THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2021

MODULE 2.06 – IRELAND OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Candidates' answers are expected to describe the main features of Ireland as a holding company location from a tax perspective, including the below points. To the extent that candidates offer other relevant tax points, these will also be awarded marks.

The corporate income tax rate is attractive at 12.5% on trading income and 25% on passive income. In addition, certain trading dividends from foreign subsidiaries located in an EU member state or in a country with which Ireland has a double tax treaty 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 for dividends. This is seen by many as a weakness as there is a greater administrative burden with this regime as well as a greater difficulty accurately forecasting the effective tax rate.

Irish 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). The calculation of the credit depends on the nature of the income item, but for income sources other than dividends and some related-party interest, the credit is limited to the Irish tax referable to the particular item of income. 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.

<u>Gains</u>

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:

- 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;

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

- 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

- 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. However, 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.

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 above are not met at the moment of liquidation.

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 treaty 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 EU Anti-Tax Avoidance Directive requires EU Member States to implement an interest limitation rule. 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. Ireland had sought such a derogation based on its extensive legislation governing interest withholding and deductibility, however, the EU Commission disagreed with this which has led to the expected earlier implementation.

Withholding taxes

Dividends: 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.

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 introduced 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 signed the OECD MLI in June 2017 and it entered into force in Ireland in May 2019. Ireland has 74 double tax treaties ('DTTs') and 71 of those DTTs will be treated as 'Covered Tax Agreements'. It implements agreed minimum standards and best practices to counter treaty abuse and to improve dispute resolution mechanisms. It also provides flexibility to accommodate different tax treaty policies.

Greecey Country Reporting Requirements: Ireland implemented legislation from 1 January 2016 on country-by-country reporting and signed a multilateral agreement (along with 30 other countries) providing for the automatic exchange of "Greecey 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 provided for the introduction of anti-hybrid rules into Irish tax law, which were enacted into legislation and applicable to payments made after 1 January 2020. Anti-hybrid rules prevent arrangements that exploit the differences in the tax treatment of an instrument or entity. Differences can arise from the way in which that instrument or entity is characterised under the tax laws of two or more territories. This can generate a tax advantage or a mismatch outcome. The anti-hybrid rules apply to all corporate taxpayers. There is no lower limit or threshold below which the rules do not relate. The rules are complex. This is because they apply to cross-border transactions and require consideration of the tax treatment of transactions and entities in other territories.

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.

EU Mandatory Disclosure reporting rules came into effect in July 2020, however due to the impacts of COVID-19 pandemic the reporting deadline was deferred until January 2021. The first reports are due by the end of January. DAC 6 applies to cross-border tax arrangements which meet one or more specified characteristics ("hallmarks") and concern either more than one EU country or an EU Italynd a non-EU country. Subsequently, all tax authorities across the

EU will exchange the received reportable disclosures amongst one another on a quarterly basis.

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. There is no capital contribution tax in Ireland.

Question 2

Part 1

Dear Tommy, while you are correct in ascertaining that the value of the asset you are receiving is below the inheritance tax threshold in the UK you should however look at the whole picture. Your uncle had other assets so there may be inheritance tax to pay in the UK if the threshold is exceeded overall.

You must also consider the Irish tax implications. Since your uncle's farm is located in the Republic of Ireland the inheritance of it will be subject to Capital Acquisitions Tax ("CAT"). CAT applies to all gifts and inheritances of ROI situate property whether that is left by an ROI resident disponer or received by an ROI resident beneficiary or not as the case may be.

The CAT system is a beneficiary based system so the beneficiary is taxed on the inheritance at the rate of 33%. The relationship between the disponer and the beneficiary dictates the level of exemption available by way of class threshold. On a gift or inheritance from an uncle the class threshold is threshold B currently €32,500. This is a cumulative threshold and all gifts and inheritances received since 1991 from grandparents, aunts, uncles, brothers, sisters and lineal descendants are amalgamated under this threshold That means that assuming you have not used any of it already, the first €32,500 of your inheritance can be considered exempt. The remainder will be taxable unless there is a further relief available.

Agricultural Property Relief is available to reduce the taxable amount if certain conditions are satisfied.

The first condition is that 80% of the total assets of the beneficiary having taken the gift or inheritance most consist of agricultural property in the EU or EEA. Since Brexit this includes land in the UK including Northern Ireland.
The second condition is that the beneficiary must pass the farmer test. That means that the beneficiary must satisfy one of the following three conditions:

- Farm the land full time (at least 20 hours per week) on a commercial basis;
- Have a relevant agricultural qualification; or
- Lease the land to an active farmer for at least 6 years who satisfies 1 or 2 above.

The relief is a 90% relief which means that 90% of the value of the farm may be relieved from tax provided the conditions are satisfied. The conditions must be satisfied for six years following the valuation date of the inheritance. The house located on the farm may also qualify as agricultural property if it is of a character appropriate to the property. If the land is leased for 6 years then the house on the farm will not qualify for relief unless it is your principal residence.

This may mean that there is tax payable on the inheritance as the house will otherwise be considered non agricultural property.

A favourite nephew threshold is where the normal B threshold is increased to the value of the A threshold applicable to children €335,000. It only applies where the nephew had worked with the uncle on the farm for the five years previously 15-24 hours per week. Since you have been living in Northern Ireland for 2 years and the farm is in Wicklow it is unlikely that Revenue would accept that he had been attending the farm on a day to day basis to assist your uncle.

The valuation date of the inheritance will be the key date in relation to the satisfaction of the conditions for the relief. If you had immediate benefit from the farm ie income or were in occupation of the dwelling then the valuation date would be date of death otherwise the valuation date is likely to be the grant of probate.

Your nephew B threshold can be used to shelter the 10% of the value of the property not covered by the agricultural relief. If you sell or dispose of the property within six years of the valuation date the Agricultural Property Relief can be clawed back unless you reinvest the proceeds in further agricultural property and retain it for the remainder of the six years.

Part 2

Whether you are resident in the ROI or the UK will depend on the residency test in both jurisdictions. The test in ROI is 183 days in one tax year makes you resident in that tax years and 280 days over two tax years with a minimum of 30 days in each makes you resident in the second of those two tax years.

The test in the UK is different and can involve fewer days if you have other ties to the UK. The tax treaty tie breaker is used where you could be considered resident in both jurisdictions and has permanent home as the first tie breaker and centre of vital interests as the second. Since you only moved 2 years ago you could still be ordinarily resident in ROI.

Any income you obtain from the farm either trading income or rental income will be subject to tax in the Republic of Ireland and also potentially in your country of residency Northern Ireland/UK. this is due to the fact that rental income from all Irish Situate land and buildings is first subject to tax in the Republic of Ireland and then in country of residency.

Income tax and USC will apply at the usual rates to the net rental income or net trading income derived from the property. The income tax and USC will then be available to reduce the equivalent UK tax on the same income by virtue of the double taxation treaty credit arrangement under the double taxation treaty between Ireland and the UK. This means that only the excess if any should be payable in your country of residency.

PRSI will only be payable if the taxpayer is resident or ordinarily resident in the Republic of Ireland. Since you moved two years ago to Northern Ireland you should no longer be resident in the Republic of Ireland but you may still be ordinarily resident as you do not lose your ordinary residency until the 4th tax year after ceasing to be resident.

If the land or house is sold at any point there will be capital gains tax to pay both in ROI and in the country of residency. CGT at 33% will apply to the uplift of the value of the land from the date of death. It will be payable in the ROI.

Since UK CGT may also be payable there should be a credit available under the double taxation treaty between Ireland and the UK for the ROI CGT suffered on the same disposal.

Part 3

The Irish tax implications would not be different because irrespective of whether Tommy's uncle lived outside the ROI the fact that the land is situate in the ROI is what brings it into the charge to CAT.

If Tommy's uncle was non resident and non ordinarily resident at the time of death then only the ROI situate property and any non ROI situate property received by ROI resident or ordinarily resident beneficiaries would have been within the charge to CAT.

Part 4

If there was tax to pay in ROI and also tax to pay in the UK in relation to Tommy's unless estate then you would have to look to any treaty arrangement to see if there is an availability of a credit for taxes suffered in the UK against the ROI CAT on the same assets to avoid double taxation on the same assets. Some treaties, e.g. the Inheritance Tax Convention with the UK, only allow a credit for UK tax paid against CAT for the residuary beneficiary.

Since Tommy is now living in Northern Ireland but still working in the ROI you would have to look to the UK Ireland Double Taxation treaty to see where he is taxed on his income.

He is taxed in ROI on rental income and also in the UK with a credit available for the ROI tax already suffered.

He is taxed under the PAYE system in ROI on his employment income. However, if his employment is considered Government service under Article 18 of the treaty then it will only be taxed in country of payment so he won't have to include it on his UK tax return.

PART B

Question 3

Part 1

Different residency rules may apply to a company, depending on whether it was incorporated in Ireland before or after 1 January 2015. A company is deemed to be tax resident in Ireland if it was incorporated in Ireland on or after 1 January 2015. This will apply unless it is treated as a tax resident company in another country under a Double Taxation Agreement. If a company was incorporated before 1 January 2015, there is a transition period up to 31 December 2020. From this date, a company will be deemed to be tax resident unless it is tax resident in another country under a Double Taxation Agreement.

There is an exception to this rule if, after 31 December 2014, a company has both: a change of ownership and a major change in the nature and conduct of the business. In these circumstances, the company will be tax resident from the date of the change in ownership.

Before these rules were introduced, the central management and control rule was used to decide if a company was resident. A company was regarded as resident if its central management and control was performed in Ireland. This was the case whether the company was incorporated in Ireland or not. This rule will continue to apply, on a transitional basis, to Irish companies that were incorporated before 1 January 2015.

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:

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

- 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 DTT, 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).

Owl Irlandia is Irish incorporated, and the company is wholly owned by a Italian parent, as well as being related to a quoted company, therefore it should be considered a "relevant company". Owl Irlandia does not have any employees nor have any activities in Ireland hence it could not be considered "trading". However Owl Trading Limited, 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 Owl Irlandia as the company would be considered resident in the Cayman Islands by virtue of management and control. Therefore, the new residency rules should only apply from 1st January 2021.

Part 2

As a rule, a company incorporated in Ireland is regarded as Irish tax resident. However, if, under the provisions of a double tax treaty (DTT), an Irish incorporated company is regarded as tax resident in another territory, the company will not be regarded as Irish tax resident. Under OECD Tax Treaty, tax authorities consider the highest level of control to decide where central management and control exists, and if this was deemed to be Italy and not Ireland, Owl Irlandia could be deemed to be non-Irish resident. Certain critical questions are included in this assessment to discover where:

- company policy is decided
- investment decisions are made
- major contracts are defined
- the company's head office is located
- the majority of directors live
- Cessation of residency

When a company is no longer tax resident its assets will be deemed to be disposed of at market value. The company must pay tax on any capital gains received from the disposal, except where the assets continue to be used in Ireland by a branch or agency of the company.

The composition of the board of Owl Irlandia should be considered to see that the requirements for sufficiently qualified directors to ensure that the strategy of Owl Irlandia plc is set by the board, and not by the parent company. Bruno should ensure that he attends board meetings in Dublin, rather than by telephone. Locally recruited, non-executive directors should have sufficient experience and standing to engage in a meaningful way with the management of Owl Irlandia.

Question 4

Part 1

The Directors of Clarkes Plant Hire Ltd 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 Clarke'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, Clarke's Plant Hire 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.

Services provided by an NI company to an ROI registered business can be supplied on a zero rated basis as B2B services intra-community before Brexit but as a zero rated supply outside of the UK after Brexit. 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 ROI 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 the ROI and the employment of Staff would indicate that a presence is being created. Also the fact that the Managing Director of the company who has authority to make decisions on behalf of the company is one of the first Persons initiating contact 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 19% 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. Since it is likely that some of the employees being taken on will be ROI based Employees, 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.

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 Clarkes Plant Hire 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, Clarkes Plant Hire Ltd, must be resident in ROI or if not so resident the asset must have been an ROI chargeable asset of Clarkes before the transfer. Any branch assets would be ROI chargeable assets of Clarkes.

- 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 Clarkes. If the ROI subsidiary leaves the Clarke 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 7.5% arising on a transfer of assets can be relieved under S79 SDCA 1999 since Clarkes 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 Clarkes Plant Hire Ltd and the subsidiary are VAT registered in ROI.

Once the branch has been transferred Clarkes Plant Hire 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.

If a loss was created, this loss cannot be used to reduce the Northern Ireland profits for corporation tax purposes whereas the losses of a branch can be utilised against the Northern Ireland profits.

After tax profits of the ROI subsidiary can be distributed by way of dividend to Clarkes Plant Hire Ltd. Dividend withholding tax at 20% will not apply to the distribution as Clarkes Plant Hire 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 Clarkes Plant Hire 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 C

Question 5

Part 1

A subsidiary is an independent legal entity that is either partially or wholly owned by the foreign company. The UK parent company can still own and control the subsidiary, but it is a separate entity incorporated within Ireland and particularly relevant post- Brexit, the EEA and EU in case further expansion is contemplated within the EU. A subsidiary must pay Corporation Tax on its worldwide profits (generally with credit for any overseas taxes paid).

A branch is an extension of the foreign company and performs the same business operations. A branch can register for all taxes in its own right. Irish branches of foreign companies are liable to corporation tax at the rates that apply to Irish resident companies. No tax is withheld on repatriation of branch profits to the head office. Depending on tax rules in home jurisdiction, the foreign company may be subject to corporate tax on the results of the Irish branch (generally with credit for Irish tax paid). This is likely to arise in this situation as the UK CT rate is higher than that in Ireland.

Both a branch and a subsidiary company can avail of Ireland's 12.5% corporate tax rate. However, an Irish branch company only qualifies for this rate on sales within the State. Whereas an Irish subsidiary company will receive the 12.5% corporate tax rate on sales in Ireland and internationally.

If a loss is incurred in the Irish operations, if a branch of the UK company is used, it should be available for immediate offset against the taxable trading profits of CCL for the accounting period in question. Therefore, the branch losses would have the immediate impact of reducing the UK CT liability. If however, a subsidiary is incorporated in Ireland, such a loss cannot generally be surrendered cross-border.

As it is anticipated that the Irish operations will be loss making for the first number of years, it is advisable that a Irish branch is first used. This structure will ensure maximum tax relief is available in for losses incurred in branch. Thus, the corporation tax liability of CCL should be reduced.

Part 2

Irish regulations follow the arm's-length principle and adopted the 2017 OECD Guidelines into the domestic legislation for accounting periods beginning on or after 1 January 2020. The forecasted sales whilst they are trading transactions, would fall within the Small and Medium Enterprises exemption from transfer pricing requirements, therefore no adherence to these regulations would be required whilst the sales levels remain at this level.

Question 6

Part 1

Italy domestic legislation provides for a 30% withholding tax on dividends. We are required to consider the OECD Model Tax Convention to determine whether this withholding tax can be reduced.

Article 10 of the OECD convention deals with dividends.

(10)(1) provides that dividends paid by a company resident in a Contracting State (Italy) to a resident of the other Contracting State (Ireland) may be taxed in that other State (Italy). Therefore, the treaty does not provide a complete exemption from withholding tax.

Article 2 however provides that if the beneficial owner of the dividend is a company which holds at least 25% of the capital of the company paying the dividend the withholding tax rate can be reduced to 5%; otherwise the withholding tax rate will be 15%.

As Clyde Ltd only owns 20% of Bonnie S.r.l, Bonnie S.r.l. will be required to withhold tax at 15% from the dividend.

As Clyde Ltd Ltd doesn't have a permanent establishment in Italy, it is not necessary to consider paragraphs 4 and 5.

Part 2

Domestic legislation provides for a 20% withholding tax rate. We are required to consider whether the OECD treaty reduces this rate.

Article 11 of the 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 Clyde Ltd carried on business in Greece 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 Clyde Ltd would be considered to have a permanent establishment in Greece. However, we are advised that the interest is a payment from an unrelated third party. Therefore, the interest should not be considered "effectively connected" with the permanent establishment. Therefore, paragraph 4 should not apply.

Therefore, the payor should withhold 10% tax from the interest payment.

Part 3

Domestic legislation provides for a 15% withholding tax rate.

Article 12(1) of the Convention provides that royalties in a Contracting State (Holland) and beneficially owned by a resident of the other Contracting State (Ireland) shall be taxable only in that other State (Ireland).

Therefore, the OECD provides for an exemption for withholding tax on royalties.

In this scenario however paragraph 4 is relevant. This provides that where the royalties paid are excessive, Article 12 only applies to the arm's length rate (i.e. the 6% royalty payment).

The excess royalty payment remains taxable according to the laws of each State "due regard being had to the other provisions of this Convention". The excess will need to be reclassified into the most appropriate income class and if both States cannot agree they may refer to the Mutual Agreement Procedure.

Question 7

Part 1

Income tax is deducted under PAYE on a real time basis. On or before each paydate the employer must obtain a tax code (RPN) for the employee and then notify Revenue of the payment they intend to make to the employee.

Tax bands for a single individual are €35,300 per annum at 20% and the excess at 40%.

Tax Credit deducted from the tax liability are €1650 personal tax credit and €1650 employee tax credit per annum. These bands and credits are apportioned for a weekly or monthly paid employee.

Universal Social Charge is deducted at graduated rates from gross income.

In 2021 the bands are:

First €12,012 per annum	0.5%
Next €8,675 per annum	2%
Next €49,357 per annum	4.5%
Balance	8%

These bands are apportioned for a weekly or monthly paid employee.

Pay Related Social Insurance (PRSI) is deducted by the employer at a rate of 4% where the weekly income exceeds €352. There is no deduction where total weekly income is below €352.

In addition the employer has to make an employers contribution to PRSI of 8.8% of gross pay where the wages do not exceed €398 per week but where they exceed €398 the rate of contribution is 11.05% of the total.

b) Irrespective of the tax residence position of the employee or the employer, income from a non-Irish employment attributable to the performance in the State of the duties of that employment is chargeable to income tax in the State and is within the scope of the PAYE system of deduction at source.

The employer can be released from the obligation to deduct taxes in ROI if they satisfy the conditions in the employment article of the relevant treaty and the additional Revenue guidance.

Under the treaty the employment income is only taxed in the State of the Foreign employer if the following conditions are met:

- The employee remains resident in the foreign State and not resident in ROI
- The remuneration is paid by and on behalf of an employer who is not resident in the ROI
- The remuneration is not borne by a permanent establishment or fixed base of the employer in ROI

There is no requirement to register and deduct taxes as an employer if workdays do not exceed 60.

The employer can apply to the Irish Revenue for a release from the obligation to deduct if the number of workdays exceeds 60 days but does not exceed 183 days. Certain obligations have to be fulfilled by the employer with respect to information on the employee and an undertaking given that should a liability to employment taxes arise the employer will make good the liability. Since 1 Jan 2018 a multi year test has been applied in arriving at the 60 days.

Part 3

With effect from 1 January 2018 the 60 days test was applied over two consecutive years and over multi years. Under these rules the employee would have breached the 60 days test and a release would have to be sought by the employer from Revenue within 30 days of commencement of the duties.

If Revenue considered that the employee had become an integral part of the ROI business or that the ROI business had become the employees economic employer release might not be given and payroll taxes would have to be deducted.

With effect from 1 January 2020, for the purposes of determining whether a dispensation from the operation of PAYE is required, employers are required only to consider the number of work days spent in the State in a single year of assessment, that is, in the year of assessment concerned. There is no requirement to consider work days spent in the State in two consecutive years or to be so spent in future years.

If the employee recruited is resident in the ROI then treaty relief cannot apply. Payroll registration must be sought and deductions must be made from the first workday. Remote fall within this category – the employer can never avail of treaty relief and must set up an ROI payroll.

Question 8

Extract from Letter to Jimmy Jones

Global mobility of people and capital has made in quite common for individuals to find themselves tax resident in more than one jurisdiction.

Jimmy when you were commuting once a week to London and continued to remain as a tax resident in the Republic of Ireland then you would have been entitled to file an Irish tax return and claim transborder workers relief in respect of your employment income in the UK. This is on the basis that:

- you commuted at least once a week;
- your employment lasted for a period of more than thirteen weeks; and
- taxes were deducted at source on that employment in the UK.

In such case you would have remained ROI tax resident and no further taxes would have been paid from your UK salary in ROI if it was your only source of income. However when you then ceased to commute once a week you no longer satisfied the conditions. Where you were then spending more time in the UK than in the Republic of Ireland your residency status in the Republic of Ireland could be drawn into question.

To satisfy residency tests in ROI you would have to have spent:

- 183 days at any time during the day in ROI in a single tax year to be considered resident in that tax year; or
- 280 days at any time during the day in ROI over two tax years with a minimum of 30 days in each year to be considered resident in the second of those tax years.

If you satisfied this test, for example in relation to 2019 where you only started working in London in the early part of that , then you would have still considered ROI tax resident. In 2018 you would have spent more than 183 says in ROI and in 2018 and 2019 combined you would have spent more than 280 days in ROI with a minimum of 30 days in each year in ROI. Since the UK tax year runs April to April you may also been considered UK tax resident by virtue of the amount of time he spent in the UK during the period to April 2020 while also remaining ROI tax resident under the 280 day test.

This dual residency can cause a problem for an individual as both countries would claim to have taxing rights in relation to your worldwide income.

Where this happens and there is a taxation treaty between the two jurisdictions then the individual can usually look to the tie-breaker rule to decide which jurisdiction has the taxing rights in relation to their income.

The first of these tests is usually the permanent home test.

While the existence of a permanent home in one state should eliminate the question of dual residence and give taxing rights to the state in which the permanent home is located. The availability of a home on a permanent basis would usually indicate that it been a permanent home where the permanency is called. This was considered in the case of Denis O'Brien.

However were an individual as more than one permanent home available to them in two different jurisdictions than the permanent home test cannot be the deciding factor in relation to the tie-breaker. In such a case the other tie breaker tests need to be considered in turn.

The second test is the centre of vital interests test. OECD guidance in this area provides that one should look at the individual's family and social relations, his occupation, personal, cultural or other activities, his place of business, the place where he administrates his property etc. Therefore where family and friends are located is vitally important. In your case, Jimmy, your immediate family, your wife Grace is currently resident in Dublin You have no immediate family located in London.

Where leisure and social activities are carried out is also vitally important. Jimmy although you are spending most of your time in London you are still involved heavily in the local Golf in Dublin. You have built up social connections and leisure activities and pursuits in your local area in London and actively play with a club there but have maintained your connections with your Dublin home.

Other factors that would be looked at is where you conduct your economic activities, for example place of employment or if self-employed, where the self-employed activities are carried out. Over the past couple of years you have spent most of your economic pursuit time in London but with the advent of this new contract in Dublin you will be dividing your time between London and Dublin.

Other personal factors which may be taken into account in determining central of vital interests would be:

- if you have a motor vehicle, where that motor vehicle is insured and taxed;
- where your driving licence is applied for;
- where medical insurance is taken out;
- where doctor and dentist is located;
- where bank accounts are located;
- how often you visit family and friends;
- which professional organisations you are a member of;
- where credit cards were taken out; and
- where taxes are paid.

So all of the individual's life circumstances need to be looked at in determining the centre vital interests.

A Canadian cases Allchin vs. the Queen discussed a range of different factors that can be considered by court in determining the tax payers centre of vital interests. They included not only the location of the family and friends and the other factors mentioned above. All of these factors are taken into account along with many others in order to determent the centre of vital interests.

The OECD commentary gives no guidance as to whether or not weights should be attached to the different factors. Some jurisdictions place more emphasis on the personal relations than the economic relations. Other jurisdictions don't place any weight on either but each are treated equally. In the case of Hertel vs the Minister of National Revenue, the judge stated that it is not enough to simply weigh or count the number of factors on each side. The depth of the roots of ones centre of vital interests is more important than their number.

Where the permanent home and centre of vital interests don't determine an individual's residency under the treaty the next test is habitual abode. The OECD guidance in relation to habitual abode states that in a case where centre of vital interests cannot be determined the habitual abode test tips the balance towards the state where the individual stays more frequently. The time spent in the state, not just at the permanent home, must be taken into account, so any days holidays or away working in different parts of the country must also be taken into account as to the amount of time spent in the state for the purpose of the habitual abode test.

Different countries take different approaches in this regard, some countries look at the reason why the individual is spending time in a jurisdiction, i.e. is it periodic visits away from their normal place of residence away from the jurisdiction or is it for holiday or personal reasons rather than professional reasons. Other countries take the view that where the individual spends most time and why they stay there is more important than where they stay i.e. whether they stay in a permanent home or temporary accommodation is irrelevant. Leading commentators in this area support the view that counting days is not sufficient but the issue of habitual abode should not depend on where the individual spends most of the time but rather on where they normally live. Therefore a period of adequate length should be chosen in determining what a habitual abode is.

If neither permanent home, centre of vital interest of habitual abode can be determined or if the individual has a habitual abode in both states or in neither of them, then they are deemed to be resident of the state in which they are a national. Determining what state a person is a national of should be fairly clear under domestic legislation in that state.

If a person is a national of both states or of neither of them then the states can settle the question of residency by mutual agreement. However this can be a long drawn out process and a tax payer can be left in limbo with an uncertain tax position for several years before the jurisdictions mutually agree the position.

In your case, Jimmy, you are working full time in the UK, and if you continued to do so, you could clearly be considered UK tax resident under UK tax rules. The availability of two homes to you could also muddy the waters. However your centre of vital interests being personal relations and social relations would sway the residency towards ROI unless Grace moves to London with you. If you take on this new contract and spend more time in Dublin this could also mean that you will spend more time in your permanent home in ROI and have more economic relations back in the ROI. While it is not free from doubt is it clear that you Jimmy could make a case that you remain ROI tax resident. Particularly if you consider setting up a weekly commute again. You could revert to claiming trans-border workers relief on the basis that you are ROI tax resident. If however the ultimate decision is that Grace moves to London with you then the UK would become your place of residence and you will be taxed on your worldwide income in the UK.