THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2019

MODULE 2.06 – IRELAND OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Candidates are expected to summarise the main features from a tax perspective of Ireland as a holding company location including the following points. Other valid points, to the extent relevant, which are not included below will also earn marks.

There is no *capital contribution* tax in Ireland.

The *corporate income tax rate* is 12.5% on trading income and 25% on passive income. However, certain trading dividends from foreign subsidiaries located in an EU member state or in a country with which Ireland has a double tax agreement or in a country which has ratified the Convention on Mutual Assistance in Tax Matters or whose principal class of shares (or the shares of a 75% parent company) is traded on a recognised stock exchange are taxed at 12.5%

Dividend regime

Ireland operates a 'credit' system as opposed to a participation exemption, which is seen by many as a weakness. The law provides for a system of onshore pooling of tax credits to deal with the situation where foreign tax on dividends exceeds the Irish tax payable (being either at the 12.5% or 25% rate). Foreign tax includes any withholding tax imposed by the source jurisdiction on the dividend itself as well as an amount of underlying foreign tax. The onshore pooling system enables companies to mix the credits for foreign tax on different dividend streams to calculating the overall credit. Dividends that are taxed at 12.5% are pooled separately to dividends that are taxed at 25%. Thus, any excess 'credit' on one dividend may be credited against the tax payable on another dividend received in the accounting period within each pool.

Foreign underlying tax includes corporation tax levied at state and municipal level and withholding tax. In this respect, is possible to look through any number of tiers of subsidiaries.

An additional credit is available where the credit calculated under Ireland's existing rules is less than the amount of credit that would be computed by reference to the nominal rate of tax in the EEA country from which the dividend is paid. This additional national credit is capped at the lower of the nominal rate of foreign CIT or the Irish rate of corporate tax on the foreign dividend (i.e. 12.5% or 25%).

Where the relevant rate of taxation on dividends received in Ireland is 12.5% or 25% to the extent that credits received for foreign tax equal or exceed the applicable Irish rate of 12.5% or 25%, then there will be no tax payable in Ireland.

Unused credits can be carried forward indefinitely and offset similarly in subsequent accounting periods. The credit system applies where the Irish holding company holds a 5 shareholding in the relevant subsidiary. These provisions apply to dividends received from all countries.

Apart from the above, discussed credit system, dividends received by a portfolio investor which form part of such investor's trading income are exempt from Irish corporation tax. Portfolio investors are companies which hold not more than 5% of the share capital (either directly or together with a connected person) and not more than 5% of the voting rights of the dividend paying company.

Gains on shares

The disposal of shares in a subsidiary company (referred to in the law as the 'investee') by an Irish holding company (referred to in law as the 'investor') is exempt from Irish capital gains tax in certain circumstances. An equivalent exemption applies to the disposal of assets related to shares, which include options and securities convertible into shares.

The exemption is subject to the following conditions:

1. The investor must directly or indirectly hold at least 5% of the investee's ordinary share capital, be beneficially entitled to not less than 5% of the profits available for distribution to equity holders of the investee company and be beneficially entitled to not less than 5% of the assets of the investee company available for distribution to equity holders. Shareholdings held by other companies which are in a 51% group with the investor company may be taken into account;

2. The shareholding must be held for a continuous period of at least twelve months in the 2 years prior to the disposal;

3. The business of the investee must consist wholly or mainly of the carrying on of a trade or trades or alternatively, the test may be satisfied on a group basis where the business of the investor company, its 5% subsidiaries and the investee (i.e. the Irish holding company and its subsidiaries) when taken together consist wholly or mainly of the carrying on of a trade or trades; and

4. The investee company must be a qualifying company. A qualifying company is one that: (a) does not derive the greater part of its value from Irish land/ buildings, minerals, mining and exploration rights; and (b) is resident in the EU (including Ireland) or in a double taxation treaty partner jurisdiction.

Losses on shares

Depreciation on the value of the underlying subsidiary shares is not tax deductible.

In certain circumstances where the value of the shares is completely dissipated, the taxpayer may make a claim to the Inspector of Taxes responsible for that taxpayer and when the Inspector is satisfied that the value of the asset has become negligible, the Inspector may allow a claim whereby the taxpayer is deemed to have sold and immediately reacquired the asset for consideration of an amount equal to the value of the shares thus crystallizing a capital loss. This capital loss is only deductible against capital gains. However, where the disposal would have qualified for relief from capital gains taxation under the exemption noted above a claim for loss of value cannot be made.

Capital losses incurred on the transfer of shares are only deductible against capital gains.

Costs relating to the participation

Certain expenses related to managing investment activities of 'investment companies' are allowed against the company's total profits. An investment company is defined as any company whose business consists wholly or mainly in the making of investments, and the principal part of whose income is derived from those investments. This can include holding companies whose investment in this case is the subsidiaries.

Interest payments relating to the *financing* of the acquisition of the subsidiaries may be deductible. However, as an anti-abuse measure, interest relief is generally not available when the interest is paid on a loan obtained from a related party, where the loan is used to acquire ordinary share capital of a company that is related to the investing company, or to on-lend to another company which uses the funds directly or indirectly to acquire capital of a company that is related to the investing company

Thin capitalisation

If securities are issued by the Irish holding company to certain non-resident group companies, any 'interest' paid in relation to the securities can be re-classified as a distribution and therefore will not be deductible. The rules relating to dividend withholding tax will then apply.

This rule does not apply to interest paid to a company resident in an EU jurisdiction (other than Ireland) or a country with which Ireland has signed a double tax agreement if the treaty contains a non-discrimination provision. The taxpayer company may elect that this rule does not apply in a situation where interest is paid by that company in the ordinary course of a trade carried on by that company.

Interest limitation rules

The ATAD requires EU Member States to implement an interest limitation rule by 1 January 2019. In general terms, under the interest limitation rule a company's ability to deduct interest will be capped at 30% of EBITDA. However, Member States that have rules that are equally effective to the interest limitation rule included in ATAD can avail of a derogation and opt not to implement the rule until as late as 2024. At the time ATAD was adopted, the Irish Department of Finance issued a statement noting Ireland's intention of availing of the derogation until 2024. It now appears that Ireland and the European Commission have been in discussions about the availability of the derogation and it may be the case that the Irish implementation date is accelerated to before 2024.

Tax rulings

The application of the holding company regime does not require an advance ruling. However, if there is doubt as to the application of the regime, for example, whether the group can be regarded as a trading group for the purpose of a capital gains tax relief, the opinion of the Revenue may be sought. This opinion is not binding and ultimately the status of the company will be decided by the individual Inspector of Taxes responsible for that company. However, where full facts are disclosed to the Revenue it would be unlikely that the individual Inspector would come to a different view.

As from 1 January 2017, Ireland (and all other EU Member States) is required to automatically exchange certain information on cross-border tax rulings and advanced pricing agreements (APAs) issued on or after 1 January 2017. In addition, certain tax rulings and APAs issued, amended or renewed on or after 1 January 2012 that were still valid on or after 1 January 2014 are also subject to exchange.

Exchange of information

Ireland has also implemented the OECD framework regarding the compulsory exchange of information on tax rulings issued on or after 1 April 2016. Tax rulings issued on or after 1 January 2010 that were still valid on or after 1 January 2014 had to be exchanged before 2017. The categories of tax rulings on which information must be exchanged are identified in the OECD BEPS Action 5 Final Report

Withholding taxes

*Dividend*s: Withholding tax on dividends paid by the holding company of 20%, which may be reduced by tax treaties or under domestic law to 0% - 15%.

Exemptions: Pursuant to the implementation of the EU Parent-Subsidiary Directive, dividend withholding tax is not due on dividends paid by Irish resident companies to companies resident in other EU jurisdictions who hold at least 5% of the ordinary share capital, provided the anti-abuse provision mentioned under 5 below is met.

In addition, domestic exemptions apply if: (i) the individual shareholder is resident in an EU member state (other than Ireland) or a treaty partner jurisdiction; (ii) the parent company is resident in an EU member state (other than Ireland) or a treaty partner jurisdiction and is not ultimately controlled by Irish residents; (iii) the parent company is not resident in Ireland and is ultimately controlled by residents of an EU member state (other than Ireland) or a treaty partner jurisdiction; or (iv) a non-resident company can also qualify for the exemption if the principal class of shares in the company or its 75% parent are substantially and regularly traded on a recognized stock exchange in the EU (including Ireland) or in a treaty partner jurisdiction.

In relation to the domestic exemptions above, the Irish company may pay a dividend free from withholding taxes if the recipient company or individual makes a declaration in the specified form in relation to its entitlement to the domestic exemption. There is no minimum shareholding requirement.

Interest paid by the holding company: Withholding tax (20%, subject to reduction under tax treaties) is levied on 'yearly interest' paid by a company. It is not applicable to short-term interest (i.e. interest on a debt of less than a year). Several exemptions apply.

Royalties: Withholding taxes are only applicable to patent royalties, at the rate of 20%. The rate may be reduced to between 0% and 15% by a tax treaty.

Exemptions (i) Pursuant to the implementation of the EU Interest and Royalty Directive into Irish law, no withholding tax is due on cross border interest and royalty payments between associated companies in the EU; (ii) A domestic exemption applies to royalties paid by a company to a company resident for tax purposes in a member state of the EU (other than Ireland) or a treaty partner jurisdiction in certain circumstances; and (iii) A concessionary exemption from withholding tax applies on patent royalty payments made to a non-double taxation treaty resident company once certain conditions are fulfilled.

Non-resident capital gains taxation: Gains realized by non-residents on the disposal of shares in an Irish company are not taxable, except when the shares in the Irish company derive their value or the greater part of their value directly or indirectly from land, minerals, mining or exploration rights in Ireland. However, if the shares in the Irish company are quoted on a stock exchange such capital gains tax does not apply.

Liquidation proceeds are subject to capital gains tax in the hands of the shareholder of the liquidated company, in circumstances where the conditions for the capital gains tax exemption described in 2.3 above are not met at the moment of liquidation.

Anti-abuse: Ireland has implemented anti-abuse rules included in the amended Parent Subsidiary Directive. The domestic Irish exemptions from interest and dividend withholding tax do not include specific anti-abuse provisions.

Ireland has a general anti- avoidance provision that allows the Revenue to re- characterize 'tax avoidance transactions' under s. 811 TCA 1997. To date, this has not been regularly invoked by the Revenue and there would have to be a strong tax avoidance motive to justify a challenge by the Revenue. It is unclear whether the existing Irish GAAR in s811C TCA 1997 will be regarded as adequate implementation of article 6 of the ATAD or if a new GAAR will be introduced into Irish law.

CFC regime: Ireland will introduce CFC rules from 1 January 2019 and has chosen to adopt an 'Option B' approach as provided for under the ATAD. A CFC charge will only arise to the extent that: (a) the CFC has undistributed income; and (b) the CFC generates income by reference to activities carried on in Ireland. There are also several exemptions available. In cases where a CFC charge does arise, it must be calculated in accordance with transfer pricing principles. The amount upon which the charge is calculated is capped by reference to the undistributed income of the CFC.

The CFC charge is applied at the Irish corporation tax rates (12.5% to the extent the profits of the CFC are generated by trading activities and 25% in all other cases).

Income tax treaties / Multilateral instrument ("MLI"): Ireland has agreed to ratify the OCED MLI in 2019.

Ireland has 73 double tax agreements ('DTAs') and has confirmed that it will treat 71 of those DTAs as 'Covered Tax Agreements'. The key changes to Ireland's DTAs which will be made under the MLI are the adoption of: a principal purpose test; a tie-breaker test based on mutual agreement to determine tax residence for dual resident entities; and a few measures, including mandatory binding arbitration, to resolve DTA disputes more efficiently.

Country by Country reporting requirements: Ireland has implemented legislation on country by country reporting and signed a multilateral agreement (along with 30 other countries) providing for the automatic exchange of "Country by Country" (CbC) reports with other participating jurisdictions in relation to certain multinational (MNE) groups. An Irish resident constituent entity of an MNE Group will be required to make certain notifications to Irish Revenue in relation to its status for CbC reporting purposes before the end of the relevant reporting period.

Anti- hybrid: Article 9 of the ATAD provides for the introduction of anti-hybrid rules into Irish tax law. The anti-hybrid rules must be implemented by 1 January 2019.

Question 2

The taxation of an individual in the Republic of Ireland depends on residence, ordinary residence and domicile.

Residence and Ordinary Residence

An individual is resident in ROI if they are present in ROI for 183 days in any calendar year. Presence at any time during the day counts as a day of residence. An individual is also considered resident in the second of two years where they have spent at least 280 days between two consecutive years in ROI with a minimum of 30 days in each year.

Ordinary residence is the pattern of habitual residence. An individual is considered ordinarily resident in Ireland if they have been resident for the three prior consecutive years. An individual does not then lose their ordinary residence until the fourth consecutive year of non-residence.

Domicile

Domicile is a broader concept than residence, it is a concept of belonging. An individual acquires a domicile of origin at birth usually from the Father if the Parents are married, otherwise from the Mother. This domicile is retained during the years of infancy up to the age of 18. If the Parent from whom the domicile was acquired changes their domicile in that period, then the Child also falls suit and changes their domicile with the Parent. Once they have reached the age of majority, an individual can choose a domicile of choice. Domicile is not as easy to change as residence. To change domicile, one must relinquish their connections to their Country of domicile and adopt a new Country. This would generally mean disposing of property and of the connections and ties to a particular jurisdiction and acquiring such connections and intending to live for the foreseeable future, in a new jurisdiction.

Implications of Residency Rules on Taxation of Income and Gains

As UK residents, Francie & Karen will only become ROI tax resident if and when they satisfy the ROI tax residency rules. On satisfying the residency rules, Francie & Karen will be subject to ROI Income Tax and Capital Gains Tax on their worldwide income and gains. Whether any income and gains can be omitted from taxation in the Republic of Ireland will depend on Francie & Karen's domicile.

If they intend to retain their UK home and Karen intends to spend a significant amount of time in London then she not become resident in ROI as quickly as Francie will as she will still have tie to the UK. If both countries could claim her a resident under their domestic rules then the treaty must be considered. The first test is permanent home, the second is centre of vital interests. Both of these tests could pull Karen back into the UK in terms of residency unless they acquire a permanent home in Ireland she starts shifting her centre of vital interest, e.g. family and social ties to the ROI.

An individual who is resident and domiciled in Ireland is liable to Irish income tax on his/her worldwide income as it arises .This individual's ordinary residence status does not impact on his/her exposure to Irish income tax.

An Irish resident Person who is also domiciled would be taxable on their worldwide income and gains. An Irish resident Person who is non-domiciled is only taxed on foreign income and gains to the extent that they are remitted to ROI.

Application of Domicile Rules to Francie and Karen

If Francie was born and reared in Co. Cavan of Irish Parents, therefore, it is likely that he has an Irish domicile. However, having spent many years in England you would need to be sure that he has not acquired a domicile of choice in England. However, considering that he is currently moving back to the Republic of Ireland, it is unlikely that even if he has acquired an English of choice, that he is probably now relinquishing that on his move to the Republic of

Ireland. In Karen's case since she was born in the UK of English parents, it is likely that she has an English domicile.

Implications of Residency and Domicile for Capital Acquisitions Tax

There are also Capital Acquisitions Tax issues for Francie and Karen. Capital Acquisitions Tax ("CAT") at a rate of 33% applies to gifts and inheritances:

- made by Irish resident or ordinarily resident beneficiaries; or
- received by Irish resident or ordinarily resident beneficiaries; or
- of property situate in ROI.

It's a beneficiary based system where the beneficiary pays the tax and the quantum of tax depends on their relationship to the disponer. Therefore, once an individual becomes resident in ROI, everything that they do in relation to their Estate, both the making of gifts or the leaving of inheritances comes within the CAT net.

However, there is provision under Sections 6 and 11 CATCA 2003 which allows a non-domiciled person some relief when they become resident in the ROI. A non-domiciled Person is not treated for CAT purposes as being resident or ordinarily resident until they have been resident in ROI for five full consecutive tax years prior to the date of the gift or inheritance. Therefore, for a non-domiciled person such as Karen, this gives her a 5 year window to plan around Capital Acquisitions Tax. If Francie is considered ROI domiciled, he does not have the same opportunity.

Therefore, prior to their move to ROI, Francie and Karen should consider the tax implications of the move. Assuming that Francie is ROI domiciled and Karen UK domiciled, then Francie could consider transferring income sources and assets to Gareth where they are likely to derive income or capital gains from such property over the following number of years. This means that unless such income and gains is remitted to Ireland, it will only be taxable in the UK.

If Francie and Karen have already made some plans in relation to the division of their Estate among their Children, then perhaps they should consider some Estate planning before they move to ROI. In particular, assets owned by Francie should be transferred where possible to the children prior to acquiring ROI residency to avoid a Capital Acquisitions Tax charge. Alternatively, he could transfer them to Karen and she has a further five years opportunity to make provision for Estate planning before the assets could come within the Capital Acquisitions Tax net.

It is important in any Estate planning that they ensure that if they do have a UK Will and that they also decide to put in place a ROI Will, that one does not overwrite the other. Often the standard wording in a Will " ------ I revoke all previous Wills and testamentary dispositions----" can overwrite any previous Wills written. If they need to have a UK Will for UK purposes then the UK Will should be mentioned in any Irish Will that is created and only other assets not covered in the UK Will should be dealt with under the Irish Will.

Ongoing Tax Issues

Once resident in the ROI, Francie and Karen will be taxed under ROI rules.

Resident	**Ordinarily resident**	**Domiciled**	**Liable to Irish income tax on**
Yes	No	Yes	Worldwide income
Yes	No	No	Irish source income; foreign employment income to the extent duties of the employment as performed in Ireland; other foreign income and gains (including UK investment income) to the extent that it is remitted into Ireland

As a domiciled person any income or gains that Francie derives after he becomes resident in ROI will be fully taxed in ROI.

As a non domiciled person Karen will be taxed on Irish source income and any foreign income or gains to the extent that she remits it.

Any taxes suffered in the UK on such income and gains can be utilised as a double taxation credit against the equivalent Irish tax on the same income or gains in the ROI under the double taxation treaty between Ireland and the UK.

If Francie decides to dispose of his remaining interest in his trading company after becoming ROI resident he will need to assess if he qualifies for any Irish reliefs such as Retirement Relief from capital gains tax on the disposal at that time.

Francie and Karen will have to file ROI Income Tax Returns of their income and gains in each year. Since they have sources of foreign income, they will automatically be considered chargeable persons, even if they had no Irish source income.

Gifts & Inheritances

Assuming that the children remain resident in the UK any gifts made by Francie after acquiring residency will be subject to CAT. There is a €3,000 annual exemption available for gifts from any one disponer. In addition each of the children will have a child's exempt threshold available to them of €320,000 and they can receive gifts and inheritances from their parents combined up to this threshold without incurring a charge to ROI CAT. If Francie disposes of his interest in his trading company by way of gift to his son then Gareth will need to consider whether Business Property Relief from CAT (a 90%) relief could apply to the gift at that time if he hasn't sufficient remaining threshold to cover it.

Karen can make gifts to her children for up to 5 years without incurring a charge to CAT provided the gifts are not of ROI situate property or from ROI bank accounts. Once these 5 years have elapsed a charge to CAT will arise on any gifts she makes.

Leaving assets by way of Will rather than as a lifetime gift eliminates Capital Gains Tax and Stamp Duty. Only CAT applies to inheritances.

Where both UK Inheritance Tax and CAT apply to the same disposition then a credit can be claimed for double taxation under the terms of the ROI UK Tax Convention. However, since the UK charge is based on domicile and the ROI charge is based on residency, the calculation of both countries taxes is not like for like. Often only Residuary Beneficiaries will benefit from the tax credit.

PART B

Question 3

Tax residence of BHIH under the current structure, including any potential impact of the Finance Act 2014 residency changes

Different residency rules may apply to a company, depending on whether it was incorporated in Ireland before or after 1 January 2015. BHIH was incorporated in 2012 prior to the new company residency rules introduced in Finance Act 2014, therefore the new company residence rules may not apply to BHIH until 1st January 2021.

For companies incorporated before 1 January 2015, a company incorporated in Ireland was automatically Irish resident unless it met either the treaty or the trading exemption:

1. An Irish incorporated company is considered non-Irish tax resident under the terms of a DTA -determined by the jurisdiction where the company has its place of central management and control. ('treaty exemption'); or

2. Where the incorporated company or a related company carries on a trade in Ireland and either the company is ultimately controlled by a tax resident of a European Union (EU) member state or a country with which Ireland has a DTA, or the company or related company are quoted companies ('trading exemption').

However, s. 23A(5) TCA 1997 deals with “stateless “companies and disapplies the trading exemption if an Irish incorporated company's place of management and control is in a jurisdiction that only applies an incorporation test for determining residency (and the company would thus not be regarded as tax-resident in any jurisdiction).

BHIH is Irish incorporated and the company is wholly owned by a US parent, as well as being related to a quoted company, therefore it should be considered a “relevant company”. BHIH does not have any employees nor have any activities in Ireland hence it could not be considered “trading”. However Blue OpCo, which is a 100% wholly owned subsidiary, is a related company and therefore the trading exemption criteria is met. The “stateless” provision is not applicable to BHIH as the company would be considered resident in Bermuda by virtue of management and control. Therefore, the new residency rules should only apply from 1st January 2021.

From 1st January 2021 the company would be considered Irish resident under Irish domestic law because it is Irish incorporated and does not have a tax treaty with Bermuda to allow a tie-breaker provision to apply. This would mean the company is subject to Irish corporation tax on its worldwide profits. As it would not currently meet the criteria to qualify as a trading company for Irish tax purposes, any income or profits will be taxable at the higher rate of 25%.

The cost sharing payments themselves would not be tax deductible in Ireland. Although Ireland has a system of tax deductions for expenditure on acquired intellectual property and on scientific research, deductions are only available for trading companies.

Possible reorganisation of the group

BH Inc. will need to consider a reorganisation of the group to mitigate the adverse impact of the new provisions. One strategy to be considered is that prior to 1st January 2021, the IP owned by BHIH could be “on-shored” to Ireland. This could be carried out in a series of steps as follows:

Step 1: One month prior to a year end of the company, BHIH gives 30 days’ notice of the cancellation of the licence of the software products of the group to Blue Op Co. This step should have no Irish consequences.

Step 2: On the year end of the company, BHIH holds a board meeting in Bermuda and resolves to transfer the residence of the company to Ireland. From the date of the next board meeting, BHIH will become Irish resident.

Step 3: On the following day (the first day of new the accounting period), the board of BHIH meets in Ireland and resolves to acquire the business and assets of BlueOpCo. On the same day, the board of BHIH meets and resolves to sell its business and assets to Blue OpCo. Since both companies are Irish tax resident at this point, they form an Irish tax group and the assets of BHIH transfer to Blue OpCo tax free with a transfer of base cost for Irish Capital Gains Tax purposes. The transfer is also free of Irish Stamp Duty because of group relief. The entire business is thereafter carried on by Blue OpCo, now an Irish resident company. Business profits reported in Ireland will be much higher, but there are two significant advantages from a tax perspective – (1) the trading profits will be taxable in Ireland at 12.5% and (2) cost sharing payments incurred after the date of transfer of the business will be deductible either as incurred on the basis that they represent expenditure on scientific research or over a five year period (to the extent that they are capital) on the basis that they are expenditure on intangible assets. The latest date for this reorganisation would be 31 December 2020 if the adverse impacts of the legislation are to be avoided.

Step 4: To ensure that the appropriate royalty rate is earned by the IP holder Blue OpCo, a comprehensive transfer pricing study should be completed across the group to ensure that transfer pricing outcomes are in line with Irish transfer pricing legislation which are construed so as to ensure consistency with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010 (OECD Transfer Pricing Guidelines).

Question 4

Part 1

The Directors of Simplex Ltd will need to consider the timing of any tax registrations due to their moving to the ROI market. Each tax has different rules with regard to when a registration is required.

In order to register for VAT and Corporation Tax since the introduction of Companies Act 2014 a non-established company must register a branch in ROI with the Companies Registration Office. Once the branch has been registered, an application can be made for tax registration.

VAT

The VAT registration threshold in the ROI for services is €37,500 and for goods is €75,000. Where both goods and services are provided, the lower of the two thresholds, €37,500 applies. However, in Simplex's case this threshold will not be applicable if they make any sales prior to setting up their first office.

From a VAT perspective, a non-established business does not have a VAT registration threshold in ROI. Therefore, in the period prior to setting up an office and having a permanent address or branch facility in ROI, Simplex Ltd will have no registration threshold, therefore, any sales that it makes in ROI will create a VAT presence. They therefore must register for VAT as soon as possible so that VAT is declared from the first euro of sales.

If goods and services are being sold in the Republic of Ireland, then it's important that the inter-branch activity is accounted for properly from a VAT perspective. If goods are sourced in Northern Ireland for sale to ROI Customers then provided they are dispatched from NI directly to the ROI Customer and the Customer is a VAT registered business in ROI, the sale of the goods can be zero rated as an intra community sale.

Likewise, services provided by an NI company to an ROI registered business can be supplied on a zero rated basis as B2B services intra-community. However, as soon as a branch registration is set up in ROI then it will be the ROI branch providing the goods and services. Therefore, if goods are sourced in NI for sale to ROI Customers, they must first be sold as an intra-community sale to the branch in ROI and then sold with Irish VAT to the Customer by the branch. The services would be provided directly by the branch with Irish VAT applied.

Corporation Tax

Corporation Tax registration is required when a non-resident company has a permanent establishment in ROI. A permanent establishment is a fixed place of business through which the business of the enterprise is wholly or partly carried on. The setting up of an office in Dublin and the employment of Staff would indicate that a presence is being created. Also the fact that the Director of the company who has authority to make decisions on behalf of the company is negotiating sales with ROI Customers, then it would appear that they have a Corporation Tax presence from the outset.

The ROI trading branch would only be subject to 12.5% Corporation Tax on its profits. Whereas a Northern Ireland company at present is subject to 20% Corporation Tax on its profits with credit for Corporation Tax already suffered in ROI at 12.5%.

Employer Taxes

A non-resident Employer has an employment registration obligation in ROI where an Employee spends more than 183 days on duties in the ROI. In fact, if they spend more than 60 days on duties in ROI, then there is also a registration obligation unless they remain resident in the UK and their employment expenses is not borne by a permanent establishment based in ROI. If any ROI resident employees are taken on, this would require an Employer registration. If this was an NI Employee being sent on secondment to the ROI and it was envisaged that this individual would spend more than 183 days on duties in the Republic of Ireland, then a payroll should be set up from the outset. Since Arlene an existing office manger in NI is taking up the role in Dublin as office-manager she will be placed on the ROI payroll from the outset unless it's a temporary arrangement and the plan is to hire a Dublin based replacement as soon as possible.

Part 2

The Irish Revenue Commissioners will not require an employer to operate Irish PAYE in respect of temporary assignees that have income attributable to duties performed in Ireland under a foreign contract. A temporary assignee refers to someone who is present in Ireland for a period or periods exceeding 60 days but not exceeding 183 days a tax year. The following criteria must be satisfied:

- The employee is a tax resident of another jurisdiction with which Ireland has a double-taxation agreement;

- The employee is present in Ireland for a period or periods exceeding 60 days but not exceeding 183 days in the relevant tax year; and

- The employee suffers withholding taxes at source in the home country on the income attributable to the duties exercised in Ireland under the foreign employment.

There are a number of other conditions which the foreign employer must also fulfil, including applying to the Revenue for agreement not to operate PAYE in these circumstances and providing an undertaking to meet any tax liability which might ultimately arise.

There is a requirement that any apportionment of remuneration between Irish and foreign duties must be agreed in advance with Revenue

NI resident workers who are posted to work in the ROI branch would be considered cross border workers. Therefore, the number of days that they spend on duties in ROI should be monitored to establish when they must be put on an ROI payroll. If it is known from the outset that they will spend more than 183 days on duties in ROI then they should be included in the ROI payroll from the outset. If only part of their work is ROI based then that portion of their work should be established on the ROI payroll with the remainder of their work remaining on the NI payroll.

As the NI resident workers now earn foreign income they will have a tax return filing obligation in their country of residence – the UK- but should be able to claim a double taxation treaty credit for tax and USC deducted under the ROI payroll.

Part 3

It may be preferable for a future streamlining of the business if an ROI company was set up to house the ROI branch activity.

Transfer of Branch to Company

The branch assets could be transferred by Simplex Ltd to a newly incorporated ROI subsidiary. If any of the branch assets are chargeable assets that would give rise to a gain on disposal relief from CGT can be claimed under S617 TCA 1997. The conditions for the relief are that:

- The transferor Simplex Ltd must be resident in ROI or if not so resident the asset must have been an ROI chargeable asset of Simplex Ltd before the transfer. Any branch assets would be ROI chargeable assets of Simplex Ltd; and

- The transferee the ROI subsidiary must be resident in the State.

If the conditions apply the disposal is treated as taking place at a price that would produce no gain or loss for Simplex Ltd. If the ROI subsidiary leaves the Simplex Ltd group with the asset within 10 years of the acquisition of the assets the capital gain arising on disposal of the branch asset which was deferred is crystallised and charged on the ROI subsidiary under S623 TCA 1997.

Stamp duty of 6% arising on a transfer of assets can be relieved under S79 SDCA 1999 since Simplex Ltd and its subsidiary form a 90% group. If the group relationship ceases within 2 years of the transfer the relief can be clawed back.

The transfer of the business from branch to company can be treated as a transfer of business under S20 VATA 2010 and no VAT should apply on the transfer provided both Simplex Ltd and the subsidiary are VAT registered in ROI.

Once the branch has been transferred Simplex Ltd can deregister for taxes in ROI.

Corporation Tax

The ROI company will need to register for corporation tax. Once the branch is incorporated all of profits will be taxed in the ROI subsidiary at the ROI corporation tax rate 12.5% for trading income and not subject to tax in the UK.

After tax profits of the ROI subsidiary can be distributed by way of dividend to Simplex Ltd. Dividend withholding tax at 20% will not apply to the distribution as Simplex Ltd is tax resident in a treaty country.

VAT

The ROI company will need to register for VAT. All sales of goods and services in ROI can be conducted by the ROI subsidiary.

Any goods sourced in Northern Ireland for sale to ROI Customers must first be sold by Simplex Ltd to the ROI company. This can be treated as a zero rated cross border intra-community acquisition by the ROI company. The onward sale to the Customer would be subject to ROI VAT.

Employer Taxes

The ROI company will need to register as an employer to take over the employees of the ROI branch. Under the S.I. No. 131/2003 – European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003, more commonly referred to as TUPE, the terms and conditions of employment and the employer's obligations in the contract of employment are automatically transferred to the ROI company where there is a transfer of undertaking.

Part 4

If the UK including Northern Ireland becomes a third country after Brexit and leaves the single market and customs union then:

- Any goods transferred from UK to ROI will incur a charge to VAT on import by the ROI company.

- Customs procedures and tariffs may apply depending on what trading arrangement between UK and ROI is in place.

Part C

Question 5

Part 1

Consideration needs to be given to whether the migration of Crow Limited from Ireland results in an exit charge under Section 627 TCA 1997. Generally, where a company ceases to be resident in Ireland it will be deemed to have disposed of and reacquired all the chargeable assets at market value (i.e. trademark and goodwill in this instance).

This exit charge however does not apply to an "excluded company", i.e. a company of which at least 90% of the issued share capital is held by a "foreign company". A "foreign company" is a company which is not resident in Ireland, is under the control of persons resident in a DTA country and is not under the control of Irish resident persons or persons directly/indirectly controlled by a foreign company.

Crow Ltd is owned 100% by Wren BV, which is a Dutch resident company. Wren BV is not Irish resident, but it is under the control of an Irish resident company and Irish resident persons. Therefore, Wren BV does not qualify to be regarded as a foreign company and the exemptions under s. 627 do not apply.

Section 628A provides for a deferral, in certain circumstances, of the charge to tax arising under section 627 where a company ceases to be resident in the State. The section provides migrating companies with options to elect to defer the immediate payment of tax arising (i.e. exit tax) where a company migrates its residency to another EU Member State or EEA State. Such migrating companies who wish to defer their exit tax charge are required to make an election on their final tax return.

Part 2

Parrot Ltd is a non- Irish resident company. Section 25(1) TCA 1997 provides that a company which is not resident in Ireland is subject only to corporation tax if it carried on a trade in Ireland through a branch or agency. A company which does not have a branch or agency in Ireland will be subject to income tax on any income derived from sources in Ireland at the standard rate of income tax (25%).

Parrot Ltd will be subject to income tax @ 25% on the net rental income which is taxed under Schedule 2, case V as per s. 18 (2) TCA 1997. Parrot Ltd should be entitled to obtain a deduction against its gross rental income for the interest expense and any other allowable costs in determining the taxable profit.

As Parrot Ltd is a non-resident landlord, the tenant will be required to withhold tax at the rate of 20% from the gross rents and remit this to Irish Revenue. Therefore, Parrot Ltd will receive only 80% of the rent from the tenant. Parrot Ltd will be entitled to a credit for the tax withheld against the income tax arises on the rents. If the credit exceeds the tax on the rents, Parrot Ltd should be entitled to a refund of the excess. However, if Parrot Ltd appoints the property management company as a collection agent to which the tenant can remit the rent, the tenant would not be required to apply the 20% withholding tax.

Part 3

Domestic legislation provides for a 20% withholding tax rate. We are required to consider whether the double tax agreement between Ireland and Spain reduces this rate. Article 11 of the Model Treaty deals with interest payments. Paragraph 1 and 2 provide that interest can be taxed in both jurisdictions. However, it reduces the interest withholding tax to 10% where the company receiving the interest is the beneficial owner of the dividends.

Paragraph 4 provides that this reduced 10% rate shall not apply if the recipient carried on business in Country B through a permanent establishment and the loan in respect of which the interest is paid is effectively connected with the permanent establishment. In such a scenario, the interest would be taxed under Article 7 (Business Profits).

Based on the information provided, in accordance with Article 5 Bird Holdings Ltd would be considered to have a permanent establishment in Spain. We are advised that the interest is a payment from a significant customer and as such the business and as such the interest should be considered “effectively connected” with the permanent establishment. Therefore, paragraph 4 should apply, and no withholding tax is required to be applied to the interest payment.

Question 6

Three cases to be identified, findings summarised and how Irish legislation was influenced to be described.

Marks and Spencer C466/03

Freedom of establishment: This case dealt with the availability of group relief for losses between EU group companies. The UK did not allow loss relief incurred by a non-resident company. The CJEU held that the restriction of loss relief should not apply if the non-resident company has exhausted all possibilities available in the State of residence for using the losses and there is no possibility of the losses being utilized in that country in the future.

Section 420C was introduced because of this case to allow for group relief for losses if the loss is an amount of a kind that would generally be available for offset under Irish tax rules, is calculated under the rules of the Member State of the surrendering company, is a trapped loss and cannot be used in the Member State.

FII GLO C466/04

Freedom of establishment/Freedom of movement of capital: In the UK, dividends from UK subsidiaries were exempt while dividends from EU subsidiaries were taxable.

The CJEU held that there was nothing to prevent Member States from using an exemption system for nationally sources dividends whilst using a credit system for foreign sourced dividends as both methods should ensure that the dividends are not liable to a series of tax charges. Nationally sourced dividends are taxed at a subsidiary level but not in the hands of the parent and foreign sourced dividends are taxed in the hands of the parent but with credit for any withholding tax and underlying tax suffered. The CJEU held that the credit system was only acceptable where the rate of tax suffered on the foreign sourced dividends is equal to the rate of tax on the nationally sourced dividends.

This decision meant there was an issue in Ireland as foreign dividends were taxed at 25% and Irish dividends were taxed at 12.5% which was contrary to EU law. Irish legislation (s21B) had to be introduced to allow for a 12.5% rate of tax on dividends received from EU subsidiaries where certain conditions were met.

FII GLO C35/11

This case was a follow on the initial FII GLO case which resulted in the introduction of section 21B. In this second case dealing with the taxation of foreign dividends, the CJEU held that the application of an exemption system for domestic dividend and a credit system for foreign dividends was contrary to EU law.

The CJEU noted that Member States are precluded from applying an exemption method to domestic dividends and a credit system for foreign sourced dividends if its established that the tax credit entitlement is based on the amount of the foreign tax actually paid on underlying profits and the effective level of company profits in the Members States is generally lower than the prescribed nominal rate of tax. One solution to deal with this proposed by the CJEU was for Member States to grant an additional credit for overseas tax at the foreign nominal rate rather than the effective rate.

Schedule 24, Paragraph 9I was introduced because of this ruling to allow for an additional foreign tax credit on dividends received from EU or EEA countries with which Ireland has a double tax agreement based on the nominal, rather than effective tax rate.

National Grid Indus C371/10

This case dealt with the imposition of an exit tax under Dutch domestic law on the migration of tax residency of a company from the Netherlands to the UK. Similar to Irish law, on migration of tax residence from the Netherlands, a tax charge arose in respect of a deemed disposal of certain assets held by the company at the date of migration (in this case a receivable owing to a UK related company). The taxpayer argued that the imposition of this exit tax represented a restriction on freedom of establishment.

In its ruling, the CJEU held that exit taxes were justified to preserve the allocation of tax rights between Member States. However, the collection of any tax due immediately on migration was not proportionate as it put the taxpayer at a disadvantage compared with taxpayers who may move operations within a Member State.

Two solutions were proposed by the CJEU – payment of the exit tax upfront with the cash disadvantage or deferral of the payment of the exit tax.

Section 628A was introduced because of this case. This section provides that where a company migrates its tax residency from Ireland to another EU Member State, Norway or Iceland or Liechtenstein, the company can use elect to defer the payment of the exit tax either in six instalments or not later than 60 days after the actual disposal of the asset subject to a maximum deferral of 10 years. The deferral of the exit tax will also result in the interest being imposed on the tax due.

European Commission v United Kingdom

This case dealt with the UK equivalent of section 590. Section 590 applies such that if a non-resident close company crystallizes a chargeable gain, the Irish Revenue will reach out to that company and pull that gain back to Ireland and subject it to Irish capital gains tax in the hands of the Irish-resident/ordinarily resident and domiciled taxpayers, even though those Irish participators would not have received any actual funds or other benefit from holding an interest in that company.

In this case, the CJEU held that the UK equivalent was against the free movement of capital in that it targeted not only wholly artificial arrangements but also imposed a tax charge on arrangements which were carried out for a bona-fide genuine commercial purposes.

Before this judgement was released the UK had already amended its version of section 590 conceding that the previous version of this legislation was against EU law and the action taken by the European Commission was therefore justified.

Finance Act 2015 amended section 590 in light of this ruling such the provisions of section 590 will now only apply in the case of a transaction which is not carried out for bona-fide commercial reasons and is part of an arrangement of which the purpose or one of the main purposes is the avoidance of Irish tax.

Question 7

Candidates should be able to demonstrate an understanding as to how treaties allocate taxing rights, and provide exemption and credit for taxes to eliminate double taxation with examples.

Question 8

Part 1

Acquisition of Property

Stamp duty arises on the acquisition of ROI property, other than by inheritance. The current stamp duty rates are 6% on commercial property and land. For residential property the rate is 1% for properties up to a value of €1m and 2% on the value exceeding that threshold.

If the property acquired is second hand residential then there is no VAT on purchase. If it is commercial property then VAT on property rules apply. If it's an existing let property it may be acquired under the VAT Transfer of Business Provisions where the transaction is treated as outside the scope of VAT but the purchaser takes over the capital goods record of the property from the vendor and must retain it in the VAT net for the remainder of its VAT life.

The alternative treatment is the joint option to tax where vendor and purchaser jointly elect to keep the property in the VAT net. The purchaser starts a new VAT life and a new capital goods record. The purchaser must then keep the property in the VAT net for 20 years by opting to tax the rents and apply VAT at 23%.

A non resident individual is subject to income tax and USC on rents from ROI property. No PRSI applies to a non resident. This can result in a high marginal tax rate if the individual is a higher rate taxpayer.

The individual investor will be taxed in their own jurisdiction of residency in relation to the rent and under the relevant Irish tax treaty if there is one in place, a credit will be available for the income taxes and USC payable in Ireland on the same income.

There are limited categories of expenses that are deductible in calculating the taxable rents – rent and rates payable, maintenance and management expenses and capital allowances. Interest on borrowings is available as a deduction but is restricted for residential properties to 85% in 2018 , 90% in 2019 unless let out to tenants in receipt of housing supports for a three year period. In additional all residential tenancies must be registered with the PRTB.

Disposal of Property

The future sale of the property will give rise to Irish capital gains tax under the specified asset rule. Irrespective of the residency of the owner ROI will have the primary taxing rights to the disposal. Capital gains tax at a rate of 33% will be applied to the gain arising. The gain arising is the difference between the sales proceeds on the property less a deduction for selling expenses and the original base cost of the property being the acquisition cost plus any purchase expenses. The capital gains tax arising is available as a credit under the treaty against any capital gains tax applicable in the home country of the acquiring individual or entity.

Second hand residential property sales will be outside the scope of VAT. Commercial property may be within the scope but the Transfer of Business rules as described above or the joint option to tax may be available.

Part 2

Withholding on Income

Section 1041 TCA 1997 outlines the provisions where rent is paid directly to a non-resident landlord. The tenant must deduct tax at the standard rate 20% on the gross rents in accordance with section 238 TCA 1997. The non-resident landlord is subject to income tax on the gross rents less any allowable expenses. Credit for the actual tax deducted by the tenant will be granted against the tax liability of the landlord.

Where a tenant deducts tax from the non-resident landlord rental income a form R185 certificate of income tax deducted should be given to the landlord. The landlord can use this to claim the credit for the tax deducted by the tenant.

Where a tenant is not paying the rent directly to the non-resident landlord but paying it to an agent then the agent must register with the Revenue Commissioners in the name of the non-resident landlord. The agent is then taxed on the rents less any allowable expenses in the name of the non-resident landlord. The agent need not be a professional person it can be a family member or other person. The agent should be set up under a new PPS number. While the assessment is in the name of the Irish agent, the tax to be charged is the amount which would be charged if the non-resident landlord was assessed in his or her own right. Accordingly, as well as assessing only the profit rent, relief should be given for any personal tax credits to which the non-resident landlord is entitled.

Regarding CGT, on sales of ROI situate property S980 TCA 1997 imposes a 15% deduction from sales proceeds where the proceeds exceed €500,000. The non resident can apply for a tax clearance known as a CG50. The non resident seller must demonstrate that there is no CGT by way of calculation or pay over the relevant CGT to avoid the 15% withholding.