THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2023

MODULE 2.06

SUGGESTED SOLUTIONS

PART A

Question 1

Candidates will be expected to prepare an answer in memorandum format which covers the following items.

Part 1

The strengths and weaknesses of Ireland as a holding company location are set out below.

Candidates are expected to summarise the main features from a tax perspective of Ireland as a holding company location including the below listed 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%. For certain taxpayers with revenue over a specified amount, it has been indicated that by the Irish Minister for Finance this rate will be increased to an effective 15% rate.

- 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:

  i) 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;
  ii) the shareholding must be held for a continuous period of at least twelve months in the 2 years prior to the disposal;
  iii) 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
  iv) 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) (ii) 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.

<u>Withholding taxes</u>

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.
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.

General Features

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 ratified the OCED MLI on 1st May 2019. Ireland has 76 signed double tax agreements (‘DTAs’) of which 73 are currently in force. It has confirmed that it will treat 71 of those DTAs as ‘Covered Tax Agreements’. The key changes to Ireland’s DTAs which 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.

Transfer Pricing: Ireland’s transfer pricing rules apply to arrangements entered into between associated companies.

Country by Country Reporting Requirements: Ireland has implemented legislation on country-by-country reporting and signed the multilateral agreement 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.

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.

Effective from 1 July 2016, Revenue introduced a formal bilateral advanced pricing agreement ("APA") programme. The bilateral APA programme only applies to transfer pricing issues (including the attribution of profits to a permanent establishment.

Ireland (and all other EU Member States) are 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.

Part 2

An interest deduction that is available to Irish companies borrowing funds to:

- purchase shares in trading subsidiaries or
- lend on to such trading subsidiaries.

Interest is generally deductible if provided for as an expense in the statutory accounts of the company, and it is incurred wholly and exclusively for the purposes of its trade. Subject to meeting certain conditions, interest incurred in lending money to a trading or property rental company or in acquiring shares in a trading or property rental company, or a holding company of such a company, should also be deductible on a paid basis. Tax relief for interest is restricted where it is paid for acquiring shares in or lending money to a connected company, or for the purposes of acquiring a trade or business of that or another connected company (irrespective of the payee's country of residence).

Ireland implemented interest limitation rules in Finance Act 2021 in accordance with ATAD with effect for accounting periods commencing on or after 1 January 2022. These rules apply to limit tax deductions for net borrowing costs at 30 per cent of (adjusted) earnings before interest, taxes, depreciation and amortisation (EBITDA) in certain circumstances. Helpfully, there are a number of exemptions from these interest limitation rules. The rules do not apply to net borrowing costs below the €3m de minimis threshold set out in ATAD. There are also exemptions available for standalone companies, legacy debt (the terms of which were agreed before 17 June 2016) and certain long-term infrastructure projects. The interest limitation rules include an option for companies to operate the rule on a single entity or local group basis and for certain group reliefs to apply where the Irish taxpayer is part of a consolidated worldwide group for accounting purposes by applying an equity ratio rule or group ratio rule. Any disallowed interest may be carried forward to a tax year in which interest capacity is available. Surplus interest capacity in an accounting period can be carried forward for up to five years. 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.

Thin capitalisation: Other than the interest limitation rules discussed above, there are no "thin capitalisation" rules applicable in Ireland. It is nonetheless possible in certain limited cases that the interest may be reclassified as a distribution, preventing such interest from being tax-deductible.

Interest that would ordinarily be reclassified as a distribution may nevertheless be deductible for an Irish "section 110 company" if one of four safe harbours applies, including where the recipient is resident and subject to tax in an EU/treaty state or where interest is paid on a quoted Eurobond to a company that does not "control" the section 110 company.

Anti-hybrid: Ireland implemented anti-hybrid rules in line with ATAD with effect from 1 January 2020. Finance Act 2021 expanded these rules to capture reverse hybrids with effect from 1 January 2022. The anti-reverse hybrid rules apply to treat certain entities that are normally transparent for Irish tax purposes (eg, Irish partnerships) as taxable entities in certain circumstances. As a result, these rules will now tax certain income in Ireland that would otherwise have gone untaxed because a hybrid entity was regarded as transparent in Ireland but tax opaque in the territory of its participator.

DEBRA: In May 2022, the European Commission published the first draft of the "debt-equity bias reduction allowance" directive ("DEBRA"), which has interest limitation measures and is expected to apply alongside and in addition to the existing ILR introduced as part of EU ATAD. The draft directive provides that EU Member States shall implement the provisions into national law if agreed by 31 December 2023, to be effective from 1 January 2024.

Question 2

Part 1

Where the duties of the employment are carried out in Ireland and the employee is a resident of Ireland then the foreign employer has an obligation to register a payroll and deduct taxes in Ireland on the salary.

This is because no treaty relief is available when the employee spends in excess of 183 days in Ireland on duties of employment. Since Miriam will be living in Ireland she will exceed this threshold.

If any of the duties are carried out in France then the salary should be apportioned between the French payroll and the Irish payroll and a dual payroll run. It may be possible to get a realtime tax credit to avoid double deduction of taxes in both jurisdictions

Miriam will become an Irish tax resident in a tax year if she spends more than 183 days in Ireland at any time during the day in that tax year (Jan – Dec). If she spends more than 280 days in Ireland at any time during the day over the course of two tax years with a minimum of 30 days in each year she will be considered resident in the second of those two tax years.

As an Irish tax resident she will have to file a self-assessment tax return where she receives foreign income. If part of her salary is paid under the Franch payroll she will have to file.

Miriam will have to consider her social security position with regard to contributions for State pension. She will have to move into the PRSI system if not immediately then within 24 months of going onto the Irish payroll.

Miriams employer will have to consider the implications for its business of having Miriam carry out her duties of employment in Ireland. Depending on her role and seniority in the business her presence in Ireland could create a PE risk for the company

For example if she has authority to conclude contracts she alone could constitute a PE. It is not clear what Miriams role in the company is but of for example if she was a director she would be exercising a lot of authority daily on behalf of the company.

If the employer does not provide her with a place of work, e.g. an external office then her home could be considered at the disposal of the employer and therefore a fixed place of business and a PE risk.

The fact that there are other activities being carried out in Ireland by that company, i.e. warehousing and a sales rep on the ground would all be looked at to determine if there is a PE. Since the changes to the UK Ireland tax treaty where they implemented the provisions of the multilateral instrument (MLI) and overall activities in a jurisdiction can be taken into account to see if they amount to a cohesive business operation and therefore a PE. This could create a corporation tax exposure in Ireland for the employer company in France

One way of trying to minimise any exposure for the employer company would be to set up a separate Irish company to house the activities and employ Miriam. A transfer price could be set between France and Ireland to reflect the relevant levels of risk that each entity takes.

Part 2

Where the duties of the employment are carried out in Ireland and the employee is a resident of Ireland then the foreign employer has an obligation to register a payroll and deduct taxes in Ireland on the salary.

This is because no treaty relief is available under Article 15 when the employee spends in excess of 183 days in Ireland on duties of employment. Since Brian will be living in Ireland she will exceed this threshold.

If any of the duties are carried out in France then the salary should be apportioned between the UK payroll and the Irish payroll and a dual payroll run. It may be possible to get a realtime tax credit to avoid double deduction of taxes in both jurisdictions

However if the university Brian is working for is a publicly funded university then under Article 18 Government Service of the UK Irish treaty his salary should only be taxed in country of payment, i.e. the UK. In that case the employer should not need to register a payroll in Ireland.

Brian will become an Irish tax resident in a tax year if he spends more than 183 days in Ireland at any time during the day in that tax year (Jan – Dec). If he spends more than 280 days in Ireland at any time during the day over the course of two tax years with a minimum of 30 days in each year he will be considered resident in the second of those two tax years.

As an Irish tax resident he will have to file a self-assessment tax return where he receives foreign income. If part of his salary is paid under the UK payroll he will have to file. However if the job is covered under Article 18 then he will not have to file a tax return assuming he has no other sources of income as the salary will not be taxed in Ireland.

Brian will have to consider her social security position with regard to contributions for State pension. He should stay in the UK system while he can and only move onto the Irish system when required .
If Brians employer is subject to corporation tax then it will have to consider the implications for its business of having Brian carry out his duties of employment in Ireland. Depending on his role and seniority in the business her presence in Ireland could create a PE risk for the company. Its unlikely that would be the case for a University

Part 3

If Brian is selling his house he would need to consider the CGT implications . If the sale goes through while he is resident in Ireland he may have dual filing obligation in the UK and Ireland.

Ireland has a principal private residence relief which applies to the years he resided in his house as his home and also the last 12 months is deemed occupation. The gain if any calculated after allowing for the relief is taxed at 33% .

He may still have to file any gains with the UK authorities as well if tax arises in both jurisdictions he may claim a double tax credit to avoid paying tax in both jurisdictions.

If Brian is not Irish domiciled he may avail of the remittance basis of taxation for any foreign income and gains he earns while resident in Ireland.

If Brian intends to make any gifts in the future he should do so before becoming resident in Ireland for 5 years. AS a non domiciled person he will not be considered tax resident for CAT purposes until the 6th tax year after arriving. If he makes gifts are of non Irish situate property and makes them to non Irish resident persons then they should fall outside of the CAT net.

There are Customs implications of Moving Goods even personal goods from outside the EU into the EU. Brian will have to declare the movement of his own personal goods to Customs on moving . There should be no liability if they are his own personal and household goods and he can demonstrate that he is moving house.

Question 3

12.5% tax rate- trading income

Ireland has two rates of corporation tax, 12.5% and 25%. To ensure that the royalty or licence fee income is taxable at 12.5% (rather than 25%) and to ensure that a deduction is available for the cost of acquisition of the IP, Waterville Ireland Ltd must be considered a trading company.

In order to be considered trading in Ireland the company needs to be considered to be actively seeking to exploit their intellectual property and employing expert individuals to assist with this. This meaning of "trading" is based on the Badges of Trade and the Noddy case.

Revenue have issued specific guidance in relation to this matter outlining the need for substance in Ireland, with the following:

- A commercial rationale for the Irish operations – the Irish operation should be profitable, day to day running costs should be borne in Ireland.
- Real value added to the Irish economy – the activity in Ireland should be more than just the mere exploitation of IP. The level of activity carried on it Ireland would be important. If the activity in Ireland is not significant and habitual in nature then it is unlikely to be considered trading.
- A company is more likely to be considered to be regarded as trading if it is seen to accept commercial risk. Therefore it would be advantageous if the Irish company carried out some R&D activities.
- Employees in Ireland with requisite skills and experience to carry out the functions of the trade in Ireland
- Office space in Ireland
- The company should be involved in several transactions and should be actively seeking new licensees and negotiating licence agreements.

Applying these criteria to Waterville Ireland Ltd,

- A profit is expected to be generated this year;
- The R&D and sales and marketing costs will be borne by Ireland and not reimbursed by the US parent company.
- The company employs over 2,000 people which is indicative of real substance and activity within the Irish economy.
- It has accepted commercial risk in its investment into R&D activities as well as arrangements with both third party distributors and foreign licenses.
- It occupies a substantial office space.
- As copyright software and patented technology were developed this is indicative of a highly skilled workforce.

Taking these facts together, it is likely that Waterville Ireland Ltd will qualify for the trading rate of 12.5% corporation tax.

Capital Allowances on Cost of Acquisition of IP

The acquisition cost by the Irish company of the IP (patents and brand name) should qualify for tax relief under s291A TCA 1997 provided it is used for the purposes of a trade carried on by the Irish company. This section provides a tax deduction over either 15 years or the accounting amortization period for specified intangible assets. Brand name and patents are included as "specified intangible assets". Therefore the qualification as a trade as discussed previously is also critical for this deduction.

Transfer Pricing Requirements

The royalty rate should be an arm's length rate to ensure that transfer pricing rules are respected. If an arrangement is not made at arm's length, an adjustment will be made to the trading profits to reflect an

arm's-length amount. The agreements with the third party distributors may provide comparable arrangements to the related party transactions, and should be carefully analyzed.

The Irish tax legislation refers to the OECD Transfer Pricing Guidelines for the interpretation of the arm's-length principle. There is an exemption for small and medium-sized enterprises. In addition, companies within scope must prepare transfer pricing documentation in accordance with Annexes I and II of the 2017 OECD Transfer Pricing Guidelines.

Withholding Tax on Royalty Payments

As the royalty payments will be received from EU companies, relief from withholding tax may be available as follows:

Interest and Royalties Directive: where the conditions of the Directive are satisfied no withholding tax should arise on the royalty payments.

R&D Tax Credit: Waterville Ireland Ltd's expenditure on research and development activities may qualify for the R&D Tax Credit. The credit is calculated at 25% of qualifying expenditure and is used to reduce a company's Corporation Tax liability Where a company has offset current and previous years' CT liabilities, or if it is making a loss, it may apply for a credit payable in instalments.

A company may qualify for the R&D Tax Credit if:

- it is within the charge of CT in Ireland, which Waterville Ireland Ltd is.
- it carries out qualifying R&D activities in Ireland or the European Economic Area (EEA)- again this condition is fulfilled by the company.
- the expenditure does not qualify for a tax deduction in another country which is not the case in this situation.

To qualify for the R&D Tax Credit, a company's research and development activities must:

- involve systemic, investigative or experimental activities
- be in the field of science or technology
- involve one or more of these categories of R&D:
  - basic research
  - applied research
  - experimental development
- seek to make scientific or technological advancement
- involve the resolution of scientific or technological uncertainty.

The R&D activities should be analysed within this context to identify qualifying activities; and contemporaneous documentation maintained.

It is notable that claims must be made within 12 months from the end of the accounting period in which the expenditure is incurred, therefore Waterville Ireland Limited may yet be able to make a claim for 2022 and obtain the benefit of a credit as a refund.

Knowledge Development Box (KDB): The Knowledge Development Box (KDB) was introduced in the Finance Act 2015. It is a tax incentive policy tool to encourage innovation by applying a lower rate of corporation tax on profits on Intellectual Property Assets resulting from qualifying research and development activities carried out within the meaning of section 766 of the Taxes Consolidation Act 1997. The KDB provides for a reduced rate of corporation tax (6.25% down from 12.5%) payable on such profits arising from qualifying IP assets.

The KDB provisions define qualifying intellectual property assets as:

- an invention protected by a qualifying patent;
- a computer program /copyrighted software, and
- inventions of small companies which are patentable but have not been patented and have been kept secret;

The qualifying assets must be the result of R&D. Waterville Ireland Ltd.'s operations would appear to meet the criteria of qualifying patents and copyright software arising from R&D. However, any marketing related IP such as trademarks, brands, image rights and other intellectual property used to market goods or services cannot be a qualifying asset.

Question 4

Part 1

Employment tax incentives are a valuable tool in the arsenal of the employer in attracting and retaining talented skilled personnel. Where you operate in a very competitive market having legitimate tax effective employment schemes that remunerate the employee in a tax efficient way adds to the attractiveness of a job.

Part 2

SARP: Special Assignee relief program. Candidate must explain the relief, how it is calculated, to whom it applies , how long it lasts, the benefit to the employee and any special features.

KEEP: Key Employee Engagement Programme is a tax incentive for SMEs to support the use of share options as a form of staff remuneration. Candidate must explain the relief, how it is calculated, to whom it applies , how long it lasts , the benefit to the employee and any special features.

R&D Relief Key Employees: is an income tax incentive for employees involved in R & D activities. Candidate must explain the relief, how it is calculated, to whom it applies, how long it lasts, the benefit to the employee and any special features.

Question 5

Where a transfer pricing adjustment imposed on one party to a transaction results in higher profits in that jurisdiction, economic double taxation can arise if the other party to the transaction does not secure a corresponding reduction in profits. Therefore when the IRS issues the notice of proposed adjustment to Jola it is key that a corresponding adjustment is secured in the Irish tax return of the Irish company.

Irish taxpayers cannot take a deduction in their tax return for increased payments to an associated entity arising from a transfer pricing adjustment for which relief may be available under a double taxation agreement ("DTA"). Further, Irish taxpayers cannot amend a tax return so as to seek a refund of tax arising as a result of a correlative relief claim unless the amount of the adjustment has been agreed in writing between the relevant competent authorities. The implications of these domestic provisions is that an Irish taxpayer's only recourse to secure a corresponding adjustment is pursuant to Ireland's international agreements.

Irish taxpayers can request:

- Correlative relief where the relevant DTA contains an article equivalent to Article 9 of the OECD Model Convention ("Article 9");
- Relief under the Mutual Agreement Procedure ("MAP") Article of the relevant DTA (all of Ireland's DTAs contain a MAP Article); or
- Relief under the European Arbitration Convention but this is not applicable here in this case involving a US counterparty.

Relief from double taxation in the case of a transfer pricing adjustment (i.e. a claim for a corresponding or correlative adjustment) must therefore be claimed i.e. relief cannot be taken automatically.

Each of the procedures require Twingo Plc's to present their case to the Irish Revenue Commissioners ("Revenue") as Ireland's Competent Authority ("CA") and provide appropriate supporting information:

- The legal basis for the claim i.e. the relevant article(s) in the Ireland US double taxation agreements (including a statement as to why the agreement quoted is the relevant agreement);
- Set out how the relevant enterprises are associated; explain what the transfer pricing policy was prior to the audit in the other country (attaching a copy of any documentation evidencing that policy e.g. transfer pricing study, economist report, any other expert advice); set out those elements of the transfer pricing policy that the other country did not agree with and why.

It will be necessary, in due course, to set out how the agreement with the US was arrived at to include details of:

- how the enterprise sought to rebut the assessment;
- the process by which agreement was reached and how such an agreement is justifiable as arm's length;
- the quantum of the adjustment agreed and the financial years covered;
- an account (if relevant) of the considerations leading to acceptance of a negotiated settlement as opposed to litigation (including, where available, a copy of the legal advice the enterprise received);
- contain a copy of the settlement agreement reached with the other country;
- state whether any previous or subsequent years are to be audited where there is a prospect of similar issues arising; and
- State whether there are audits being undertaken by other countries that might affect the profits of the Irish associated enterprise.

In making a claim it is important to be aware that no relief will be available, inter alia, for:

1) Interest and penalties imposed by the other country;
2) Secondary/repatriation of profits adjustments implemented under the laws of the other country; and
3) Non-deductible payments of a capital nature.

If the merits of the claim are accepted, Twilio Plc will be asked to submit revised tax computations for the accounting periods affected in order to compute the quantum of the relief and normally a revised assessment will then issue.

Twingo Plc is not entitled to be a party to the discussions between the Irish CA and US CA and taxpayers are not guaranteed that the CAs will agree to a position that results in no double taxation, but this is the usual outcome.

Question 6

Three cases to be identified, findings summarised and Irish impact explained.

Below are some examples of CJEU cases that students may refer to their answers.

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 utilised in that country in the future.

Section 420C was introduced as a result 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 as a result 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 treaty 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 in order 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 as a result 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 crystallises 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 the 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

Part 1

It is important to distinguish between the two legal transactions that happened:

1) the purchase of the land, and
2) the financing of that purchase.

Martin did not guarantee Paul's loan. The monies that he put up for the purchase were to assist Paul in acquiring the land.

Martin has had no beneficial use or enjoyment of the land throughout its entire period of ownership. He received no rent, no farm income, he expended nothing on the upkeep of the land.

A declaration of trust showing that Martin held the land as trustee for Paul since 1991 should be prepared. This should set out the facts and circumstances arising and demonstrate that Paul was the beneficial owner of the land since 1991.

As Martin financed half of the purchase in 1991 he effectively loaned Paul IR£15,350 or €19,490 at that time.

No interest was charged on this loan . This loan has not been repaid. Martin intends to write off the loan at this point in time.

If the beneficial ownership of the land always resided with Paul then there is no disposal of land on rectification of the title. This should eliminate any capital gains tax exposure for Martin on the tidying up of this Land Registry title.

If there is no document transferring the land then there will be no charge to stamp duty

No interest was charged on the loan so the interest free use of the monies was an annual gift from Martin to Paul. All gifts are subject to capital acquisitions tax ("CAT"). However there has been an annual exemption for capital acquisitions tax for all of the years since 1991. It was €635 1991-1998, €1270 1999-2002 and has been €3,000 since 2003.

When you give monies on loan interest free the imputed interest which is a gift is calculated at the best deposit rate you could have achieved on the monies if deposited in a bank. At an interest rate of say 3% the annual gift exemption would have shelter the gift between brothers eliminating any charge to tax on Paul. NO returns were required to be filed in this instances

The write off of the loan is a gift from Martin to Paul and is subject to capital acquisitions tax ("CAT"). The loan has not increased in size since 1991.

Paul has not received any gifts within the Class B threshold from close relatives which means that he has a threshold of €32,500 to utilise against the taxable gift.

The loan amount was IR£15,350, i.e. €19,490. The amount being written off is sheltered by the threshold so no CAT liability applies.

If Paul were to give a site to Diarmuid in the future irrespective of whether Diarmuid still lives in the UK or not the gift would be chargeable to CAT at 33%. The current threshold for such a gift would be €32,500 between uncle and nephew. If Diarmuid hasn't already used this threshold he can use it against this gift. Only if the site value exceeded this and the annual exemption currently €3,000, would any CAT arise on the gift.

CGT as 33% would arise to Paul on the difference between the value of the site and the original base cost in 1991 as increased by the CGT multiplier. Paul may be able to claim retirement relief on this under S598 TCA 1997. Stamp duty would arise for Diarmuid on the value of the site. The current rate is 7.5%.

Part 2

An alternative way of looking at is that Paul and Martin have equally owned shares in the land since 1991. Therefore for Paul to become the sole owner Martin has to make a disposal of his half share. This would give rise to a CGT liability at 33% on his share based on the difference between the current market value and the original base cost as increased by the CGT multiplier.

As Paul isn't paying anything for this then it is treated as a gift from Martin. CAT at 33% arises on the market value of any gift as reduced by the available CAT threshold. The threshold between brothers is €32,500 if Paul hasn't used it already. Paul may be entitled to claim Agricultural Property Relief on the gift if he satisfies the conditions. That would reduce the value of the gift buy 90% before application of the threshold.

Stamp duty will arise on the transfer at 7.5%. Consanguinity relief may be available to reduce this to 1% as the transfer is between close blood relatives and if Paul is likely to farm the land for 6 years following the transfer.

Question 8

Part 1

A close company is an Irish resident company controlled by 5 or fewer participators or any number of directors who are also participators. A participator is any person who has an interest in the share capital, or voting rights or loan capital or a right to dividends or the use of the assets of the company.

Benefits-in-kind and expense payments made to participators or their associates are treated as distributions.

Interest, above the specified rate, paid to directors or their associates are treated as a distribution.

Loans or advances to participators or their associates must be grossed up and tax at 25% of the net loan amount paid to Revenue. The tax remains with Revenue until the loan is repaid. Where the loan is interest free a BIK charge applies to the interest free element annually.

A surcharge of 20% applies to after-tax investment and estate income of close companies where it hasn't been distributed with 18 months of the year end.

Close professional service companies are also liable to a surcharge of 15% on half of their undistributed after-tax trading income .

Part 2

Julia's company will be considered a close professional services company and will be subject to the professional services surcharge of 15% on half of the after-tax trading income unless it is distributed out to the shareholder within 18months of the accounting period end.

An Irish holding company is usually used as a structure to enable a tax free sale of a trading subsidiary S626B TCA 1997. So if Julia wanted to sell her trading company in the future she could make a tax free sale by the holding company but would be taxed on any funds she draws personally from the holding company.

Dividends paid from one Irish company to another Irish company are considered Franked Investments Income are not subject to Dividend Withholding Tax and are not taxed as income in the holding company.

However a close company surcharge at 20% applies to dividend income in the holding company as it is considered investment income.

An election can be made under S434 to not treat the distribution as a distribution for the purposes of S440 in the paying company or the recipient company. This election works well where there are no surcharges in the paying company as it removes the surcharge on the Franked Investment Income in the recipient company. However it does not work well where there is a surcharge in the paying company as although it removes the surcharge issue in the recipient company it doesn't remove the surcharge in the paying company as it will be deemed not to have made a distribution with the 18 month period to avoid the surcharge.

Part 3

As an Irish resident a dividend received from an Irish company is subject to dividend withholding tax at 25%. The DWT deducted is then available to credit against the income tax liability of the individual receiving the dividend.

The dividend is included in the total income of the individual when calculating their personal taxes . Tax at the marginal rate ,USC and PRSI all apply to the dividend.

A salary taken by an individual from an Irish company is subject to tax at source under payroll in the company where tax , USC and PRSI are deducted after taking into account the individuals tax credited allocated to that job.

The salary and any other sources of income are then included on the individual’s self-assessment return and the total income for the year taxed with credit then given for the USC and Tax deducted under the payroll.

A non resident and non ordinarily resident individual is not subjected to dividend with holding tax (DWT) at 25%. Unless the non resident individual is required to file a self-assessment return due to being a proprietary director then they don’t file it in Ireland but may have a requirement to file it in the country of residency and pay taxes there. If the individual does have to file an Irish tax return but they are non resident and non ordinarily resident then the dividend is not included in the return as it is only taxable in country of residency.

Tax on any salary earned buy the non resident is deducted at source in Ireland through the payroll and then credit given for the tax and USC suffered on any tax return filed in country of residency.

To ensure the company is ROI tax resident the board of management should carry out board meetings in the ROI.and day to day effective management should be carried out in the ROI.