THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2017

PAPER 2.06 – IRELAND OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

The Estate of Carol Deegan
Taxation Report for the Executors

Part 1

Residence and Ordinary Residence

An individual is resident in ROI if they are present in ROI for 183 days or more in any tax year (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 tax years. An individual does not then lose their ordinary residence until the fourth consecutive year of non-residence.

As a US resident Carol would only become ROI tax resident if she had satisfied the ROI tax residency rules. From 2010 to 2015 it doesn't appear that Carol would have spent sufficient time in ROI to satisfy the 183 or 280 day tests. However she remained in ROI from October 2015 up to her death in February 2017. Therefore she satisfied the 183 day test in 2016 and the 280 day test in 2017 making her tax resident under ROI rules in each of those years. However she would still have been non-ordinarily resident.

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 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. Under Irish law, 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.

Carol assuming she was born in ROI of ROI domiciled parents was originally domiciled in ROI. However she lived many years in the US, had made it her home, had become a US citizen and intended to return there. She had acquired US citizenship its not clear whether she had elected to be US domiciled but the fact that she didn't give up her assets in ROI and continued to visit ROI could indicate that she had never relinquished her ROI domicile.

Part 2 & Part 3

Capital Acquisitions Tax ("CAT") on Estate

Ireland imposes CAT inheritance tax on worldwide assets where the disponer or beneficiary is resident/ordinarily resident in Ireland, otherwise only assets situated in Ireland are liable to inheritance tax.

The Ireland – US Treaty, is treated as applying to inheritance tax in Ireland and federal estate tax in the US.

Under that treaty it provides that Ireland cannot tax property outside its territory unless the disponer died domiciled in the State (or the disposition in question was governed by the law of the State) or else died not domiciled (i.e. not resident) in the U.S and this will continue to be the position irrespective of the residency rules. This means that a benefit taken by an Irish resident beneficiary of U.S. situate property from a disponer who is domiciled in the U.S. might appear to be subject to C.A.T. but is in fact not liable under the terms of the Treaty. Where either country imposes tax on property situated solely in the other country then the country where the property is not situated gives credit for the tax paid in the other country. The amount of the credit cannot exceed the amount of inheritance tax on the property which is doubly taxed.

As the U.S. claims to tax assets wherever situated if the deceased is a U.S citizen at the time of his/her death, irrespective of the domicile, it often results in both Ireland and the U.S. claiming tax on worldwide assets. In such a case the Convention, if the deceased died domiciled and resident or ordinarily resident in Ireland but a citizen of the U.S. at the date of death, provides that Ireland will allow against its tax on property situated in the U.S. a credit for the U.S. tax payable on that property. The credit given is the lesser of the Irish or U.S. tax on that property. The U.S. on the other hand will allow against its tax on property situated in Ireland a credit - again equal to the lesser of the Ireland or U.S. taxes.

The location of assets known as the situs code is important in determining what is taxed where. Immoveable property is sited where it is located. Bank accounts, insurance policies etc are sited where the deceased was domiciled. Share in companies are sited where the company is registered,

If Carol was a US citizen, domiciled in ROI but still resident in the US at the time of her death then the estate is subject to CAT in ROI and US federal tax. Where tax is suffered in both jurisdictions on the same asset a credit will be given by ROI for US tax suffered on the US situate assets and vice versa a credit will be given by the US for CAT suffered on ROI situate assets.

The assets inherited by Bruce her husband would qualify for the spouse exemption so no CAT applies.

The assets inherited by Cathal will be subject to CAT in ROI. The ROI situate assets inherited by Nuala will be subject to CAT in ROI. The sibling exempt threshold of €32,500 will apply provided it not been previously used. The excess over this threshold will be taxed to CAT at 33%. Any US inheritance taxes suffered on the same assets will be allowed as a credit against the CAT suffered.

The bequests left to her US resident friends will be subject to CAT as bank accounts are situate where the deceased is domiciled. The stranger in blood threshold €16,250 should be available to shelter these bequests from CAT.

Part 4

Implications of Residency and Domicile Rules on Taxation of Income and Gains

If ROI resident and domiciled Carol should have been taxed on her worldwide income in ROI in 2016 and 2017 subject to any treaty relief available under the ROI US tax treaty.

A United States citizen is a resident of the United States, but only if such person has a substantial presence, permanent home or habitual abode in the United States.

If a person could be a resident of both the US and ROI then the treaty tie breakers apply to determine the residence. The first of these is the permanent home. While Carol had a property in Dublin it was rented out – her permanent home was in New Jersey.

Therefore Carol would have been treated under the terms of the treaty as US resident and not ROI resident. Therefore she would only have been subject to tax in ROI on her ROI source income i.e. the rental income.

Part 5

Post Death Taxes

Since Bruce and Carol's brother and sister inherit the Dublin apartment jointly they will be subject to tax in ROI on the rental income after Carols death. As two of them Bruce and Nuala are non resident landlords the tenant should deduct basic rate tax and source and pay it to Revenue. If the tenant doesn't do this or an agent is appointed to collect the rent then a tax return needs to be filed in respect of the income and taxes calculated at the normal rates. The ROI resident landlord Cathal should file a return of his share of rental on his self assessment return. No withholding needs to take place on his share of the rent.

If the ROI property is sold ROI capital gains tax at 33% will apply to the gain being the difference between the market value at date of death and the proceeds received. Any taxes suffered in ROI on the gains can be utilized as a credit against tax suffered in the US on the same gain.

Question 2

Candidates will be expected to prepare an answer in memorandum format which demonstrates an awareness of the Irish tax system and its advantages and challenges within the current international tax landscape. Candidates that describe how particular measures are either more or less attractive will gain marks, and there is no right or wrong answer. The following items would be expected to be amongst those addressed by students, and any additional valid points will also gain marks.

Amendment to residency rules

Both Finance Act (No. 2) 2013 and Finance Act 2014 saw amendments to the Irish company resident rules. The measures were introduced to address situations where multinational enterprises ('MNEs') where exploiting the differences in residency rules in different jurisdictions to minimise their tax bills. This addressed perceived issues in relation to Ireland's international reputation and ensured that no "Stateless" income was facilitated.

The change came into effect for new companies from 1 January 2015 while a transitional period will apply until the end of 2020 for existing companies. This change brings 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.

R&D credit improvements

Finance Act (No. 2) 2013 and Finance Act 2014 also saw improvements to the research and development ('R&D') tax credit including the increasing of the limit on the amount of R&D expenditure that can be outsourced to third parties from 10% to 15% of the qualifying expenditure and the removal of the base year threshold which improved the overall international competitiveness of the tax credit and removed a significant administrative burden from all companies who claim the credit.

Enhancement of the IP regime

The other cornerstone of the Irish corporate tax regime in the area of innovation is the capital allowance regime for intangible assets which was introduced in Ireland in 2009. Recent changes include the 2013 reduction of the clawback period from ten years to five years. This change reduced the period in which capital allowances for expenditure on intangible assets may be clawed back from a company in the event that the asset is disposed of or ceases to be used in the company's trade. The shorter timeframe provided greater flexibility and certainty for companies investing in intangible assets which are taxable in Ireland. As such, the measure enhanced the competitiveness of our tax relief regime for intangible assets.

Furthermore, the aggregate amount of allowances that can be claimed was previously capped at 80% of profits from the relevant trade in a given accounting period. This cap has been removed with effect from 1 January 2015 so the aggregate amount of allowance is now 100%.

Introduction of the Knowledge Development Box

Finance Act 2015 introduced the Knowledge Development Box ('KDB'), the first patent box in the world to conform to the OECD's new 'modified nexus' standard. From a practical perspective, this means that Ireland has been the first country to narrow the scope of its KDB, whilst certain other KDB schemes remain in operation for at least a number of years.

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.

Codification of Transfer Pricing Rules

Since 2010 Irish transfer pricing rules have been codified in legislation. In general, the rules are in line with the rules in place in most countries. One important exception to note is that the rules allow for some "grandfathering" whereby arrangements entered into before 1 July 2010 will fall outside the scope of the new rules.

- The rules apply even where both parties are within the charge to Irish tax as this is necessary in order to ensure that the rules are not discriminatory from an EU perspective. However, where the profits of one party are adjusted under the legislation, the rules (s.835G TCA 1997) do provide that, where the other party is also within the charge to Irish tax, they can make an election to use the arm's length price in the calculation of their profits so that the group is not disadvantaged.

- The rules do not apply to small and medium-sized enterprises (s.835E TCA 1997) (i.e. companies with less than 250 employees and either turnover of less than €50m or assets of less than €43m).

- The legislation provides that the relevant person (i.e. the person charged to tax under Case I or II of Schedule D) is required to have certain detailed documentation in place and available for review. Guidelines on what the necessary documentation might include were issued by Irish Revenue in June 2010. To the extent that transactions are covered from the other side (e.g. a transaction between a US parent and an Irish subsidiary where US TP documentation has been prepared), additional Irish-specific documentation may not be required. However, some analysis should be done at the time that the transaction is entered into to determine that the transaction is arm's length. Documentation should be prepared on a timely basis, but no specific time deadline is outlined. Normal practice is to expect documentation within 28 days of request. Such documentation should, where possible, be backed up by legal contracts and agreement.

- Importantly, Irish Revenue has confirmed that they will accept documentation that has been prepared in accordance with either the OECD Transfer Pricing Guidelines or the code of conduct adopted by the EU Council in relation to transfer pricing documentation. This should reduce the additional burden imposed on multi-national groups by the new rules as there will already be documentation in place where the counterparty is resident in territory which already has transfer pricing legislation.

CBCR Legislation

Directly as a result of the BEPS project, CBCR legislation was introduced in Ireland. Country by country reporting (as proposed by Action 13 of the BEPS Action Plan) was formally introduced in Ireland as part of Finance Act 2015. The new s891H TCA 1997 applies for accounting periods commencing on or after 1 January 2016.

For multinational groups where the ultimate parent is tax resident in Ireland, the parent will be required to provide a country by country report (CBCR) to Revenue within 12 months of the end of the fiscal year end. The CBCR requirements do not apply if the group's consolidated turnover is less than €750 million. The ultimate parent must notify Revenue that it is an ultimate parent entity for the purposes of s891H TCA 1997.

Enhanced Special Assignee Relief Programme (SARP) to attract mobile talent

SARP has been through a number of "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).

Increase 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 still 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

The final report on BEPS Action 14 – *Making Dispute Resolution Mechanisms More Effective*, contains a best practice recommendation that countries should implement bilateral advance pricing arrangement programmes. Recognising the Action 14 recommendation, as well as the need for greater certainty in relation to the taxation of cross-border transactions entered into by multinational enterprises ("MNEs"), Ireland decided to introduce a formal bilateral advance pricing agreement ("APA") programme. Prior to the introduction of the formal programme, Ireland accepted requests for bilateral APAs on an ad hoc basis in situations where a double tax treaty partner has agreed to enter into a bilateral APA negotiation.

The introduction of a formal programme provides certainty to taxpayers with respect to the process involved in applying for a bilateral APA and the ongoing reporting and administrative requirements once an APA has been entered into.

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).

PART B

Question 3

Part 1

12.5% tax rate

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

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

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

- A commercial rationale for the Irish operations – the Irish operation should be profitable, day to day running costs should be borne in Ireland.

- Real value added to the Irish economy – the activity in Ireland should be more than just the mere exploitation of IP. The level of activity carried on 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 considered to be regarded as trading if it is seen to accept commercial risk. Therefore it would be advantageous if the Irish company carried out some R&D activities – 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 royalty rate should be an arm’s length rate to ensure that transfer pricing rules are respected.

Capital Allowances on Cost of Acquisition of IP

The IP should be acquired at market value in order to satisfy transfer pricing rules. (1 mark)

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

Withholding Tax on Royalty Payments

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

- Ireland US Double Tax Treaty provides for 0% withholding tax on royalties
- Interest and Royalties Directive – where the conditions of the Directive are satisfied no withholding tax should arise on the royalty payments.

Part 2

No Irish corporation tax deduction will be available for Irl Co on the payment of the dividend under Section 77(5)(a) TCA 1997.

Generally the payment of a dividend by an Irish tax company will require dividend withholding tax at 20% to be applied to the such payment under Section 172B(1) TCA 1997.

Irl Co will be paying a dividend of USD $1.5 million to Swiss Co. No DWT should apply by virtue of the extension of the Parent-Subsidiary Directive to Switzerland, as outlined in Section 831A TCA 1997, as Swiss Co directly holds at least 25% of the voting power in Irl Co and is subject to tax in Switzerland on receipt of the dividend.

Unlike the general domestic exemption from DWT under Section 172D(3) (which could apply in this case as Swiss Co is not Irish tax resident and not ultimately under the control of an Irish tax resident individual), no certificate is required to be provided by the payee (Swiss Co) to the payor (Irl Ltd) before payment of the dividend.

Although no DWT will apply, Big Co will still have an obligation to file a nil DWT return in respect of the payment of the divided Section 831A (2)and details of the dividend would also be required to be disclosed on the annual corporation tax return (Form CT 1) of Irl Co.

As Swiss Co is not Irish tax resident and does not carry on a trade in Ireland through a branch or agency, it will only be liable to Irish income tax at 20% on receipt of the dividend.

Swiss Co should be considered to be a "qualifying non-resident person" as defined Section 153(1)(b)(i) as it a company not tax resident in Ireland and under the control of Irish tax residents, no charge to Irish income tax should arise on receipt of the dividend under s. 153(4).

Part 3

Double taxation agreements entered into by the Irish Government have the force of Irish law. First, however, the Government must have made an order that has been approved by the Dáil, and the Oireachtas must enact law that inserts a reference to the order into Schedule 24A, TCA 1997 (s.826(1) TCA 1997).

It is not 100% clear-cut as to whether DTA relief can be restricted by national law, i.e. whether there can be treaty override. Some countries, e.g. the US, sometimes apply a "later in time" rule such that subsequent domestic legislation can override a DTA position. In Ireland, the general consensus position is that a DTA overrides all domestic law, subject to a 6 year time limit for claiming DTA relief (Sch 24 Paragraph 13 TCA 1997 refers).

Question 4

Part 1

VAT

Services provided by a NI VAT registered business to a ROI VAT registered business can be supplied on a zero rated basis as B2B services intra-community.

The VAT registration threshold in the ROI for services is €37,500. As soon as Edward opens an ROI office he has an establishment for VAT purposes in ROI. If services provided in ROI are likely to exceed this threshold registration should be applied for.

ROI VAT should then be charged at the 23% standard rate.

Employer Taxes

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;
- 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.

Income Tax

Edward as a UK resident is subject to tax on his self employment income in his country of residence. However when he sets up the ROI office and registers for VAT and employer taxes he is trading through an enterprise in ROI and is creating an income tax presence in ROI.

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.

Social Security

As an unincorporated business Edward can remain in the UK system for his own social security contributions. However employees that are recruited in ROI will have PRSI deducted through the ROI payroll.

Employees transferred from the UK payroll may apply to stay within the UK social security system for a temporary period up to 24 months.

Part 2

If Edward incorporated his business in NI into an NI registered company then the ROI office becomes a branch of that company.

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

VAT branch registration can be applied for once there is an establishment in the ROI.

VAT at 23% can be charged by the ROI branch to ROI customers.

If there are any head office branch transactions, then it's important that the inter-branch activity is accounted for properly from a VAT perspective.

Employer Taxes

The branch can set up an ROI payroll and deduct ROI payroll taxes.

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 ROI and the employment of Staff would indicate that a presence is being created.

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% unless it applies for a foreign branch exemption.

Part 3

Transfer of Branch to Company

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

- The transferor must be resident in ROI or if not so resident the asset must have been an ROI chargeable asset of the transferor before the transfer. Any branch assets would be ROI chargeable assets of the NI company.
- 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 the NI company. If the ROI subsidiary leaves the NI parent company group with the asset within 10 years of the acquisition of the assets the capital gain arising on disposal of the branch assets 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 the NI company 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 the NI company ROI branch and the subsidiary are VAT registered in ROI.

Once the branch has been transferred to the company the NI company 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 the NI parent. Dividend withholding tax at 20% will not apply to the distribution as the NI company 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 intercompany transactions between the NI company and its ROI subsidiary can be treated as intra community sales and zero rated from a VAT perspective.

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.

<u>Part 4</u>

There are a lot of unknowns with Brexit or UKs exit from the EU. The most immediate impact has been currency volatility where foreign exchange rate has been more unpredictable than usual The imposition of tariffs would also be a concern – where goods are supplied. Where it is a services business it is more likely to be non tariff measures such as regulation or restriction on number of foreign suppliers that could impact trading cross border. Having an established entity in both jurisdictions in advance of Brexit with each subject to the regulations of the country of incorporation may be preferable.

PART C

Question 5

Part 1

Below are some recent examples of CJEU cases that students may refer to their answers (marks to be awarded for any other relevant examples).

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

Marks and Spencer C466/03

Freedom of establishment: This case dealt with the availability of group relief for losses between EU group companies. The UK did not allow loss relief incurred by a non-resident company. The CJEU held that the restriction of loss relief should not apply if the non-resident company has exhausted all possibilities available in the State of residence for using the losses and there is no possibility of the losses being utilised in that country in the future.

Section 420C was introduced as a result of this case to allow for group relief for losses if the loss is an amount of a kind that would generally be available for offset under Irish tax rules, is calculated under the rules of the Member State of the surrendering company, is a trapped loss and cannot be used in the Member State.

FII GLO C466/04

Freedom of establishment/Freedom of movement of capital: In the UK, dividends from UK subsidiaries were exempt while dividends from EU subsidiaries were taxable.

The CJEU held that there was nothing to prevent Member States from using an exemption system for nationally sources dividends whilst using a credit system for foreign sourced dividends as both methods should ensure that the dividends are not liable to a series of tax charges. Nationally sourced dividends are taxed at a subsidiary level but not in the hands of the parent and foreign sourced dividends are taxed in the hands of the parent but with credit for any withholding tax and underlying tax suffered. The CJEU held that the credit system was only acceptable where the rate of tax suffered on the foreign sourced dividends is equal to the rate of tax on the nationally sourced dividends.

This decision meant there was an issue in Ireland as foreign dividends were taxed at 25% and Irish dividends were taxed at 12.5% which was contrary to EU law. Irish legislation (s21B) had to be introduced to allow for a 12.5% rate of tax on dividends received from EU subsidiaries where certain conditions were met.

FII GLO C35/11

This case was a follow on the initial FII GLO case which resulted in the introduction of section 21B. In this second case dealing with the taxation of foreign dividends, the CJEU held that the application of an exemption system for domestic dividend and a credit system for foreign dividends was contrary to EU law.

The CJEU noted that Member States are precluded from applying an exemption method to domestic dividends and a credit system for foreign sourced dividends if its established that the tax credit entitlement is based on the amount of the foreign tax actually paid on underlying profits and the effective level of company profits in the Members States is generally lower than the prescribed nominal rate of tax. One solution to deal with this proposed by the CJEU was for Member States to grant an additional credit for overseas tax at the foreign nominal rate rather than the effective rate.

Schedule 24, Paragraph 9I was introduced as a result of this ruling to allow for an additional foreign tax credit on dividends received from EU or EEA countries with which Ireland has a double tax treaty based on the nominal, rather than effective tax rate.

National Grid Indus C371/10

This case dealt with the imposition of an exit tax under Dutch domestic law on the migration of tax residency of a company from the Netherlands to the UK. Similar to Irish law, on migration of tax residence from the Netherlands, a tax charge arose in respect of a deemed disposal of certain assets held by the company at the date of migration (in this case a receivable owing to a UK related company). The taxpayer argued that the imposition of this exit tax represented a restriction on freedom of establishment.

In its ruling, the CJEU held that exit taxes were justified in order to preserve the allocation of tax rights between Member States. However, the collection of any tax due immediately on migration was not proportionate as it put the taxpayer at a disadvantage compared with taxpayers who may move operations within a Member State.

Two solutions were proposed by the CJEU – payment of the exit tax upfront with the cash disadvantage or deferral of the payment of the exit tax.

Section 628A was introduced as a result of this case. This section provides that where a company migrates its tax residency from Ireland to another EU Member State, Norway or Iceland or Liechtenstein, the company can use elect to defer the payment of the exit tax either in six instalments or not later than 60 days after the actual disposal of the asset subject to a maximum deferral of 10 years. The deferral of the exit tax will also result in the interest being imposed on the tax due.

European Commission v United Kingdom

This case dealt with the UK equivalent of section 590. Section 590 applies such that if a non-resident close company crystallises a chargeable gain, the Irish Revenue will reach out to that company and pull that gain back to Ireland and subject it to Irish capital gains tax in the hands of the Irish-resident/ordinarily resident and domiciled taxpayers, even though those Irish participators would not have received any actual funds or other benefit from holding an interest in that company.

In this case, the CJEU held that the UK equivalent was against the free movement of capital in that it targeted not only wholly artificial arrangements but also imposed a tax charge on arrangements which were carried out for a bona-fide genuine commercial purposes.

Before this judgement was released the UK had already amended its version of section 590 conceding that the previous version of this legislation was against EU law and the action taken by the European Commission was therefore justified.

Finance Act 2015 amended section 590 in light of this ruling such the provisions of section 590 will now only apply in the case of a transaction which is not carried out for bona-fide commercial reasons and is part of an arrangement of which the purpose or one of the main purposes is the avoidance of Irish tax.

Question 6

Part 1

20% withholding tax will apply in the absence of a relief under domestic or EU legislation or under tax treaties.

Dividend to Saint Andre Sarl

Domestic Legislation – s172D Exemption for payments to certain non residents.

The dividend payment qualifies for exemption under s172D(3)(b)(i) as it is a company resident in France (a relevant territory) and it is not under the control of persons resident in Ireland.

Therefore, provided Ryder Ltd receives a declaration from Saint Andre Sarl as required under s172D, then no dividend withholding tax should apply on the payment of the dividend.

Relief would not be available under the EU Parent Subsidiary Directive as the 5% holding requirement is not in place.

Dividend to Gabrielle Digan

The dividend payment qualifies for exemption under s172D(3)(a) on the basis that the US individual is neither resident nor ordinarily resident in Ireland, is resident in a country with which Ireland has a tax treaty (which includes the US) and has made a relevant declaration in that regard. No withholding tax should be deducted from the dividend payment.

Under the Irish US double tax treaty the Withholding Tax would only be limited to 15%.

Dividend to Ryder Benelux Sarl

The exemption in section s172D(3)(b) (i) does not apply as the company is under the control of Irish residents.

The exemption in section s172D(3)(b)(ii) does not apply b)(ii) as the company is not under the control of persons resident in a relevant territory.

The exemption in section s172D(3)(b(iii) does not apply as Lux the company is not listed.

EU Parent Subsidiary Directive – s831

In order to qualify for exemption from withholding tax under the Parent Subsidiary Directive, Ryder Benelux Sarl needs to hold at least 5% of the share capital of Ryder Ltd (in some cases needs to be held for at least 2 consecutive years). This condition should be satisfied.

However s831(6) provides that Irish companies are still required to withhold tax on dividends where the majority of the voting right in the EU resident parent are controlled by persons not resident in a relevant territory (Ireland is not a relevant territory) unless it is shown that the parent company exists for bona fide commercial reasons and does not form part of any arrangement or scheme of which the main purpose, or one of the main purposes, is the avoidance of tax.

As we are told that the sole reason the Ryder Benelux Sarl was set up was to benefit from reduced tax rates in Luxembourg on investment income, the Irish Revenue may not allow relief under the EU Parent
Subsidiary Directive.

Treaty

In the absence of relief under the Parent Subsidiary Directive and any treaty relief, a 20% withholding tax obligation would arise. However the OCED Convention (Article 10.2) reduces the withholding tax to 5% where Ryder Benelux Sarl is the beneficial owner of 25% of the Irish company.

Therefore, withholding tax of 5% is likely to apply to the dividend payment.

Ryder Ltd will have to complete a DWT return within 14 days of the end of the month in which the dividend is paid including details of each of the dividend payments.

<u>Part 2</u>

A correlative adjustment arises when the profits of one country are adjusted upwards and as a result the profits of another country are adjusted downwards. Where a correlative adjustment arises profits are doubly taxed i.e. the increase profits in Ryder will be taxed in both Ireland and Spain unless an additional deduction for this additional commission charge is available to Ryder in Ireland.

Generally, section 81(2)(o) provides that a deduction would not be available for Ryder Ltd on the basis that the additional commission charge was not incurred wholly and exclusively for the purposes of the trade of Ryder Ltd, with relief only being made available if so provided for under the terms of the double tax treaty.

Under Article 9(2) of the OECD MTC which deals with Associated Enterprises, where one country imposes a tax on Company A in respect of profits which have already been taxed in the other country as part of Company B's profits, and the other country agrees that, had the parties been dealing at arm's length, the profits would have accrued to Company A, then the other country will make an appropriate adjustment to the amount of tax charged to Company B.

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 competent authorities of the two states.

In this instance therefore, the Irish and Spanish tax authorities will have to agree to the amount of the adjustment between them. Once agreement is reached Ryder Ltd should be entitled to a deduction for the amount of the correlative adjustment (€10 million) by virtue of Article 9 of the OECD MTC, which should result in a refund due of €1,250,000.

Question 7

Part 1

A Tax Advisor
Dublin
Ireland

John Cartier
Dalkey
Dublin

Date

Dear John

I refer to our recent conversation about your tax residency position.

By way of background I will outline for you the basic rules in regard to residency and domicile and then from the fact you have provided me with I will endeavor to apply these rules to your circumstances.

Residence and Ordinary Residence

An individual is resident in ROI if they are present in ROI for 183 days or more 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 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.

Applying the rules to your fact pattern

You were born in Argentina to an Argentinian father and an Irish mother. If your parents were married at the time of your birth you took on an Argentinian domicile. If your parents were unmarried at that time you took on an Irish domicile. You would have retained that domicile of origin during your minor years. While you have lived in UK, Belgium and Ireland as an adult you haven't declared your domicile or chosen a new domicile in any of those jurisdictions.

You have spent sufficient time in ROI to meet the 280 day test for residency each year since 2011.

The time spent in New York each year would constitute a substantial presence for US tax purposes also making you tax resident in the US.

Part 2 & Part 3

To determine which country has the primary taxing rights where you could be dual resident we look to Article 4 of the US Ireland Treaty.

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

However where 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 interest 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, your child spends time with you in Dublin but not in New York.

Where leisure and social activities are carried out is also vitally important. If you are a member of clubs and associations in ROI then that would be an indicator consistent with ROI residency. Other factors that would be looked at is where economic activities are conducted. This is clearly divided between Dublin and New York.

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

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

So the whole circumstances of the individuals life needs to be looked at in determining the centre vital interests.

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

Where the permanent home and centre of vital interests don't determine an individual's residency under the treaty the next test is habitual abode. The OECD guidance in relation to habitual abode states that in a case where centre of vital interests cannot be determined the habitual abode test tips the balance towards the state where the individual stays more frequently. The time spent in the state, not just at the permanent home, must be taken into account, so any days holidays or away working in different parts of the country must also be taken into account as to the amount of time spent in the state for the purpose of the habitual abode test. Different countries take different approaches in this regard, some countries look at the reason why the individual is spending time in a jurisdiction i.e. is it periodic visits away from their normal place of residence away from the jurisdiction or is it for holiday or personal reasons rather than professional reasons.

Other countries take the view that where the individual spends most time and why they stay there is more important than where they stay i.e. whether they stay in a permanent home or temporary accommodation is irrelevant. Leading commentators in this area support the view that counting days is not sufficient but the issue of habitual abode should not depend on where the individual spends most of the time but rather on where they normally live. Therefore a period of adequate length should be chosen in determining what a habitual abode is.

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

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

In your case the ties you have to Ireland – home, passport, driving licence, time spent with your child are important in determining of all the countries you spend time in you are most likely to be resident in Ireland rather than the US.

<u>Part 4</u>

Remittance Basis

If you are considered ROI tax resident but not ROI domiciled then you can avail of the remittance basis of taxation. This means that you are taxed in ROI under Schedule D case 111 on the full amount of profits or income arising from foreign securities and possession on an arising basis where the individual is non domiciled in ROI they are taxed on the amount of that income or gains which is remitted to ROI.

An employment has been held in the case of *Colquhoun v Brooks* (2 TC 490) and *Bennet v Marshall* (22 TC 73)] to be a possession, So a foreign employment is a foreign possession.
Where a foreign employment is exercised partially in the State then it is taxed under Schedule E as PAYE income and cannot avail of the remittance basis. If the foreign employment is wholly foreign then a non-domiciled person can avail of the remittance basis of taxation in respect of it.

The income of a non-Irish sourced employment attributable to the Performance outside the State of the duties of that employment, remains, where chargeable to tax in the State, chargeable to tax under Case III of Schedule D and the remittance basis of assessment is available on this portion of employment income.

Therefore if your employment contract is with the head office in New York then the proportion of the income which relates to your New York duties could be taxed on the remittance basis.

Any foreign rental income from the Belgian property and any investments would only be taxed to the extent they are remitted.

I trust this answers some of your questions but if you have any further queries please do not hesitate to contact me.

I trust this answers some of your questions but if you have any further queries please do not hesitate to contact me.

Yours sincerely
A Tax Advisor

Question 8

Part 1

Any of the following may be taken as an example (three required):

CGT

S980 TCA 1997 15% withholding tax on capital gains tax proceeds on sale by a non resident of ROI situate specified assets. This section does not apply where the value of the asset disposed of does not exceed €500,000 or €1,000,000 in the case of a house or apartment, where a capital sum derives from a settlement under an insurance policy, or where the vendor is a body specified in *Schedule 15*. Neither does it apply to a disposal by NAMA or by a 51% subsidiary of NAMA.

A capital gains tax clearance cert a CG50 application can be made where the non resident vendoris paying the CGT up front or can demonstrate by way of calculation that there is no gain.

CAT

Special rules apply in order to ensure that non-resident beneficiaries make returns and pay their tax. Where the Personal Representative or Executor of the Estate is Irish resident, then that person is obliged to ensure that the Non-Resident Beneficiary discharges the tax and if such Beneficiary fails to do so, the Personal Representative can be personally assessed for the tax. Exposure to assessment is limited to the amount of assets under the Personal Representatives control to which the Beneficiary is entitled. In order to allow the Personal Representative discharge this onerous obligation, such Personal Representative has the power to sell the assets to which the to which the Non-Resident Beneficiary is entitled.

In the event that some or all of the Beneficiaries are non-resident and the Personal Representative or Executors are also non-resident in Ireland, then under Section 48(10) of the Capital Acquisitions Act (as amended by the Finance Act 2010) requires such Personal Representative or Executor to appoint a solicitor who is lawfully practising in Ireland to act in connection with the administration of the deceased person's Estate. The Probate Office will not issue a Grant of Probate or Letters of Administration without such a solicitor having been so appointed. From the solicitor's viewpoint, this gives rise to substantial additional risk as such solicitor is then deemed to be an assessable person for the purposes of the tax should the nonresident Beneficiary fail to make a return and pay the tax. Once again, the solicitor's exposure to assessment is limited to the amount of assets under his or her control to which the Beneficiary is entitled and, furthermore, a solicitor has the power under the Act to sell those assets in order to discharge the taxes.

Income Tax on Rent

Where rents are paid directly to a person whose usual place of abode is outside the State, the tenant is obliged to deduct income tax at the standard rate from the payment (section 1041 TCA 1997). The tenant then gives the landlord a certificate of the tax deducted on Form R185 (Certificate of Income Tax Deducted). The landlord is entitled to claim relief for expenses which are usually allowed in arriving at the rental profit and may be entitled to a proportion of personal allowances. A payment into a bank account in the name of the landlord is payment directly to the landlord.

Where rents are paid to a person whose usual place of abode is in the State, for example to an Irish based estate agent acting on behalf of a non-resident landlord, the tenant is not obliged or entitled to deduct income tax. The nonresident landlord is chargeable in the name of the Irish agent. The Irish agent is not entitled to deduct tax from the rent on payment to the landlord but may retain a sufficient portion of the rents to satisfy the tax payable on the rents (section 1046(2) TCA 1997). The agent should not issue a Form R185 to the landlord.

The landlord is assessable and chargeable to income tax in the name of the Irish agent (section 1034 TCA 1997). The agent should be set up under a new PPS number. While the assessment is in the name of the Irish agent, the tax to be charged is the amount which would be charged if the non-resident landlord was assessed in his or her own right. Accordingly, as well as assessing only the profit rent, relief should be given for any personal tax credits to which the non-resident landlord is entitled.

Income Tax on Professional Services

A withholding tax, at the rate of 20 per cent, is deductible at source from payments for "professional services" made to individuals and companies by "accountable persons" (Government Departments, local authorities, health boards, State bodies, etc.). The tax applies generally to fees and similar payments made by listed accountable persons but does not apply to payments already covered by PAYE or the construction industry tax deduction scheme. The tax also applies to payments made by health insurers under contracts of insurance to cover fees for services provided by medical practitioners in certain circumstances. The tax is charged on payments net of value-added tax.

Income Tax on Construction, Forestry and Meat Processing

Relevant Contracts Tax applies to payments made by a principal contractor to a subcontractor under a relevant contract (this is a contract to carry out, or supply labour for the performance of relevant operations in the construction, forestry or meat processing industry). Payments to subcontractors in respect of a relevant contract are generally made under deduction of tax, but payments can also be made gross where the subcontractor satisfies certain conditions.

RCT applies to both resident and non-resident contractors operating in the construction, forestry or meat processing industry.

Rates of deduction are 35%, 20% and 0%. A refund of the taxes deducted can be claimed by the subcontractor. A subcontractor with a permanent establishment in ROI will have to file an income tax return whereas one who does not have a permanent establishment can apply to the International Refunds section.