THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2022

MODULE 2.06 – IRELAND OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Candidates are expected to demonstrate their understanding of how Ireland's international tax offering has evolved in response to substantial international pressures from the OECD, the EU and trading partners. Ireland's competitive corporation tax policy offering includes the following, which candidates would be expected to reference:

- A 12.5% rate on trading income: a 12.5% rate of corporation tax applies to trading profits and trading dividends. A rate of 25% applies to passive income. The rate of capital gains tax is 33% however the sale of shares by a non- Irish resident is usually exempt from capital gains tax. An exemption also exists for disposals of 5%+ corporate shareholdings held for at least 12 months in trading companies/groups that are EU/tax treaty resident. It is noted that there will be a 15% minimum tax rate applicable to certain companies arising from the implementation of the BEPS Pillar Two recommendations, but this will not apply to most companies located in Ireland.

- A best-in-class research and development (R&D) tax credit.

- A competitive regime for intellectual property (IP); and

- A knowledge development box offering an effective rate of 6.25%

- No dividend withholding tax applies to dividends paid to person's resident in an EU or an Irish tax treaty country or on U.S./Canadian listed shares held through ADRs (subject to collection of relevant forms). It is also possible to implement structures using income access shares where it is necessary to allow shareholders to continue to receive non-Irish dividends.

- Dividends received by an Irish incorporated company are taxed at 12.5% or 25% but a flexible credit system usually eliminates any tax liability on receipt; also other tax free cash repatriation techniques are available.

- No interest withholding tax applies to interest paid (i) to persons resident in an EU or an Irish tax treaty country or (ii) on listed bonds or commercial paper.

- Ireland operates a favourable and flexible securitisation and finance company regime.

- Ireland currently has a comprehensive framework of double taxation agreements. The agreements generally cover income tax, corporation tax and capital gains tax (direct taxes).

- Enhanced Special Assignee Relief Programme (SARP) to attract mobile talent - SARP has been through several "facelifts" since its introduction in 2009. Recent enhancements would appear to be very positive for business and should make it more accessible than it previously was. The current version removes the previous earnings ceiling of €500,000, which was seen as one of the main shortcomings of the relief, and it is also available to employees who have spent greater than 6 months with the group (previously 12 months).

A prescriptive solution is not appropriate to such a question but some current developments which candidates may reference, inter alia, include:

BEPS

Ireland is committed to the OECD Base Erosion and Profit Shifting (BEPS) global tax reform process and has taken significant steps in implementing the BEPS recommendations as well as committing to both Pillars One and Two. Pillar One will see a reallocation of a proportion of profits to the jurisdiction of the consumer. Pillar Two will see the adoption of a new global minimum effective tax rate applying to multinationals with global revenues in excess of €750m.

Tax residence rules

In FA 2014 Ireland acted unilaterally to update tax residence rules, to abolish the possibility for companies to be Stateless due to mismatches with US tax rules, and to bring an end to the artificial structures, such as the so-called Double. The change came into effect for new companies from 1 January 2015 while a transition period applied until the end of 2020 for existing companies.

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.

Country By 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 "CBCR 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 characterized 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.

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 country and 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.

Irish Knowledge Development Box (KDB)

This provides for profits from certain intangible assets to be taxed at a lower rate of corporation tax of 6.25%. The KDB was assessed by the EU and the OECD and found to be the first such regime to be fully compliant with the new international standards for patent boxes.

ATAD-compliant Exit Tax

This was introduced in Finance Act 2018 and took effect from 10 October 2018.

ATAD-compliant anti-hybrid rules

These were introduced in Finance Act 2019. Transposition of anti-reverse-hybrid rules is planned for 2021, in line with the schedule set out in ATAD. This Directive significantly strengthened anti-avoidance provisions to target hybrid mismatches (e.g. tax reductions resulting from differing the treatments in different jurisdictions) and brings EU law more closely in line with the BEPS recommendations.

OECD Transfer Pricing Guidelines

Finance Act 2019 incorporated the OECD 2017 Transfer Pricing Guidelines into domestic legislation and extended transfer pricing rules to non-trading and capital transactions. It also provided for the extension of the rules to SMEs but this is subject to a Ministerial commencement order due to the current uncertain business environment.

Territorial tax system

A public consultation process around the consideration of moving to a territorial system of taxation was launched in 2021.

Mandatory Disclosure rules

Legislation was introduced in Finance Act 2019 to transpose DAC6. Revenue has developed the necessary systems and produced guidance, with the system going active on 1 January 2021.

Dispute Resolution Mechanism Directive

Regulations by Ireland were issued in June 2019 transposing this Directive.

Increasing revenue competent authority resources to defend transfer pricing disputes

One consequence of the current international focus on BEPS – and of the OECD Anti-BEPS Action Plan – is that there is likely to be a significant increase in the number of disputed profit adjustments for MNE's leading to an increased risk of double taxation. In 2015, Irish Revenue committed to strengthening Ireland's competent authority, and this has occurred to a certain extent, however the function remains significantly smaller than other international trading partners. Revenue needs to ensure that the number of open cases and the time taken to conclude cases does not increase significantly and damage Ireland's reputation as a location to do business.

Introduction of formal APA programme

Ireland's bilateral APA programme is effective from 1 July 2016 and applies to bilateral APA applications made to Revenue on or after this date. The bilateral APA programme only applies to transfer pricing issues (including the attribution of profits to a permanent establishment ("PE")). An application for a bilateral APA may be made by a company which is tax-resident in Ireland for the purpose of the relevant double tax treaty and also by a PE in Ireland of a non-resident company in accordance with the provisions of the relevant treaty. The bilateral APA programme is intended to apply in respect of a transaction(s) where the transfer pricing issues involved are complex, e.g., there is significant doubt over the appropriate application of the arm's length principle, or where, for any other reason, there would otherwise be a high likelihood of double taxation arising (in the absence of a bilateral APA).

International Mutual Assistance Bill

A draft bill has been circulated by the Irish government to be routed through the legislative process.

Question 2

Part 1

An Aspect Query is a form of Revenue Compliance Intervention. It requires a taxpayer to review the query raised and disclose if necessary any errors, omissions or an anomalies in the returns to Revenue. An Aspect Query tends to deal with a specific tax head or period. However the taxpayer should be aware that it is an opportunity to make an unprompted qualifying disclosure to Revenue and attract the reduced penalty regime. Therefore it is advisable to review all tax heads and periods to see if there is anything to disclose.

The 2020 tax return showed disposal proceeds of €310,000 and a gain of €0. However when a company is liquidated it has to pay off its creditors before any proceeds are distributed to its shareholders. So if €360,000 was distributed then the first €350,000 was the repayment of the directors loan by the company. A repayment of a directors loan is not a capital gains tax event and should not be disclosed as proceeds on disposal.

The remaining €10,000 was proceeds for disposal of the shares on liquidation. Since the shares were transferred from David to his wife Susan in 2018 then the gain on disposal is Susan's gain.

As long as the couple were living together at the time the shares were transferred and not separated by court order then Susan is deemed to have the same acquisition cost and acquisition date as David had when he acquired them.

The gain of €5,000 can be reduced by Susan's annual exemption of €1,270. If Susan is separately treated or separately assessed she should return the gain on her 2020 return. If they are jointly assessed then all gains are returned under Davids name if he is the assessable spouse.

The 2016 – 2018 gains or losses on disposal of the Irish properties should be calculated and disclosed to Revenue. It is important that losses are returned so that they can be carried forward against future gains. Where the couple are jointly assessed Davids losses can be carried forward to shelter Susan's gain on disposal of shares.

The only exception to this is the connected party losses on the sale of the premises to his brother. These can only be used against future gains on sales to the same brother Barry.

The part disposal of the site by the Polish company in 2017 can be attributed back to the Irish resident participator in the company, David under S590 TCA 1997. This applies where the company is not Irish resident but would have been considered a close company if it were. A close company is one which is controlled by 5 or fewer participators or any greater number of participators who are also directors. Therefore David is taxable on the €50,000 gain.

If he had losses brought forward from periods prior to 2017 or had current year capital losses in 2017 these can be used to shelter the gain arising.

The final site disposal by the Polish company occurred in 2020 when David and Susan were living in the UK. If they spent less than 183 days in Ireland in 2020 and less than 280 days in Ireland in 2019 and 2020 or less than 30 days in Ireland in 2020 then they should have been considered non resident in Ireland in 2020. Even if non resident they would still have been ordinarily resident in 2020 if they had been resident in Ireland in the three previous years 2017 -2019 inclusive.

The last disposal of property by David occurred in 2020. If he was still ordinarily resident in 2020 then he would be taxed in Ireland on any gain. Any gain or loss should be disclosed on his 2020 tax return.

As an ordinarily resident person then any gain on the disposal of the remainder of the site in 2020 would be attributed back to Susan and taxed on her in Ireland unless she was non

domiciled.

Part 2

David should consider:

- Irish tax on rental income from any properties if he rented them out. Rental income should have been returned on any rentals received.

- UK taxes on any rental income earned since moving to the UK. Double tax relief could be claimed as a credit if Irish tax was suffered on the rental income as well.

- UK taxes on gains arising since moving to the UK. Double tax relief could be claimed as a credit if Irish tax was suffered on the gains as well.

Part 3

The Automatic Exchange of Information (AEOI) between OECD countries means that Revenue authorities can share information on taxpayer more freely than they could prior to 1 May 2017.

The opportunity to disclose previously undisclosed offshore income and gains was afforded to the taxpayer prior to that date. Since then there is no ability to make a qualifying disclosure in respect undisclosed offshore income and gains. This means penalties falling into the deliberate default category which can be as high as 100%.

In a case like David's the Polish authorities could disclose information on the company to the Irish authorities which could allow then to identify the offshore gains. The Irish authorities could disclose information on David and Susan's income and gains to the UK authorities.

If the amount of the tax default is less than €6,000 and the offence is not deliberate then it can be disclosed as a minor default without penalty.

PART B

Question 3

Dividends

Cash can be repatriated by the payment of dividends.

The main foreign issues that arise in this context are:

- Availability of reserves in the foreign jurisdiction.
- Any exchange control permissions or restrictions.
- Foreign withholding tax applicable and treaty or EU Directive relief available; and
- The impact of the dividend on any thin capitalization provisions in the foreign country – the dividend will reduce the foreign equity.

The relevant Irish issues are:

- Tax rate applicable to the dividends in Ireland (25% or 12.5% or exempt);
- Availability of foreign tax credit for foreign direct and underlying tax; and
- Whether the foreign tax credit is:
  - Fully utilizable against Irish Corporation Tax liability in the same year (including via the pooling provisions)
  - Available for carry forward under the pooling provisions
  - An expense in the profit and loss account (and the corresponding impact on the effective tax rate for the year)

Loans

Cash can be repatriated by making a loan from the foreign company to its Irish parent.

The main foreign issues which arise are:

- Any exchange control permissions or restrictions.
- The requirement to charge interest on the loan and the taxation of the interest in the foreign jurisdiction (the interest rate required by any transfer pricing provisions, the tax rate and the impact of any Irish withholding required, the latter being unlikely); and
- Any foreign tax issues if the loan is denominated in euro rather than in the foreign currency.

The relevant Irish issues are:

- The loan will not generate distributable income for accounting purposes.
- The deductibility of any interest payable on the loan in Ireland (unlikely) and, if deductible, the tax rate at which the deduction is available (trading v charges on income);
- Any withholding tax on the interest from Ireland (unlikely); and

- Any mismatch between the Irish and foreign treatment of exchange gains or losses on repayment of the loan.

Redemption of shares

Cash can be repatriated by redemption of shares by the foreign subsidiary. The main foreign implications are:

- Any exchange control permissions or restrictions.

- The foreign tax treatment of the redemption – as a distribution (with dividend withholding tax) or a disposal of shares (with possible foreign Capital Gains Tax on the Irish parent); and

- The impact of the dividend on any thin capitalization provisions in the foreign country – the redemption will reduce the foreign equity.

- The relevant Irish implications concern the Irish tax treatment of the redemption – as dividend (see above for implications) or capital gain. If capital gain, whether relief is available under section 626B TCA 1997. If the disposal is subject to Capital Gains Tax, the level of Capital Gains Tax payable, the availability of any credit for foreign Capital Gains Tax and the impact on the tax charge for the year.

Kingdom Japan GK

	€m
Effective tax rate	25%
Pre-tax reserves (Gross up at effective tax rate)	13.33
Tax (effective rate)	3.33
Distributable	10.00
Dividend before WHT	7.00
Net dividend to Japan	7.00

Additional credit on Japanese dividend (para. 9I Sch 24 TCA 1997):

No additional credit is due because the Japanese effective rate exceeds the lower of the Japanese and Irish statutory rates (ie 12.5%)

Computation of credit on the dividend from Kingdom BV

	€m
Effective tax rate	5%
Pre-tax reserves (Gross up at effective tax rate)	5.26
Tax (effective rate)	0.26
Distributable	5.00
Dividend before WHT	5.00
WHT (Parent/Subsidiary Directive Relief)	-
Net dividend	5.00
Foreign tax qualifying for credit in respect of Dutch dividend underlying tax	0.26
Additional credit on EU dividends (para. 9I Sch 24 TCA 1997)	
Formula for additional credit:	
E=(D*B/(1-B))-C	
Where E is the additional credit	
B is the lower of the Irish and foreign statutory rate payable on the dividend	
D is the net dividend	
C is the foreign tax credit available before computation of the additional credit	
Compute additional credit on EU dividends (para. 9I Sch24 TCA 1997):	
B - Tax rate on Dutch dividend (assume treasury operations are a trade)	12.5%

D	5.00
C - Foreign tax as computed above based on underlying tax computation	0.26
Additional credit on EU dividends E=(D*B/(1-B))-C	0.45
Total credit on Dutch dividend	
Underlying credit relief	0.26
Additional EU credit	0.45
Total foreign tax for credit on dividend from Dutch Co	0.71

Computation of foreign tax credit limit

	BMD €m	BV €m	Japan €m	Total €m
Foreign tax qualifying for credit	-	0.71	7.04	
Net dividend received in Ireland	30.00	5.00	14.60	
Total (Gross Irish income)	30.00	5.71	21.64	
Foreign effective rate (Foreign tax/Gross Irish income)	0.0%	12.5%	32.5%	
Irish rate (Note Bermuda is trading and KINGDOM plc is listed so eligible for 12.5%)	12.5%	12.5%	12.5%	
Net dividend received in Ireland (net foreign income)	30.00	5.00	14.60	
Gross up net foreign income at lower of Irish and foreign effective rate (0 for Bermuda and 12.5% for Dutch and Japan)	30.00	5.71	16.69	
Qualifying for credit (Grossed up amount at lower of Irish and foreign effective rate)	0.00	0.71	2.09	
Qualifying for deduction (balance of foreign tax)	0.00	-	4.96	
Corporation tax computation - KINGDOM plc				
Income taxable in Ireland	30.00	5.71	21.64	57.36
Deduct: foreign tax	4.96	4.96		
Income after foreign tax deduction	30.00	5.71	16.69	16.69
Irish tax at 12.5%	3.75	0.71	2.09	6.55
Foreign tax credit	0.71	2.09	2.80	
Irish tax payable	3.75	-	-	3.75
Available for pooling (87.5% of deductible foreign tax)	4.34			
Pooling credit	3.75	-3.75		
Pooling credit for carry forward	0.59			
Net tax payable	-	-		

Question 4

Part 1

James and Maura were tax resident and ordinarily resident in the UK. James was domiciled in Wales if he was born there of Welsh parents and has lived there all his life. However Maura may have retained her Irish domicile. She was born in Ireland and intends to move back there so she may not have lost her domicile of origin which she would have acquired from her father at birth if the parents were married or the mother if the parents were unmarried.

On the move to Ireland they will become Irish resident. Maura will most likely be domiciled but James will not be domiciled. This means that Maura will be taxed on her worldwide income and gains. James will be taxed on Irish source income and gains but could avail of the remittance basis of taxation and only be taxed on non Irish income and gains that he remits to Ireland.

They could transfer the Welsh property into James sole name so that the rental income is only taxed in Ireland if remitted. The transfer should take place before they become resident in Ireland.

Capital Acquisitions Tax ("CAT") applies to gifts of:

- Irish situated property;
- any property received by Irish resident or ordinarily resident beneficiaries and made by Irish resident or ordinarily resident disponers.

However for CAT purposes a non domiciled person does not become resident or ordinarily resident for the first 5 years after they move to Ireland.

If they wish to make a gift to Daniel they should do it before the 5 years have elapsed. The gift should be made by James not Maura and it should be made out of a bank account that is not situated in Ireland, to avoid a charge to CAT.

James' consultancy business will be subject to income tax in Ireland as it will be carried out in Ireland after the move.

VAT will need to be charged on his services to Irish customers if he exceeds the threshold of €37,500 whether they are B2B or B2C customers.

Prior to 1 January 2021 VAT would need to be charged from Ireland to his B2C customers in Northern Ireland and GB. Vat for his business customers in GB and Northern Ireland would have been zero rated provided he obtained their VAT number in the UK.

Since James is supplying services from 1 January 2021 no VAT should be charged from Ireland to any customer in Northern Ireland or GB as they are based outside of the EU.

There may be an opportunity for James to adjust his price to these B2C customers in the UK since he will no longer be charging them VAT. B2C customers don't have VAT recovery anyway so may not be as sensitive to a price increase if its still the same as or less than they were paying before.

When moving to Ireland there will be Customs implications if the removal takes place on 1 Jan 2021 or thereafter. The goods being removed are personal goods and own professional equipment. There are customs procedures to declare these as own goods so that no Customs Duty Charge arises.

Valerie buys from Asia and imports into Ireland. She pays Customs duty at point of Entry and used to pay VAT at point of Entry also. However from 1 January she can postpone the VAT on import and account for it as a reverse charge on her next VAT return.

Valerie's sales to:

- Irish customers either B2B or B2C are subject to VAT both before and after 1 January 2021.
- Northern Irish B2C customers are subject to Irish VAT until the distance sale threshold is breached, (£70,000 up to 30 June 2021 for the UK only and €10,000 EU wide threshold from 1 July 2021.) Once the threshold is breached registration is required in the UK.
- Northern Irish B2B Customers are zero rated provided their Vat number is obtained and the goods are dispatched cross-border.
- GB Customer -Prior to 1 Jan 2021 this was a sale within the EU. From 1 January 2021 it is an export.
- B2B – zero rated.
- B2C prior to 1 January 2021 Distance Sales threshold applied. From 1 January 2021 zero rated as an export but registration required in UK.

Customs Clearances are required for GB sales from 1 Jan 2021 on each consignment – export from Ireland and import into Ireland.

Monica's move to the UK will mean a change of residence for her. She will be taxed in the UK on her income. If she retains her Irish domicile she may avail of a remittance basis of taxation. Domicile is a broader concept than residence, it is a concept of belonging. An individual acquires a domicile of origin at birth usually from the Father if the Parents are married, otherwise from the Mother. This domicile is retained during the years of infancy up to the age of 18. If the Parent from whom the domicile was acquired changes their domicile in that period, then the Child also falls suit and changes their domicile with the Parent. Once they have reached the age of majority, an individual can choose a domicile of choice.

Domicile is not as easy to change as residence. To change domicile, one must relinquish their connections to their Country of domicile and adopt a new Country. This would generally mean disposing of property and of the connections and ties to a particular jurisdiction and acquiring such connections and intending to live for the foreseeable future, in a new jurisdiction.

Monica will only be taxed in Ireland on her Irish source income and gains. For 3 years after leaving she will be ordinarily resident and taxed on any gains on disposal of assets she owned before she left.

If she resumes residency within 5 years than she will be taxed on any gains on disposal of assets in the intervening years 4 and 5 after ceasing to be resident if she owned those assets before leaving.

Her business is mainly B2C sales of trophies. In Ireland this would have been subject to Irish VAT. In the UK any UK sales would be subject to UK VAT. Prior to 1 January 2021 any Irish sales from the UK were distance sales to Ireland and unless the distance sales threshold was breached she didn't have to register for VAT in Ireland.

From 1 Jan 2021 she has an obligation to register for VAT in Ireland and account for the import VAT.

Customs Declarations will be due on each consignment from I Jan 2021 – export from GB and import into Ireland.

Since Customs clearances on a per consignment basis are as added cost to both Valerie and Monica's businesses they could consider amalgamating their businesses. Monica could send Trophies destined for Ireland as a bulk consignment to Valerie as a single consignee and then Valerie could distribute them on to the customers. This would only require one set of clearances per bulk consignment. Likewise Valerie could send a bulk consignment to Monica as Consignee and Monica could on distribute these to customers.

PART C

Question 5

Points relevant to the taxation of Irish companies holding IP are as follows:

- Provided the Irish company carries on a trade in the commercialization of the IP, income derived from the IP can be taxed at 12.5%. 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 in 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 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 – an R&D tax credit of 25% should be available for this expenditure.
    - 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 a number of transactions and should be actively seeking new licensees and negotiating licence agreements.
- The cost of acquiring the IP can be written off in accordance with the capital allowances regime available under s291A TCA 1997.
- Royalties received by an Irish IP holding company can often be received free from foreign withholding tax (provided the payer is located in a DTA country);
- Unilateral credit relief is available for withholding tax suffered on royalties received as trading income.

Other reliefs that may be available to IP holding companies (depending on their profile) include:

- The R&D tax credit regime which provides for a 25% credit offset on qualifying R&D expenditure in Ireland or within the EEA to Irish companies.
- The Knowledge Development Box introduced in Finance Act 2015 was the first KDB globally to conform to the OECD modified nexus approach. The KDB provides that an effective corporation tax rate of 6.25% applies to the profits arising to certain intellectual property assets which are the result of qualifying R&D activity that is carried out by an Irish taxpayer. In line with the OECD 'modified nexus' criteria, the amount of profits that can avail of the relief is determined by the proportion that the Irish company's R&D costs

bear to the total R&D costs incurred to develop the qualifying assets. In essence, this means that if a company performs 50% of the R&D that developed an asset in Ireland, then 50% of the income arising to that asset qualifies.

- A domestic exemption from withholding tax on royalties paid to residents of the EU and DTA countries (as well as non-DTA countries where certain conditions are met.

- An exemption from stamp duty on the acquisition of certain IP (broadly the same IP as defined in s291A TCA) per s101 SDCA 1999.

When assessing if Ireland is the appropriate location for the group's IP, it is critical to evaluate if there is sufficient appropriate substance within the Irish company to support the holding of the IP. The level of substance required to defend foreign transfer pricing adjustments (for example downward adjustments of royalties paid to Irish companies for the use of the IP) will likely be somewhat different to the substance required to access the 12.5% rate. The ability to defend against downward adjustments of royalty receipts by foreign tax authorities will depend on the DEMPE functions of the IP holder.

Question 6

Sections 811 and 811C of the Taxes Consolidation Act 1997 (TCA) contains Ireland's general anti-avoidance rule (GAAR) (section 811 applies to transactions made on or before 23 October 2014 and section 811C applies to transactions after that date). The GAAR is intended to defeat the effect of transactions that have little or no commercial reality but are intended to reduce or avoid a tax charge, or to artificially create a tax deduction or a tax refund.

The GAAR applies where the Irish Revenue forms the opinion that a transaction is a "tax avoidance transaction". A tax avoidance transaction is a transaction that both:

- Gives rise to a tax advantage.
- Was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage.

In considering whether a transaction is a tax avoidance transaction, the Irish Revenue must consider the results of the transaction, its use as a means of achieving those results and any other means by which the results (or part of the results) could have been achieved.

The GAAR provide that a transaction is not a tax avoidance transaction where it was undertaken with a view to either:

- The realization of profits in the course of the business, and not primarily to give rise to a tax advantage.
- Obtain the benefit of a relief, allowance or abatement, and was not a misuse or abuse of that provision.

In determining whether a transaction is a genuine commercial transaction or the legitimate use of a tax relief, the Irish Revenue can have regard to the substance of a transaction, and of related transactions, so as to go beyond the mere form of the transaction.

The most recent Irish case that considered the substance of Ireland's general anti-avoidance rule (GAAR) was the O'Flynn case in 2011. The Supreme Court observed in the OFlynn case that the test to determine whether a transaction is a tax avoidance transaction is directed towards "making the difficult distinction between a commercial transaction which has been legitimately structured in such a way as to mitigate the tax due on the one hand, and a purely tax-driven transaction designed to give rise to a tax advantage on the other". The Supreme Court acknowledged that this is a distinction "more easily described than applied".

However, a recent Supreme Court decision has addressed the procedural elements of this provision. It observed that the Irish tax authorities had a four-year time limit in which to issue a particular notice of opinion, and there was nothing in section 811 of the TCA that would override this time limit. In particular, the Supreme Court stated that where a taxpayer had made a "full and true" disclosure of all relevant facts, the legislature must have considered that it would be unfair to allow the Irish Revenue to reopen the amount of tax due after the four-year period.

The O'Flynn case focused on whether a claim for a particular tax relief should be denied under section 811 of the TCA, notwithstanding that the technical conditions for the relief itself were satisfied. Much of the case related to the second safe harbor, and whether the claim for the tax relief in question was a misuse or abuse of the tax relief.

The majority judgment of the Supreme Court indicated that this safe harbor must be considered in light of the general purpose of section 811 of the TCA, namely to reverse the Duke of Westminster case in Ireland (that is, the principle that a taxpayer is entitled to arrange its affairs

so as to minimize tax) (see Inland Revenue Commissioners v Duke of Westminster 1936 A.C. 1). The Supreme Court offered two (somewhat informal) tests of whether section 811 should deny a claim for a tax relief:

- Was the claim a "proper and intended use" of the relevant tax relief?
- Was the claim an "appropriate use" of the relevant tax relief?

In ascertaining the intention or appropriate use of any particular tax relief, the Supreme Court indicated that this was to be derived from the legislative words used in their context ("deploying all the aids to construction which are available, in an attempt to understand what the Oireachtas (that is, the Irish Parliament) intended").

To ascertain the purpose of a tax relief, the Supreme Court was quite clear that it was not sufficient to simply consider the general purpose of the tax relief provision. Instead, it was necessary to ascertain the purpose of the particular scheme. In other words, the focus should not be on an attempt to define the overall parameters of the tax relief in question, but should instead be on an attempt to conclude whether the transaction in question fell within the tax relief.

The Supreme Court held that "the important guides" in determining whether there was a misuse or abuse of a tax relief in the context of a particular transaction were the matters set out in section 811 of the TCA itself, namely:

- The form and substance of the transaction.

- Whether the transaction was undertaken for the realization of profit in the course of business activities carried out by any person.

- Whether it was undertaken primarily for purposes other than to give rise to a tax advantage.

The Supreme Court emphasized that, in ascertaining whether a tax relief was being misused or abused, the Irish Revenue should have regard to all these matters to which attention is directed under section 811 of the TCA.

Question 7

Part 1

The income of a non-Irish sourced employment attributable to the performance in the State of the duties of that employment is chargeable to income tax under Schedule E and is within the scope of the PAYE system of deduction at source.

That means that where the employment duties are only partially carried out in the ROI an apportionment needs to be made and the portion attributable to the performance of the duties in ROI taxed under PAYE.

Revenue does not require a foreign employer to operate PAYE in the following circumstances:

- Short term business visits of up to 30 workdays in a tax year, whether from a DTA or non-DTA country.
- Short term visits greater than 30 workdays and not more than 60 workdays in a tax year from a DTA country.
- Short term visits greater than 60 workdays and not more than 183 days in a tax year from a DTA country, where dispensation from the requirement to operate the PAYE system has been issued.

Treaty relief is available where the employee remains a resident in their home State and does not become a resident of the ROI.

Where the foreign employment duties are being exercised in the State by an ROI resident no relief applies and PAYE must be operated in full.

This affects remote workers of non resident employers.

The Working from Home policy adopted where possible during the pandemic left a lot of workers working from a different jurisdiction from that of their employer. This meant that the employers had to apply the global mobility rules to these employments.

Part 2

Any two of the following will suffice:

SARP (Special Assignee Relief Programme)

This relief was introduced in 2012 to provide income tax relief for individuals assigned to work in the state.

It was to encourage high earning individuals to take up employment roles and key positions in indigenous companies.

It provides for income tax relief on a portion of the income earned by the employee who is assigned by his or her relevant employer to work in the state for that employer or for an associated company in the state of that relevant employer.

A relevant employer is a company incorporated and tax resident in a country with which the state has a double taxation treaty agreement.

The relief applies to disregard 30% of the employee's income which exceeds €75,000 but does not exceed €1m in the relevant year.

Income disregarded is not subject to income tax but is still subject to USC and PRSI.

The relief can be claimed for a maximum period of five years. The individual must have immediately before being assigned to work in the state, worked outside the state for a minimum period of six months before the relevant employer, company located in a country with a double taxation treaty with Ireland. That employer has to have assigned the individual employee to work in that state. They must work in the state for a minimum period of twelve consecutive months. They must not have been tax resident in the state for the five years preceding the year of their arrival to take up employment in the state. For all years in which relief is claimed they must be tax resident in ROI.

Where SARP relief is claimed the foreign earnings deduction cross border workers relief or research and development relief or the remittance basis of taxation cannot also apply.

The employer must report to the Revenue Commissioners within thirty days of the employee's arrival that the employee satisfies the conditions. They must also file a form SARP 11A for each employee availing of the relief. They must also complete a SARP annual return before the 23rd of February after the end of each tax year.

Each employee availing of the SARP relief is a chargeable person so they must file an annual tax return form 11. The employer can make an application to revenue to grant SARP relief at source in real time through the payroll.

Foreign earnings deduction

The foreign earnings deduction provides relief from taxation on certain emoluments of individuals who are resident in the state for tax purposes but who spend significant amounts of time working in relevant states. The relief is provided on an apportionment basis based on the number of qualifying days worked in the relevant state over the number of days that the relevant employment is held in the tax year.

The relevant emoluments that may be relieved from tax in any year cannot exceed €35,000.

The qualifying day must be at least one of three consecutive days spent in a relevant state substantially devoted to the performance of duties. Travelling time to or from the relevant state is deemed to be time spent in the relevant state. A relevant state means Brazil, Russia, India, China or South Africa, Egypt, Algeria, Senegal, Tanzania, Kenya, Nigeria, Ghana and Democratic Republic of Congo, Japan, Singapore, Korea, Saudi Arabia, United Arab Emirates, Qatar, Bahrain, Indonesia, Vietnam, Thailand, Chile, Oman, Kuwait, Mexico and Malaysia, Columbia and Pakistan.

The relevant relief is calculated as follows:

D multiplied E divided by F, where:

- D is the number of qualifying days in the year of assessment in relation to the individual;

- E is the income in the year for relevant office of employment and includes so much of any gain realised by the exercise, assignment or release of a right obtained by the individual as benefit in kind and F is the total number of days in the tax year that the individual held the relevant office or employment.

A minimum number of qualifying days must have been worked in the relevant state and this is thirty.

A remittance basis cannot also apply. The relief is for income tax only the emoluments are not relieved from USC or PRSI.

Trans-border workers relief

This relief applies to people who are resident in ROI but work and pay tax in another country with which Ireland has a tax treaty. They must commute daily or weekly back to ROI.

The relief reduces the tax otherwise payable in Ireland on the foreign employment income. Employment taxes must have been paid in the other country and not refunded. The employee must spend at least one day a week in Ireland for every week that they work abroad. The employment abroad must be held for a continuous period of at least thirteen weeks in the tax year. This relief cannot be claimed along with seafarers allowance, foreign earnings deduction.

The relief is not available to employment income of proprietary directors. The relief is calculated as total Irish tax due multiplied by other foreign employment income divided by total income. As it is formula based any other income assessed on the employee e.g. investment income or a spouses income under joint assessment will skew the formula so that full relief is not available in ROI.

Relief can be claimed on an Irish income tax return form 11.

Question 8

Part 1

Resident Ordinarily Resident and Domiciled Person is taxed on worldwide income and gains.

Resident Ordinarily Resident and Non Domiciled Person is taxed on Irish source income and gains but only taxed on foreign income and gains to the extent that they are remitted or deemed to be remitted to the State. That means the monies must be left offshore to avoid a tax charge in Ireland.

Both are resident citizens availing of the Irish public services but one is fully taxed in the country and the other isn't.

Both can avail of the use of their funds. However the non domiciled person cannot have the use of them in Ireland otherwise it would be a deemed remittance and taxable.

Part 2

A charge to CAT arises on Gifts of non Irish situate property given to or left to a non Irish resident or Ordinarily resident individual by a Resident Ordinarily Resident and Domiciled Person.

However a charge to CAT does not arise on Gifts of non Irish situate property given to or left to a non Irish resident or Ordinarily resident individual by a Resident Ordinarily Resident and NON Domiciled Person provided that person only became resident for ROI income tax purposes less than 5 years previously.

This means that a non domiciled person has a window of years in which they can do gift or inheritance tax planning after arriving in Ireland whereas a domiciled person doesn't.

Part 3

S590 TCA 1997 applies where the company is not Irish resident but would have been considered a close company if it were.

A close company is one which is controlled by 5 or fewer participators or any greater number of participators who are also directors. The section attributes the gains to Irish resident participators and taxes it on them instead.

The gains of a resident close company are not attributed to its Irish resident participators.

This can have an unintended complicated effect on offshore structuring of investments.