, California, 94043, U.S.A.		0
Adobe Software Trading Company Ltd.	Not disclosed ⁵	City West Business Campus. Accounts say "Adobe Software Trading Company is not subject to Irish Corporation Tax" ⁶ .	.	Refers to Irish VAT Refers to social welfare costs	Employees in Ireland not disclosed
Novell Software International	Cayman Islands	Avalon Management Ltd, Grand Cayman, Cayman Islands	1800, South Noveil Place, Utah, U.S.		0
VMWare Bermuda Ltd ⁷	Bermuda	D. Smith, 17 Mountainwood Court, Hillsborough, California.	3401 Hillview Avenue, Palo Alto, Calif. US and company address at Parnell House Ballincollig, Co. cork		

Notes

- (1). Table reproduced from Stewart (2013b). Data Source: filings at Companies Registration Office. All companies are incorporated in Ireland and hence the company auditor is located in Ireland. All companies are registered in Ireland, hence books of account must be maintained in Ireland.
- (2). This is the address of Conyers, Dill and Pearman a law firm, who provide company administration and other services.
- (3). The web site of this firm states "Intertrust Cayman, the largest trust and corporate services provider in Cayman, offers a full range of corporate, fiduciary, fund administration and company secretarial services".
- (4). The web site of this firms states "The Ogier Group provides legal, trust, fund and corporate administration services across the world's major independent financial centres.
- (5) Adobe Software Trading company moved its registered office from Barbados to Bermuda and then to Dublin in 2007.
- (6) In 2006 the registered office was given as Ram Re House, Hamilton, Bermuda. A footnote to the accounts (footnote, 7) states that the Adobe Software Trading Company is not subject to Irish corporate tax. According to filings at Companies Registration Office the new address from 16th June 2008 is Citywest Business Park.
- (7). This firm is a subsidiary of EMC. Footnote (6), Annual report and accounts for Dec. 2012 state that "Profits are not within the charge to Irish tax", The address of the solicitor is given as Appleby Services (Bermuda) Ltd. Canon's Court 22 Victoria St. Hamilton, Bermuda

5. Some Implications

(a) Measures of Effective Tax Rates

As noted above some firms although incorporated in Ireland, are regarded as not resident for corporate tax purposes, and are excluded from measures of aggregate corporate profits. They may however be regarded as resident for other taxes such as employers PRSI and VAT. For example the subsidiary at the centre of recent controversy in relation to corporate tax payments in Australia, Apple Sales International (ASI) (Chenoweth, 2014), is not included in estimates of corporate profits in Ireland, but is liable for VAT and employers PRSI. Hence measures of effective tax rates (Corporate Tax paid/pretax profits) derived from aggregate data provided by the Revenue Commissioners are over estimated (Tax receipts remain the same, but the denominator excludes the profits of bi-located firms). This paper argues that it is reasonable to conclude that bi-located firms are located in Ireland and their profits should be included in measures of aggregate profits. Omitting these firms leads to measures of effective tax rates that are underestimated and misleading.

There are other problems with estimating effective tax rates using aggregate data, for example including firms making losses also reduces the denominator and thus overestimates effective tax rates.

The main beneficiaries of bi-location strategies are firms such as Apple, Google, and other firms operating in what the OECD describe as the digital economy (Table (2) above and OECD, 2014, pp. 25-41). Bi-location is a very attractive aspect of the Irish fiscal regime. It means in effect, that the nominal rate of corporation tax is irrelevant for bi-located firms, because tax strategies can ensure that the bulk/all of profits are declared in a no or low corporate tax jurisdiction, and the effective tax rate for these firms is low/ zero.

Bi-location status is determined by “fact and precedent” (Revenue Commissioners, 213, p. 1). ‘Facts’ necessarily vary from case to case. Because the ‘facts’ of each case will be different, discussions with Irish tax authorities could be construed as negotiations. Hence in the US Senate Apple inquiry, one expert witness stated:- “It is not clear to me whether they cut a specific deal with the Irish taxing authorities. That was what I was led to believe by some of the testimony they apparently gave to members of the staff”²². The Chief executive of Apple stated in testimony “as a part of recruiting us, the Irish Government did give us a tax incentive agreement to enter there”²³. Hence the PSI concluded “Apple has negotiated a special corporate tax rate of less than 2%”, (PSI, 2013, p. 17). At the same time this claim has been vehemently denied by the Irish Government. The US ambassador wrote to the PSI stating that Irelands tax system is “set out in statute – so there is no possibility of individual special tax rates being negotiated for companies”²⁴. From an outside perspective there is necessarily a lack of clarity because relevant ‘facts’ cannot be disclosed.

²² Oral testimony of J. Richard Harvey, Professor of Law at Villanova University, to Permanent Subcommittee on Investigations in relation to Apple, available at <http://www.gpo.gov/fdsys/pkg/CHRG-113shrg81657/pdf/CHRG-113shrg81657.pdf>, p. 15.

²³ Oral testimony of Apple Chief executive (Mr. Cook), to Permanent Subcommittee on Investigations in relation to Apple available at:- <http://www.gpo.gov/fdsys/pkg/CHRG-113shrg81657/pdf/CHRG-113shrg81657.pdf>, p. 46.

²⁴ Letter from Irish Ambassador to PSI, available at:- <http://www.finance.gov.ie/sites/default/files/mn226.pdf>.

Omitting profits of bi-located firms also means that measures of aggregate profits are reduced, which in turn reduces estimates of GDP.

(b) Industrial Policy

This paper argues that the tax regime in Ireland which allows companies incorporated in Ireland to be non-resident for tax purposes, is exceptional. It has been shown above, that on several objective criteria these firms are located in Ireland. Those subsidiaries that are bi-located are an integral part of overall group operations in Ireland. There is no evidence that Revenue has contested their status as not 'being managed or controlled' in Ireland or contested their absence of a 'permanent establishment' for corporate tax purposes. In contrast, as shown above, several other countries have contested such claims. One reason for this is that the taxing authorities in other countries such as Spain, have considerable motivation to contest the claim not to have a taxable residence with consequent implications for corporate income tax and other taxes.

The fact that in other countries, MNCs' claims to be non-resident for corporate tax purposes have been contested while there is no evidence that such claims have been contested in Ireland, may be explained by the considerable advantages for Ireland, of recognizing some subsidiary companies to be bi-located.

Ireland has become a major centre for the location of centralized operations of MNCs partly due to long established factors such as Ireland's membership of the EU because it enables non-EU MNCs, to trade within the EU without paying tariffs (Jacobson and Andreosso, 1990). The more recent possibility of bi-location is an important feature of the tax minimization strategies of multinational companies operating in the digital economy, and in particular for those firms that use Ireland as a centre for EMEA (Europe Middle East and Africa) operations. Attracting firms operating in the digital economy is at the heart of Ireland's industrial strategy.

Low corporate tax payments and tax strategies pursued by multinational companies have attracted considerable criticism. As a result the OECD developed an "Action Plan" to "better align rights to tax with economic activity". The OECD proposals which have been endorsed by both the G8 (June 18, 2013) and G20 (September 6, 2013), are likely to result in change to the Irish corporate tax regime with a consequent impact on foreign direct investment in Ireland. The OECD (2013b) in particular single out the use of shell companies, transfer pricing of intangibles and absence of transparency as key issues (OECD, 2013b pp. 13-14). The OECD propose (p. 19) to change the definition of "permanent establishment" and the pricing of intangibles so that multinationals may no longer be able to "separate income from the economic activities that produce that income and to shift it into low tax environments".

In addition to the OECD proposals (OECD, 2103a) a key issue for the continued location of firms that use this tax strategy is the possible effect of redefining the tax base, so that a greater proportion of profits are declared for example in France, Germany or the UK, rather than in Ireland (European Commission, 2007, 2011). Such reallocation may not necessarily require the introduction of a common corporate tax base throughout the EU, but could be in response to individual country actions in terms of establishing a permanent establishment and tax base. A likely response by MNC's

would be to switch costs (recognised by taxing authorities) to these locations (for example labour costs).

A tax based industrial policy will not result in an innovative research led economy. Other policies are required (Jacobson, 2013). A tax based industrial policy leads to an emphasis on tax reduction. The greater the importance of tax factors in influencing a firm's location decision the less likely that firms will be influenced by other factors identified as important in investment surveys, such as key infrastructure, transport, logistics, and a skilled labour force, and the less likely they are to have linkages with the local economy (Stewart, 2013a). Hence their location decision is vulnerable to changes in tax regimes over which Ireland may have little control. The net effect of proposals to reform corporation tax regimes is to underline the risks involved in an industrial policy that is over reliant on tax concessions and low corporation tax rates.

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