

THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

December 2021

MODULE 3.01 – EU DIRECT TAX OPTION

ADVANCED INTERNATIONAL TAXATION (THEMATIC)

TIME ALLOWED – 3¼ HOURS

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

You need to answer **five** questions in total. You will **not** receive marks for any additional answers.

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.
- As you are using the online 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.
- There is no separate reading time, so you can start typing your answers as soon as the exam begins. However, we recommend that you set aside some time to thoroughly read each question and plan each of your answers.

PART A

You are required to answer BOTH questions from this Part.

1. The directors of a manufacturing company resident in Homeland are considering transferring part of the company's operation (and relevant manufacturing assets) to the company's subsidiary, resident in Newhomeland. The subsidiary will borrow the purchase price from the parent and will repay the loan over a period of five years. Interest will be charged at 2% above the central bank's base rate.

The directors have advised you that the original cost of the tax depreciable assets was €12 million and the current market value is €10 million. You have been advised also that the current tax basis (after depreciation allowances) is €6 million; that Newhomeland will grant depreciation allowances on the basis of the current market value; and that the subsidiary is expected to use the assets for a further five years, after which it will replace them.

The Homeland tax authorities propose to assess the parent company for tax on €4 million, being the difference between the current market value of the depreciable assets, which is taken into account as deemed disposal proceeds, and the current tax basis.

Both Homeland and Newhomeland are EU member states.

You are required to prepare a note for the directors, addressing all of the potential direct tax issues relating to this transaction and making reference to the EU Treaties, secondary legislation and relevant case law of the Court of Justice of the European Union. (25)

2. "According to the case law of the Court, Community law cannot be relied on for abusive or fraudulent ends..."
(*Kefalas C-367/96, paragraph 20*)

You are required to answer the following questions:

- 1) **Explain, with reference to the case law of the Court of Justice of the European Union, when a taxpayer might be considered to be relying upon EU law "for abusive or fraudulent ends", and provide examples.** (18)
- 2) **Has the Court's case law been superseded by the Anti-Tax Avoidance Directive (ATAD, Council Directive (EU) 2016/1164)? Explain your answer.** (7)

Total (25)

PART B

You are required to answer ONE question from this Part.

3. “It is necessary to consider what the consequences would be if an advantage such as that at issue...were to be extended unconditionally.”

(Marks & Spencer Case C-446/03, paragraph 41)

You are required to answer the following questions, with reference to the case law of the Court of Justice of the European Union:

- 1) **What is the advantage that the Court is referring to?** (3)
- 2) **How does the advantage arise under national law, and in what other cases has the Court considered schemes of other member states that seek to achieve the same objective?** (8)
- 3) **What would be the consequences if the United Kingdom’s provisions had extended the relief unconditionally?** (9)

Total (20)

4. Investco, a company resident in Resiland, an EU member state, has a 15% stake in a company, Target, which is resident in Targetland, a third country.

Targetland exempts Target’s profits from company tax because of the type of business conducted, but levies a withholding tax at a rate of 20% on all distributions made by Target.

Resiland will tax Investco’s foreign source income at the standard rate of its company tax (30%), but will grant credit relief for foreign tax paid on the distributions charged to tax.

Resiland also taxes domestic source dividends, but in that case subject to a 90% abatement of the income brought into charge to tax. Resiland does not levy a withholding tax on distributions made by resident companies.

You are required to provide an analysis of this situation, with reference to EU Treaty rights and relevant case law of the Court of Justice of the European Union. (20)

PART C

You are required to answer TWO questions from this Part.

5. **You are required to explain, with examples drawn from the case law of the Court of Justice of the European Union, the importance of the principles of ‘equivalence’ and ‘effectiveness’.** (15)
6. “No uniform or harmonisation measure designed to eliminate double taxation has as yet been adopted at Community law level”.

You are required to answer the following questions, with appropriate reference to the Treaties and relevant case law of the Court of Justice of the European Union:

- 1) **Upon what legal basis may a harmonisation measure be made? Explain what form the measure may take, and how effect is given to it.** (4)
- 2) **Do the Treaties impose any constraints on the making of harmonisation measures? Identify a reason why harmonisation in the area of double tax elimination has yet to be addressed by the European Union.** (4)
- 3) **When a matter engages both a harmonisation measure and primary law, which will take precedence and why?** (7)

Total (15)

7. An EU member state which provides direct tax benefits to inward investors that are not available to residents of the state engaging in comparable activities may be regarded as providing ‘State Aid’.

You are required, with reference to the relevant Treaties, Council Regulations and case law of the Court of Justice of the European Union, to:

- 1) **Explain who can instigate an investigation, and what the consequence would be if the member state taxation scheme is determined to constitute State Aid.** (6)
- 2) **Suggest three forms of tax benefit that might be regarded by the Court as being “granted... through state resources”, and provide reference to the relevant case law.** (9)

Total (15)

8. Trader is a company, resident in Homeland, which has conducted business both in Homeland and, through a permanent establishment (PE), in Branchland. Both Homeland and Branchland are EU member states. Homeland’s corporate tax system exempts from tax the profits of foreign permanent establishments and, correspondingly, disregards any losses suffered by such establishments.

The business of the PE in Branchland recently failed and Trader closed down the PE, having incurred losses that cannot be utilised in Branchland. Trader subsequently made a claim to set the PE losses against its Homeland assessments. The claim has been refused by the Homeland tax administration.

You are required, with reference to the relevant Treaties and case law of the Court of Justice of the European Union, to:

- 1) **State which freedom of movement is engaged, and explain why the Homeland tax administration’s refusal of Trader’s claim may cause a restriction.** (5)
- 2) **Explain the potential grounds for justification that might be argued by the Homeland tax administration.** (5)
- 3) **Comment on the proportionality of the potential restriction.** (5)

Total (15)

9. An EU member state levies withholding tax of 25% on dividends payable to non-corporate and non-resident corporate shareholders. Resident corporate shareholders are exempted from the withholding tax. The state has concluded a wide network of double tax agreements, under which the withholding tax is reduced to 10%.

You are required to write a brief note on the EU law issues which may arise in this situation, with reference to relevant Treaty law, secondary measures and case law of the Court of Justice of the European Union.

(15)