

## THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2019

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### MODULE 3.01 – EU DIRECT TAX OPTION

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#### ADVANCED INTERNATIONAL TAXATION (THEMATIC)

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TIME ALLOWED – 3¼ HOURS

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This exam paper has **three** parts: **Part A**, **Part B** and **Part C**.

You need to answer **five** questions in total.

You must answer:

- **Both** questions in **Part A** (25 marks each)
- **One** question from **Part B** (20 marks)
- **Two** questions from **Part C** (15 marks each)

#### Further instructions

- All workings should be made to the nearest month and in appropriate monetary currency, unless otherwise stated.
- Start each answer on a new page and clearly indicate which question you are answering. If you are using the on-screen method to complete your exam, you must provide appropriate line breaks between each question, and clearly indicate the start of each new question using the formatting tools available.
- Marks may be allocated for clarity of presentation of your answers.
- The time you spend answering questions should correspond broadly to the number of marks available for that question. You should therefore aim to spend approximately half of your time answering Part A, and the other half answering questions in Parts B and C.
- The first 15 minutes of the exam is reading time. You will be allowed to annotate the question paper during this time; however, you will **not** be permitted to start writing or typing your answer. The Presiding Officer will inform you when you can start answering the questions.

**PART A**

**You are required to answer BOTH questions from this Part.**

1. Belia, an EU member state, imposes a 10% dividend withholding tax on all distributions of dividends by resident limited liability companies. Consequently, private investors who directly invest in Belian companies are subject to tax of 10% on dividends received.

However, if investors were to choose to invest through a Belian investment fund, which is also a limited liability company, they would be subject to double dividend withholding taxation in Belia: once upon the distribution of dividends by the operational company to the investment fund, and again upon the distribution of dividends by the investment fund to the investors.

In order to avoid double taxation of investments through Belian investment funds, the tax laws of Belia provide that domestic investment funds are granted a refund of the Belian withholding tax paid on their investments. In order to receive this refund, it is required that these investment funds distribute all the income from their investments to their participants within six months. In this way, Belia wishes to guarantee that, in the end, all Belian dividends are taxed once with Belian withholding tax. The refund does not apply to foreign investment funds.

World Investors Ltd is an investment fund established in another EU member state, Catandra. It has invested in companies in Belia and requested a refund of the Belian withholding tax that was levied on the dividends received from the Belian tax authority. The Belian tax authority, however, rejects such refunds to non-resident investment funds, on the basis that the single levy of Belian withholding tax will not otherwise be assured.

**You are required to answer the following questions, with explanation and reference to European Union case law:**

- 1) **Can World Investors Ltd rely on any Treaty on the Functioning of the European Union (TFEU) Freedoms?** (5)
- 2) **Does Belian tax law restrict the exercise of this freedom?** (10)
- 3) **On what grounds may such a restriction be justified?** (10)

Total (25)

2. Yoyan Holding Ltd is a technology company established in India. It owns all the shares in Yoyan Europe Ltd, a company established in Luxus, an EU member state. Yoyan Europe Ltd serves as the group's European headquarters and has 25 employees. Yoyan Europe Ltd owns all shares in three European chip producing companies based in member states A, B and C.

In order to finance the three chip producing companies, Yoyan Holding Ltd has granted a loan of €3 million to Yoyan Europe Ltd. Yoyan Europe Ltd has in turn provided three loans to its three subsidiaries companies:

- A loan of €1 million to Subsidiary A at a fixed rate of 6%;
- A loan of €1 million to Subsidiary B at a fixed rate of 15%;
- A profit participating loan of €1 million to Subsidiary C. The interest is set at 25% of the annual profits of Subsidiary C.

Member States A, B and C each levy a 25% withholding tax on interest payments, while Luxus does not apply a withholding tax. Yoyan Europe Ltd claims that, under the Interest and Royalty Directive, no withholding tax may be levied in Member States A, B and C. The tax inspectors of Member States A, B and C, however, reject this interpretation of the Directive and argue that the present structure constitutes abuse because the ultimate shareholder of the group resides outside the EU. In addition, the tax inspectors consider Yoyan Europe Ltd to be an artificial conduit company.

**You are required to answer the following questions, with explanation and reference to European Union case law:**

- 1) Are the interest payments made by the three subsidiary companies subject to the Interest and Royalty Directive? (10)**
- 2) Are the tax inspectors justified in denying Yoyan Europe Ltd's claim? (15)**

Total (25)

## PART B

**You are required to answer ONE question from this Part.**

3. Jacques is a citizen and resident of Foliza, an EU member state. Jacques worked for a number of years as a truck driver in a neighbouring member state, Garia, for a transport company established in Garia. Under the Foliza-Garia bilateral tax treaty, based on the nationality of employees involved in international traffic, Jacques is subject to tax in Foliza on his monthly wage.

The transport company recently suffered losses and eventually went bankrupt, and consequently Jacques lost his job, receiving insolvency payments from the Garia state. Under the Foliza-Garia treaty, these insolvency payments are subject to tax in Garia. Since tax rates in Garia are higher than in Foliza, Jacques faces an increased tax burden which he considers an infringement of the free movement of workers.

**You are required to explain, with reference to European Union case law, whether the following elements of Jacques's tax circumstances are in accordance with the free movement of workers:**

- 1) **The division of the power to tax in the Foliza-Garia tax treaty on the basis of nationality; and** (10)
- 2) **The increased tax burden on the insolvency payments.** (10)

Total (20)

4. LawTechCo is a limited liability company resident in Legibus, an EU member state. LawTechCo holds 70% of the shares in a limited liability company in Australia. The Australian company has distributed a dividend to its shareholders.

Under the tax laws of Legibus, dividends received from shares in domestic companies are tax exempt. However, dividends received from shares in non-resident companies are subject to tax in Legibus, with the application of the credit method to the taxation of the underlying profits.

LawTechCo claims that, on the basis of EU law, dividends received from its shares in the Australian company should be tax exempt.

**You are required to explain whether you expect LawTechCo's claim to be successful, and the reasons for your conclusion. You should support your answer with reference to relevant Court of Justice of the European Union cases.** (20)

## PART C

**You are required to answer TWO questions from this Part.**

5. Jordy is a citizen of Gorum, an EU member state, where he has lived his entire life and worked as a self-employed carpenter. Upon his recent retirement, Jordy decided to emigrate to another EU member state, Solevita, due to its warm climate.

Following his emigration, Jordy received a pension from a pension fund in Gorum. As Jordy is now a non-resident, a flat rate tax of 30% was imposed on his pension, whereas residents of Gorum are subject to a progressive tax rate that varies between 22% and 42%. Jordy believes the tax is discriminatory, because no part of his income is taxed against the 22% rate.

**You are required to explain, with reference to European Union case law, the following:**

- 1) **Whether Jordy can rely on any of the Treaty on the Functioning of the European Union (TFEU) Freedoms or EU Citizenship rights;** (5)
- 2) **Whether Gorum's pension tax law infringes upon any of these freedoms or EU Citizenship rights; and** (5)
- 3) **The tax consequences if the Court of Justice of the European Union considers this law to be an infringement of the Treaty on European Union (TEU) or TFEU.** (5)

Total (15)

6. Bilateral tax treaties often contain 'limitation of benefits' clauses. A number of tax experts have raised the question of whether limitation of benefits clauses are in line with the fundamental freedoms of the Treaty on the Functioning of the European Union (TFEU).

**You are required to explain, with reference to European Union case law, to what extent and in what circumstances the fundamental freedoms of the TFEU may be impinged by limitation of benefits clauses in bilateral tax treaties.** (15)

7. Under the tax laws of Scandic, an EU member state, in corporate merger cases when a company is wound up and transfers all of its assets to another company, losses which have not yet been compensated can also be transferred to the receiving company. This is not allowed in cases of cross-border mergers.

Nortic Holding is a limited liability company established in Scandic. It held all shares in Nortic Operations, a limited liability company established in Octivia, another EU member state. During the course of a cross-border merger, Nortic Operations was wound up, and the legal ownership of all of its assets and liabilities were transferred to Nortic Holding.

Under the tax laws of Octivia, losses incurred by Nortic Operations that have not yet been set off cannot be transferred to Nortic Holding and will therefore evaporate. Nortic Holding's tax adviser claims that the losses of Nortic Operations are to be classed as 'final losses' as discussed in paragraph 55 of *Marks & Spencer v David Halsey (Her Majesty's Inspector of Taxes)*, C-446/03.

**You are required to explain, with reference to European Union case law concerning 'final losses', whether the losses of Nortic Operations's losses are to be considered final losses and, if so, what the tax consequences will be.** (15)

8. Jeanette, who is resident in Memora, an EU member state, received an inheritance tax assessment from the Memoran tax agency. Jeanette did not file any appeal against this decision. After the formal deadline to file an appeal expired, the Court of Justice of the European Union ruled that a specific provision of the Memoran inheritance tax is in violation of the free movement of capital. Consequently, Jeanette understands that she has overpaid her inheritance tax as her situation meets the same criteria as the case on which the Court ruled.

**You are required to write a memorandum, advising Jeanette on whether she can file an appeal against the inheritance tax assessment despite the fact that the formal deadline for appeals has expired. Use Court of Justice of the European Union (CJEU) cases in support of your arguments.** (15)

9. In Artis, an EU member state, legal entities are subject to a corporate income tax rate of 20%.

The capital of Artis, Barbica, hosts a number of world famous museums. In order to attract as many tourists as possible and to support the education of its population, the government of Artis has decided to lower the corporate income tax rate for all museum income to 5%. This tax rate will also apply to the profits generated by restaurants and gift shops run by the museums.

**You are required to explain, with reference to European Union case law, the following:**

- 1) **Whether the new corporate income tax law of Artis is in line with the state aid regulations.** (10)
- 2) **What, in general, the tax consequences will be if the Court of Justice of the European Union (CJEU) rules that the tax laws of a particular member state have violated the state aid rules.** (5)

Total (15)