

Answer-to-Question-_8_

Mark and Spencer C466/03

The case dealt with the use of loss relief amount subsidiary companies in EU.

UK does not allow relief for loss incurred by non-resident companies.

CJEC held that this represent an infringement of freedom of establishment if the subsidiary has:

- exhaust all the possibilities to utilize the loss in the state of residence; and
- it is not possible to use the loss in the future

Ireland introduced s.420C in Tax Consolidation Act 1997 (TCA 1997) to all the use of such losses if:

- the loss is the kind that in general is available under Irish tax laws
- the loss is calculated according to the law of the state of residence of the surrendering company
- the loss is stranded losses and can not be utilised in the state of residence of the surrendering company.

National Grid Indus C371/10

The case dealt with the exit tax triggered by the migration of residency of a company from the Netherlands to the UK.

Upon the migration, the exit tax arose on deemed disposal of certain asset of the company.

The company argued that such imposition of tax infringe the freedom of establishment.

CJEU held that it is reasonable to use exit tax in order to preserve the

allocation of taxing rights among the Member States, but the demand for immediate payment of tax put the company at a disadvantage compared to other companies moving within a Member State.

Ireland introduced s.629 of TCA 1997 allowing that given companies moves its residency to other EU or EEA countries (Norway, Iceland and Liechtenstein, they can defer the exit tax

- in six annual instalment starting from 9 months after the financial year end

- no later than 60 days of the disposal of the assets with a maximum limit of 10 years of deferral.

FII GLO C466/04

The case dealt use of exemption method to relief tax suffered on nationally sourced dividends and credit method for foreign sourced dividend and relates to freedom of establishment

UK exempted tax on dividends received from UK subsidiary while taxing foreign dividend but with credit relief available.

CJEC held that there is nothing to prevent to use exemption method on nationally sourced dividends and credit method on foreign sourced dividends because both systems eliminate double taxation, but exempting nationally dividend and taxing foreign dividend but with credit relief available based on the withholding tax suffered and underlying foreign corporate tax.

CJEC held that the practice is acceptable only if the tax suffered on the foreign dividend is equal to the tax on nationally sourced dividend.

Ireland used to tax foreign dividends at 25% and therefore introduced s. 21B in TCA 1997 to allow these dividends to be taxed at 12.5% when meeting certain conditions.

Answer-to-Question-_7__

When additional tax was imposed on Brightfield by IRS without correlative adjustment on the books of Luminos by the Irish Revenue, it is an economic double taxation.

Luminos can not claim deduction of the additional payment to Brightfield as a result of the IRS's adjustment because the relief is potentially available under the double tax agreement.

Luminos can not amend the tax assessment to request for a refund unless the adjustment is agreed in written by the competent authorities between Ireland and the US

Luminos can request for

- correlative relief available under article 9 of the relevant double tax agreement (DTA)
- mutual agreement procedures in the DTA
- procedures under European Arbitration Convention (not applicable for the case)

In all the cases, Luminos need to present to the Irish Revenue

- the basis on the claim, such as what DTA and what article to be based on
- how the companies are associated
- the transfer policy in question, together with any transfer pricing studies, economic studies and expert report
- the element of the transfer pricing policy that IRS disagrees

Luminos need to set out the following

- how the company's counter-argument on the charge
- how the company justified the settlement is at arm's length price
- quantum of the settlement of financial year covered
- an account of consideration as to why settlement was reached instead of litigation and provide a copy of legal advice
- a copy of the settlement

- any on-going investigation in previous year or future year
- any investigation in other countries

Luminos was not all for deductions

- for second repatriation of payment as a result of the adjustment
- interest and penalty by IRS

If Irish Revenue accept the case, it will request Lumions to revise the tax computation and adjust the tax payable in the financial years concerned

However, it can take more than 2 years for the competent authorities of Ireland and US to come up an agreement.

There is no guarantee that there is will be an agreement.

Luminos is allowed to be a party in the negotiation.

Answer-to-Question-__4__

Deductibility of interest

Interest is deductible only if it is wholly incurred in trading activities, no matter whether it is paid to associated companies or third party companies.

Transfer pricing

Ireland has adopted transfer pricing recommendation from OECD since 2010.

Interest paid to associated companies is subject to transfer pricing rule and be will adjusted to arm's length price if they are not.

Currently, there is an exemption for SME which does not employ more than 250 employees, does not generate more than EUR50 million annual revenue or EUR43 million total asset.

Interest deduction limitation

Introduced in 2022, interest deduction is capped at 30% of tax adjusted profit before interest and tax. Interest not deducted in the current year will be brought forward to coming years when there is profit available.

There are exemptions available:

- interest expenses less than EUR3 million
- legacy debts with terms agreed before 17 June 2016

Withholding tax

Withholding tax on interest is at 20% subject to various exemptions.

Double tax treaty reduce the rate to 10% if it is 25% associate.

EU Interest and Royalties directive implemented in Irish law exempt dividend withholding tax paying to companies in Member States if in a 2 uninterrupted period, they are associated company by controlling one another or becoming held by a common holding company.

Domestic exemption allow interest paid to relevant territories (EU, DTA countries) with no withholding tax.

2.

Research and Development (R&D) credit

30% (up to 31 December 2025, 35% from 1 January 2026) credit will be granted on qualify R&D expenditure.

Together with the deduction available, it gives 42.5% credit.

Expenditure must be incurred in EU

Research activities mean:

- basic research
- applied research
- experimental research that seek to achieve scientific or technological advancement or involve the resolution of scientific or technology

uncertainties

Knowledge Box (s.769I)

Profit generated from qualifying asset will be taxed at 10%.

The avail of the relief is based on the proportion that the R&D cost incurred by the Irish company bears to the total cost incurred in the developing the qualifying asset.

If the Irish company incurred 50% in the cost, 50% of the profit will be taxed at 10%

These can be used in

- patented technology
- patentable know-how but keep in secret

Answer-to-Question-__2__

Corporate tax rate

Ireland Corporate tax is charged at 12.5% for trading profit and otherwise at 25%.

Therefore, it depends whether the new subsidiary is to be seen as generating trading profits

Trading is not defined in the statute and need to look at case law for badges of trade (Noddy case)

Guidance is issued the Irish Revenue in relation to the substance required for trading activities involved intellectual properties

- commercial rationale
- valued added in Ireland

- taking commercial risk
- employees with skills and experience to perform the trading function
- office in Ireland
- involving several transactions including seeking additional licensing

While the proposal include opening office, employing specialist, it would place the company in a better position if the company incur R&D to show the company is taking commercial risk.

Dividends from foreign subsidiaries

Neogene Ireland can be entitled to taxed on 12.5% on its dividends, given dividends are derived from trading activities or more than half of activities of the subsidiaries are trading activities.

For other case it is deemed passive income is taxed at 25%

Parent and subsidiary directive should spare dividends received by Nexigen Ireland from subsidiaries in EU Member State when the following conditions are satisfied

- hold for interrupted period of 2 years
- 5% of the ordinary shares and entitled 5% of profit for distribution and assets in case of winding up.

Capital Gain on disposal of shares in subsidiaries

Participation exemption in s.626B of TCA 1997 exempted capital gain on disposal if the following conditions are met:

- subsidiaries are resident of relevant territories (EU or DTA countries)
- hold for 12-month interrupted period
- 5% of the ordinary shares and entitled 5% of profit for distribution and assets in case of winding up.

As the proposal is for Nexigen Ireland to hold European operating subsidiaries, the holding should be more than 5% and longer than 12

months and therefore, the gain should be exempted.

Withholding tax applicable to remittance to Nexigen AG

Exemption in s.831A is available to dividends pay to Nexigen AG which is a resident of Switzerland if the following conditions are satisfied

- hold for interrupted period of 2 years
- 25% of voting right.

Domestic exemption is available for dividends paid to resident of relevant territories (EU or DTA countries) and is not controlled by Irish resident.

General features

Controlled foreign entities

Irish Revenue seeks to tax profit from a company which its profit are from activities with reference to activities in Ireland but was artificially diverted to non-resident companies under their control.

Answer-to-Question-1__

Special Assignee Relief programmed is available to John. It gives 30% relief for tax on income exceed EUR100,000.

The following are the conditions.

- he is employed by a foreign company to perform duties in Ireland
- he has been employed by that company for 6 months
- he assignment to Ireland should be as least 12 months
- he is not resident of Ireland for 5 tax years immediately before his arrival

He can claim the relief for 5 years

His employer need to apply to Irish Revenue with 30 days of his arrival.

Split year

John can also claim split year so that the employment before his arrival to Ireland is exempt from Irish income tax.

Irish tax implication on other sources of income and gains

Tax treatment of John's inheritance

Since John was born in State M and both his parents were citizens of State M, he is still keeping his domicile of origin in State M, therefore non-Irish domiciled when he is an Irish resident.

Therefore, John is entitled to the use of remittance basis. That is, foreign source income will be taxed only when it is remitted.

He is also entitled to remit capital to Ireland free of tax.

June was born Ireland and therefore is likely Irish-domiciled

June is subject to tax on her worldwide income and gain.

It is advised that before they move to Ireland, the income-earning assets should be transferred from June to John in order to avoid worldwide tax suffered by June.

John should also open accounts to separate capital and income so that he can remit capital to Ireland free of tax.

Tax treatment of John's inheritance

Since John was born in State M and both his parents were citizens of State M, he is still keeping his domicile of origin in State M, therefore non-Irish domiciled when he is an Irish resident.

For the purpose of capital acquisition tax (CAT), John will not be treated as Irish resident until his sixth year of arrival.

As he just arrived in 2026, he is not subject to CAT in Ireland. He may be subject to inheritance in State M if any.