Chartered Institute of Taxation
Excellence in Taxation

THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

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PAPER 2.06 – IRELAND OPTION

Suggested Solutions

PART A

Question 1

Part 1

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

Strengths:

- Ability to distribute profits out of Ireland gross of withholding tax;
- Limited territorial scope of Irish corporation tax in respect of Irish source dividends;
- Low tax rate on inbound dividends with unilateral credit relief for foreign tax suffered;
- Onshore pooling of credits to reduce further the incremental tax payable in Ireland on dividends and interest;
- Availability of a deduction for interest on borrowings used to finance or acquire subsidiaries;
- Participation exemption from Irish CGT on disposal of subsidiaries;
- Wide DTA network allowing for reduced withholding tax on inbound payments and relief for foreign tax suffered on trading income;
- EU membership allowing access to EU Directives;
- No thin capitalisation rules;
- Transfer pricing rules limited to trading transactions;
- No controlled foreign companies legislation; and
- No capital duty on the issue of shares.

Weaknesses:

- No general participation exemption on dividends;
- Complex anti-avoidance rules around obtaining an interest deduction for intra-group borrowings required to invest in subsidiaries; and
- Detailed paperwork requirements in respect of dividend withholding tax exemptions.

Part 2

Candidates are expected to answer in detail on either the new KDB or the change in residency rules.

Candidates are expected to describe the changes as a result of FA 2014 which amends Ireland's company tax residence rules to provide that all companies that are incorporated in Ireland will be tax resident here, unless regarded as resident in a territory other than the State for the purposes of a tax treaty. The change will come into effect for new companies from 1 January 2015 while a transition period will apply until the end of 2020 for existing companies. This change will bring Ireland's rules into line with the rest of the OECD. Reference to end of double Irish/ on-shoring of profits/ alignment of profits & substance.

Candidates may also refer to the new Irish KDB and features of same which have been designed to be in line with the OECD guidelines per Action 5 of the BEPS work on Harmful Tax Practices.

Question 2

Part 1

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

Residence and Ordinary Residence

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

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

Domicile

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

Implications of Residency Rules on Taxation of Income and Gains

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

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

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

Application of Domicile Rules to Aidan and Marion

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

In Marion's case, since she was born in the UK of Irish Parents, it is questionable as to whether or not she had an Irish domicile or a UK domicile. At the time of her birth she was in the UK but it appears that her Parents may have already chosen a domicile of choice in the UK having lived there for many years. If they had, then Marion could be considered UK domiciled.

Implications of Residency and Domicile for Capital Acquisitions Tax

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

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

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

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

If Aidan and Marion move in May 2017 their first year of residence will be 2017 as they will spend more than 183 days in ROI in 2017. Marion will not be considered resident and ordinarily resident for CAT purposes until 5 years after first becoming resident, i.e. 2022.

Therefore, prior to their move to ROI, Aidan and Marion should consider the tax implications of the move. Assuming that Aidan is ROI domiciled and Marion UK domiciled, then Aidan could consider transferring income sources and assets to Marion where they are likely to derive income or capital gains from such property over the following number of years. This means that unless such income and gains is remitted to Ireland, it will only be taxable in the UK. Aidan should make these transfers to Marion before the end of 2016 to ensure that they don't occur in a year in which he will be tax resident in ROI.

If Aidan and Marion have already made some plans in relation to the division of their Estate among their Children, then perhaps they should consider some Estate planning before they move to ROI. In particular, assets owned by Aidan should be transferred where possible to the children prior to acquiring ROI residency ie in 2016 to avoid a Capital Acquisitions Tax charge. Alternatively, he could transfer them to Marion and she has a further five years opportunity up to the end of 2021 to make provision for Estate planning before the assets could come within the Capital Acquisitions Tax net.

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

<u>Part 2</u>

<u>Income and Gains</u>

Once resident in the ROI, in 2017 Aidan and Marion will be taxed under ROI rules.

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

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

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

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

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

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

Gifts and Inheritances

Assuming that the children remain resident in the UK any gifts made by Aidan after acquiring residency in 2017 will be subject to CAT. There is a €3,000 annual exemption available for gifts from any one disponer. In addition each of the children will have a child's exempt threshold available to them of €280,000 and they can receive gifts and inheritances from their parents combined up to this threshold without incurring a charge to ROI CAT. If Aidan disposes of his interest in his trading company by way of gift to his son he will need to consider whether Business Property Relief from CAT (a 90%) relief could apply to the gift at that time.

Marion can make gifts to her children for up to 5 years up to the end of 2021 without incurring a charge to CAT provided the gifts are not of ROI situate property or from ROI bank accounts. Once these 5 years have elapsed a charge to CAT will arise on any gifts she makes.

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

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

PART B

Question 3

Part 1(a)

Country A domestic legislation provides for a 30% withholding tax on dividends. We are required to consider the OECD Model Tax Convention to determine whether this withholding tax can be reduced. Article 10 of the OECD convention deals with dividends.

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

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

As HeadCo Ltd only owns 20% of TailCo Ltd, TailCo Ltd will be required to withhold tax at 15% from the dividend.

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

Part 1(b)

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

Article 11 of the Treaty deals with interest payments. Paragraph 1 and 2 provide that interest can be taxed in both jurisdictions. However, it reduces the interest withholding tax to 10% where the company receiving the interest is the beneficial owner of the dividends.

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

Based on the information provided, in accordance with Article 5 HeadCo Ltd would be considered to have a permanent establishment in Country B. However, we are advised that the interest is a payment from an unrelated third party. Therefore, the interest should not be considered "effectively connected" with the permanent establishment. Therefore, paragraph 4 should not apply.

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

Part 1(c)

Domestic legislation provides for a 15% withholding tax rate.

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

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

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

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

Part 2

A correlative adjustment will have to be made in the tax returns for HeadCo Ltd, i.e. HeadCo Ltd's profits will have to be reduced by the amount of the excess royalty payment.

A correlative adjustment arises where the profits of one country are adjusted upwards (Country C in this case) and as a result the profits of another country (Ireland) are adjusted downwards which usually arise as a result of Revenue audits.

However, it is not possible to claim a deduction in respect of a correlative adjustment by relying on the "wholly and exclusively" principles in s81.

S81(2)(o) states that no deduction will be available for a payment made to a non-resident connected person in respect of an adjustment made to their profits for which relief may be available under the terms of the DTA.

Therefore, need to go to the OECD Model Convention and the relevant Article is Article 9 which allows for the correlative adjustment. In determining the correlative adjustment due regard will have to be had to the other provisions of the OECD Convention and if necessary the two tax authorities must consult with each other.

Section 865 (1)(b)(iii) provides that where a refund claim arises as a result of a correlative adjustment, the claim will only be regarded as valid once the amount of the adjustment is agreed in writing by the two tax authorities.

Question 4

Part 1

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

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

VAT

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

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

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

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

Corporation Tax

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

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

Employer Taxes

A non-resident Employer has an employment registration obligation in ROI where an Employee spends more than 183 days on duties in the ROI. In fact, if they spend more than 60 days on duties in ROI, then there is also a registration obligation unless they remain resident in the UK and their employment expenses is not borne by a permanent establishment based in ROI. Since the first Employee being taken on is likely to be a Dublin based Employee, this would require an Employer registration. If this was an NI Employee being sent on secondment to the ROI and it was envisaged that this individual would spend more than 183 days on duties in the Republic of Ireland, then a payroll should be set up from the outset.

Part 2

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

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

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

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

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

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

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

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

Part 3

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

Transfer of Branch to Company

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

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

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

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

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

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

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

Corporation Tax

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

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

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

VAT

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

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

Employer Taxes

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

PART C

Question 5

Part 1

Consideration needs to be given to whether the migration of Snowdrop Ltd to Jersey results in an exit charge under Section 627 TCA 1997.

Generally where a company ceases to be resident in Ireland it will be deemed to have disposed of and reacquired all of the chargeable assets at market value (i.e. trademark and goodwill in this instance). This exit charge however does not apply to an “excluded company” i.e. a company of which at least 90% of the issued share capital is held by a “foreign company”.

Snowdrop Ltd is owned 100% by Daffodil GMBH. Therefore, we need to determine whether Daffodil GMBH is a “foreign company”.

A “foreign company” is a company which is not resident in Ireland, is under the control of persons resident in a DTA country and is not under the control of Irish resident persons or persons directly/indirectly controlled by a foreign company.

As Daffodil GMBH is not resident in Ireland (resident in Germany), is under the control of a UK resident company which is a tax treaty country and is not under the control of Irish resident persons (it is under the control of UK resident persons) the exit charge should not apply.

Therefore, no Irish CGT should arise on the migration to Jersey.

Part 2

On first look, this is a dividend between two Irish resident companies and thus tax free. S129 refers. s129A provides that dividends received by an Irish resident company from an Irish resident subsidiary where the subsidiary became Irish tax resident in the last 10 years will not be exempt from tax but the amount which is paid out of profits arising before the paying company became resident in Ireland will be taxable at 25% under Case IV.

The provision does not apply where the company paying the dividend was at all times before the date of migration controlled by non-Irish resident persons. As Sweetpea GMBH is owned by an Irish company it is likely that the provision will apply.

In order to determine the amount paid out of profits arising pre-migration, it is necessary to compare the amount of the distribution with the amount distributable profits created between the date of migration and the end of the last accounting period which ended before the date of the distribution.

Part 3

Lavender Ltd is a non-resident company. Section 25(1) provides that a company which is not resident in Ireland is only subject to corporation tax if it carried on a trade in Ireland through a branch or agency.
A company which does not have a branch or agency in Ireland will be subject to income tax on any income derived from sources in Ireland at the standard rate of income tax (20%). Lavender Ltd will be subject to income tax @ 20% on the rental income.

Lavender Ltd should be entitled to obtain a deduction against its gross rental income for the interest expense and any other allowable costs in determining the taxable profit.

The tenant will be required to withhold tax at the rate of 20% from the gross rents and pay it over to the Revenue. Therefore, Lavender Ltd will receive only 80% of the rent from the tenant. Lavender Ltd will be entitled to a credit for the tax withheld against the income tax arises on the rents. If the credit exceeds the tax on the rents, Lavender Ltd should be entitled to a refund of the excess.

Question 6

Corporation Tax Computation for IR CO for the year ended 31 December 2015

Based on the information provided, the royalty income should be considered trading income in IR CO.

Profit 4,500,000

Deduct foreign tax 455,000

4,045,000

Corporation Tax @ 12.5% 505,625

Unilateral relief (Note 1) 161,875

Net Corporation Tax 343,750

Note 1

Schedule 24 para 9DB provides for unilateral credit relief for “relevant foreign tax” in relation to royalties received from a non-treaty country.

The unilateral relief is the lower of:

(A) 87.5% of the foreign tax; and
(B) The corporation tax attributable to the amount of the relevant royalties.

(A) 87.5% of €455,000 = 398,125

(B) Income attributable to relevant royalties: 3,500,000/9,000,000 × 4,500,000 = 1,750,000

Tax attributable to relevant royalties: (1,750,000 – 455,000) @ 12.5% = 161,875

Lower of A and B = 161,875

As both companies are non-trading companies s21B cannot apply. Therefore the dividends will be taxable in Ireland at 25% rather than 12.5%.

Net Foreign Income (NFI)	Francia	Belco
FER	100,000	200,000
IMI	30% + (10% of 70%) = 37%	20%
Foreign Tax (IMI × FER)	100,000/(.63) = 158,730	200,000/.80 = 250,000
Gross up NFI at lower	58,730	50,000
Max credit	100,000/.75 = 133,333	200,000/.80 = 250,000
Irish Tax Payable	33,333	50,000
Taxable Dividend	133,333	250,000
Irish tax @ 25%	33,333	62,500
Credit	(33,333)	(50,000)
Tax payable	Nil	12,500
Tax credit available for pooling	58,730	(12,500)
Total tax	(33,333)	

Credit	(6,349)
Deduction (158,730 – 133,333) @ 25%	19,048
Available for pooling	(12,500)
Utilised for pooling	6,648
Credit available for carry forward	

Question 7

Part 1

The contract in ROI could be structured as:

a) An employment
b) A Sole Trade operation
c) Through a limited company established in the UK
d) Through a limited company established in ROI

An employment

If Tim were to take on an employment contract with the engineering company in ROI then he would be considered ROI resident if he spends more than 183 days in ROI in the current tax year. As an ROI resident, he would be subject to tax in ROI on his worldwide income unless he is non-domiciled. If he is non-domiciled, then he would only be subject to tax on ROI source income and foreign income on the extent that it is remitted to the Republic of Ireland. As an employee of an Irish organisation he will be subject to payroll deductions for tax, USC and PRSI on his income from the employment.

If he remains a UK resident then this will be treated as foreign income and he will have to return this on his UK tax return and take a double taxation treaty credit for the taxes suffered and the USC suffered in ROI.

As an employee of the ROI engineering company the move should have no VAT or Corporation Tax implications for his existing UK engineering company.

A Sole Trade operation

If the contract is structured as a sole trade operation which Tim sets up in the Republic of Ireland, then Tim would need to register for Income Tax and VAT in ROI. The VAT registration threshold for services is €37,500 but as a non-established Person, Tim would not be subject to this threshold and would have to register from the first euro of sales if he does not have a base in ROI. If he has a base, then the threshold applies.

As an individual trading in ROI, he would be subject to income tax on the profits of that trade. He would be required to submit a self-assessment income tax return in ROI to return details of the income and expenses of the trade and of profits derived therefrom. He would be subject to tax, USC and PRSI on the income from that trade.

If he remains UK resident, he would also be required to file a UK tax return and claim double taxation treaty credit in respect of the taxes suffered on the ROI trade and the USC suffered.

There is no flat rate VAT scheme in ROI. He will charge VAT at 23% on the engineering services that he provides under the terms of the contract to the ROI customer. He would be entitled to recover input VAT on expenses directly associated with the trade of engineering in ROI.

If he spends more than 183 days in ROI in the current tax year, he would be treated as an ROI resident and subject to tax on his worldwide income unless he is non-domiciled. If he is non-domiciled then he would only be subject to tax on his ROI source income and any foreign income to the extent that he remits it.

If he remains UK tax resident under the terms of the UK residency rules, then there is a possibility that he could be dual tax resident. Therefore, you would need to look to the treaty for relief to see which jurisdiction has taxing rights on his income. Under the terms of the UK Ireland double taxation treaty, the tiebreaker in relation to an individual's residence is usually where the permanent home is located. If Tim's Wife and Child remain in the UK in their permanent home, then it is likely that he will be treated under the terms of the Treaty as being UK resident and not ROI resident. If however, Tim moves his permanent home to the Republic of Ireland and his Wife and Child also moves there, then it is likely that he will be considered Irish resident.

Through a limited company established in the UK

If Tim conducts the ROI contract through his existing UK limited company, then the company would have a presence in Ireland for taxation purposes.

If the company is a non-established business in the Republic of Ireland then it would need to register for VAT from the first euro of sales. If it has a base in the Republic of Ireland then it would be subject to the registration threshold of €37,500 for services.

Assuming that Tim would be carrying out the duties for his employment for his UK Company in the Republic of Ireland, then the UK Company may have an employer registration obligation in this regard. If he is going to be spending more than 183 days on duties of employment in the Republic of Ireland then the company would need to register as an employer from the outset and deduct tax, USC and PRSI on his salary.

If Tim were to spend less than 183 days of duties in the Republic of Ireland, then whether his company would have to register as an employer or not would depend on whether or not they satisfy certain conditions. If Tim meets the following criteria, then the UK company would not be required to set up an ROI payroll provided it provides an undertaking to ROI Revenue to meet any tax liability which might ultimately arise:

- Tim remains UK resident;
- The expense of the employment is not borne by a permanent establishment of the UK Company in the Republic of Ireland; and
- Tim suffers deduction of taxes in the UK on his salary income.

However, if the time spent in ROI makes Tim ROI tax resident, these conditions would not apply and employment registration obligation applies to the UK Company.

If the UK Company is trading in Ireland, then it may also have a Corporation Tax presence and be required to file Corporation Tax Returns in respect of its profits from the Irish business. A company usually has a corporation tax presence in a Country if it is trading in a country through a branch or agency. Since Tim is the owner/shareholder/managing director of his own company and he is the person making key decisions in relation to the business and the conduction of the contract in ROI, it is likely that he is creating a presence for his company in ROI for corporation tax purposes. Therefore, his UK Company would be required to file a Corporation Tax Return detailing the income and expenses of the ROI trade and pay ROI Corporation Tax in respect of it at 12.5%. These will also form part of the results of the UK companies operations in the UK and any tax suffered in ROI can be taken as double taxation treaty credit against UK taxes suffered on the same income.

Through a limited company established in ROI

If Tim sets up a new ROI limited company and runs the contract through it, then it will have tax registration obligations. The company will need to register for corporation tax as it is trading in the Republic of Ireland. The profits of the company would be taxed at 12.5% after a deduction of Tim's salary. Any salary paid to Tim from the ROI Company would be subject to deduction of tax, USC and PRSI.

The company would be required to register for VAT. The threshold applying to the company would be €37,500 for services. Input tax on expenses incurred in relation to the trade may be deducted against the tax charged on the engineering services at 23%.

If Tim remains resident in the UK then he will be taxed in the UK in relation to the income that he draws from the company for example his ROI salary. A double taxation treaty credit can be taken for the ROI tax and USC suffered in ROI against the tax on the equivalent income in the UK.

There is no advantage on either option 3 or option 4 above to taking dividends from an ROI company if Tim is ROI resident. Dividends, salary income and investment income are all taxed in the same basket and subject to tax, USC and PRSI. If Tim remains resident in the UK, he can continue to avail of the dividend regime there from both the ROI and UK companies under examples 3 and 4 above.

An ROI company that pays a dividend to a non-resident who is also non-ordinarily resident does not have to deduct dividend withholding tax from that dividend payment. If Tim however becomes ROI resident then dividend withholding tax would have to be deducted on any dividend payment at the rate of 20%. The dividend would then be taxed at his marginal rate of tax 40%, USC up to 8% and PRSI 4%. This DWT already deducted can be credited against his ROI tax liability on that dividend.

Part 2

Where Tim draws salary in the Republic of Ireland, then PRSI will usually be deducted at ROI rates in relation to that salary.

If Tim is an employee of the ROI engineering company then he would usually pay Class A PRSI at 4% and his employer would also pay a contribution at 10.75% for him.

If Tim becomes self-employed in the Republic of Ireland then Class S PRSI at the rate of 4% usually applies to the earnings from the self-employment.

If he is a proprietary director through his own UK company he could be treated as a temporary assignee and remain subject to the NIC system in the UK. No PRSI would then need to be deducted on the salary he earns from his own company in ROI. This temporary arrangement could last up to 24 months.

If he is a proprietary director through his own ROI Company on an Irish payroll, then he would also pay Class S PRSI at 4% in relation to his earnings from those companies.

If Tim returns to live in the UK then he can seek to have these contributions deducted in ROI treated as credits towards his record for future State pension qualification.

Question 8

Extract from Letter to Micheal Doherty

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

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

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

In such case you would have remained ROI tax resident. However when you then ceased to commute once a week you no longer satisfied the conditions. Where you were then spending more time in the UK than in the Republic of Ireland your residency status in the Republic of Ireland could be drawn in to question.

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

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

If you satisfied this test, for example in relation to 2014 where you only started working in Luton part way through the year, then you would have been considered ROI tax resident. Since the UK tax year runs April to April you may also been considered UK tax resident by virtue of the amount of time you spent in the UK during the period to April 2015. Likewise in the current tax year to April 2016 you may also be considered UK tax resident while also remaining ROI tax resident under the 280 day test.

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

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

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

While the existence of a permanent home in one state should eliminate the question of dual residence and give taxing rights to the state in which the permanent home is located, it is not always clear whether the home is available on a permanent basis. The home must be available all the time, i.e. not rented out or otherwise unavailable. This was considered in the case of Denis O'Brien.

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

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

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

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

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

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

A Canadian case: Allchin vs. the Queen discussed a range of different factors that can be considered by court in determining the tax payers centre of vital interests. They included not only the location of the family and friends and the other factors mentioned above. All of these factors are taken into account along with many others in order to determine the centre of vital interests. So the whole circumstances of your life needs to be looked at in determining the centre of vital interests.

The OECD commentary gives no guidance as to whether or not weights should be attached to the different factors. However it does say that special attention should be paid to the personal acts of the individual.

Some jurisdictions place more emphasis on the personal relations than the economic relations. Other jurisdictions don't place any weight on either but each are treated equally. In the case of Hertel vs the Minister of National Revenue, the judge stated that it is not enough to simply weigh or count the number of factors on each side. The depth of the roots of ones centre of vital interests is more important than their number.

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

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

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

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

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