

Holding
Companies
in
Ireland

DILLON  EUSTACE

DUBLIN CORK BOSTON NEW YORK TOKYO



Contents

Holding Companies in Ireland

Holding Companies in Ireland	Page 2
Establishment of an Irish holding company	Page 2
Taxation of Irish holding companies	Page 3
Disposition of shares in an Irish holding company	Page 8
Ceasing operations in Ireland	Page 9
Tax Treaty Network	Page 10
Conclusion	Page 10

Holding Companies in Ireland

Ireland has in recent years become a destination of choice for holding companies because of its capital gains participation exemption, generous foreign tax credit system, membership of the EU, ever expanding double tax treaty network, lack of CFC and thin capitalisation rules and the general ability to pay dividends free of withholding tax. The changes contained in the Finance Act 2010 (the “Act”) can be seen as continuing evidence of the Irish government’s commitment to attracting holding companies to Ireland.

The Irish tax issues associated with establishing an Irish holding company are reviewed under the following headings:

-  establishment of an Irish holding company;
-  taxation of Irish holding companies;
-  disposition of shares in an Irish holding company;
-  ceasing operations in Ireland; and
-  tax treaty network.

Establishment of an Irish holding company

A holding company incorporated in Ireland must take one of the forms provided for by Irish corporate law. The most commonly used structure for a holding company is a private limited liability company or a private unlimited liability company. There are no minimum equity requirements for an Irish private company.

Financial statements must be prepared in accordance with generally accepted accounting practice in Ireland and with Irish corporate law comprising the Companies Acts, 1963 to 2009.

The Companies (Miscellaneous Provisions) Act, 2009 which was signed into law on 23 December 2009 permits certain parent undertakings to use US GAAP in preparing their accounts and was implemented to assist companies which are migrating to Ireland.

The ability to use US GAAP is available to parent companies incorporating in Ireland for the first time where its securities are not traded on a regulated market in the EEA. The company's securities must be registered with or subject to reporting to the US Securities and Exchange Commission (SEC) and the company must not have incurred on 23 December 2009 an obligation to file its first accounts with the Registrar of Companies.

The Minister may also approve the use of other internationally recognised accounting standards in similar arrangements. The arrangements will apply for a maximum of four financial years after the undertakings incorporation in Ireland and it will expire on 31 December 2015.

It is possible to establish an Irish tax resident holding company which is incorporated in another jurisdiction. For example, a number of UK groups have used Jersey incorporated companies and simply established the holding company's tax residence in Ireland. Groups may prefer this option because the company law requirements in Jersey are less onerous than in Ireland and also stamp duty is not payable on the sale of shares in a Jersey company (see "Stamp Duty" section below).

Taxation of Irish holding companies

General taxation regime

Ireland has an extremely favourable corporation tax rate of 12.5% on profits earned in the course of an active business (a trade). Passive income earned by a company is taxed at a rate of 25% and capital gains not qualifying for any relief/exemption are subject to tax at 25%.

Capital Gains Tax Participation Exemption on Disposal of Shares

A disposal of shares in a subsidiary company by an Irish holding company will be exempt from Irish capital gains tax provided the following conditions are met;

- ▣ The holding company must have held at least 5% of the ordinary share capital (including the rights to profits and assets on a winding up) for a continuous 12 month period and the disposal must take place during or within 2 years after the date of meeting the aforementioned holding requirement. Therefore if a disposal is made which brings the shareholding below 5% the remaining shareholding will still qualify for the participation exemption provided the remaining shares are disposed of within 2 years.
- ▣ The shares being disposed of must be of a company tax resident in a country with which Ireland has concluded a double tax treaty or in a country with which Ireland has signed but not yet ratified a double tax treaty or in a country resident in an EU Member State.
- ▣ At the time of disposal, the shares being disposed of must be of a company whose business consists wholly or mainly of the carrying on of a trade or trades, or if taken together, the businesses of the holding company and that of the companies in which

it has a direct or indirect 5% or more holding, consist wholly or mainly of the carrying on of one or more trades.

The Irish tax authorities have issued guidance in relation to the “wholly or mainly” test. The guidance confirms that “wholly or mainly” means greater than 50%. It also outlines that the primary tests to determine whether a company or group is wholly or mainly trading are the proportion of net trading profits and the proportion of net trading assets, though other factors may be taken into account.

If the holding company is unable to meet the minimum holding requirement, but is a member of a group (comprising a parent company and its greater than 50% worldwide subsidiaries), and the holding requirement can be met by including holdings of other members of the group, then the gain arising on the disposal will still be exempt from capital gains tax. Therefore, an Irish resident company may be exempt from capital gains tax on a disposal of shares even if it does not directly hold a significant shareholding.

The exemption may apply to a disposal of assets related to shares, such as options and convertible debt, but will not apply to the disposal of either shares or related assets that derive the greater part of their value from Irish real property or Irish situated minerals or mining rights or on the disposal of shares that derive their value or the greater part of their value from exploration and exploitation rights of the sea bed and subsoil in the State or the Continental Shelf.

In determining whether the exemption conditions are met, it should be noted that:

- ▣ The holding company need not hold its entire shareholding for the minimum holding period of 12 months; the disposal of shares will be exempt provided it holds 5% of the shares for that period.
- ▣ The holding company is not required to dispose of its entire shareholding to obtain the participation exemption; once the prescribed holding requirements as outlined above are met, the gain arising on any piecemeal disposal will be exempt.
- ▣ In the case of stocklending and repo transactions, the period during which the shares have been temporarily lent or sold will be regarded as a period of ownership of the original holder for the purposes of determining the holding period.
- ▣ On liquidation, a liability to capital gains tax may arise on the disposal of assets by the liquidator, however gains or losses that arise on liquidation are deemed to be gains or losses of the company. In this regard, the exemption from capital gains tax on a disposal should also apply (once the necessary conditions are met) to disposals in the context of the liquidation.

Taxation of dividend income

Dividends paid by a company located in the EU or by a company resident in a country with which Ireland has concluded a double tax treaty or signed but not yet ratified a double tax treaty (“Qualifying Companies”) to an Irish company may be liable to Irish tax in the following manner:

- ▣ Dividends paid out of “trading profits” will be chargeable to corporation tax at the rate of 12.5% (as opposed to 25%). In the majority of cases the application of the 12.5% rate of corporation tax and double tax relief should ensure that no further Irish tax arises on such dividends. The 12.5% rate will also apply where the dividend is paid out of dividends received by the foreign company from the trading profits of its subsidiaries.
- ▣ If only part of the dividend is derived from “trading profits” then the requisite part of the dividend will be liable to tax at 12.5% with the balance taxable at 25%. The Act simplifies the rules for identifying the underlying profits out of which dividends are regarded as being paid for the purpose of determining the tax rate to be applied to those dividends.
- ▣ Where 75% or more of the profits of the dividend paying company are trading profits of that company or dividends received by it out of trading profits of lower tier companies that are Qualifying Companies and their trading assets constitute more than 75% of the aggregate value of all of their assets all of the dividend will be subject to tax at the 12.5% rate (even though a percentage of the dividends is not derived from trading profits).
- ▣ “Portfolio Dividends” (i.e. dividends arising on holdings of 5% or less) will also be taxed at the 12.5% rate provided the portfolio dividend is received from a Qualifying Company.
- ▣ Dividends received from other Irish tax resident companies are generally exempt from tax.

The Act broadens the application of the 12.5% rate to foreign dividends paid out of trading profits from companies based in non EU/Double Tax Treaty countries provided that the payer company is listed, or is a 75% direct or indirect subsidiary of a company that is listed on a recognised stock exchange either in Ireland or an EU/DTA country or other stock exchange approved by the Minister for Finance.

Credit should be available for foreign taxes on dividends received by an Irish company. The credit is for both foreign withholding taxes and foreign tax on the underlying profits out of which a dividend has been paid. Ireland operates a generous tax credit “pooling” regime. In addition, excess foreign tax credits can be carried forward indefinitely. The foreign tax credit pooling regime can in many cases result in an effective exemption from tax on foreign dividends.

Repatriation of dividends from Ireland

Withholding tax of 20% must be applied in respect of dividends paid and other profit distributions made by companies resident in Ireland. The obligation to withhold tax is placed on the company making the distribution.

Exemption from dividend withholding tax is available to non-resident shareholders in the following circumstances:

- ▣ under domestic law, where the dividend is paid to individual recipients resident in the EU or in a country with which Ireland has concluded a double tax treaty or in a country which Ireland has signed but not yet ratified a double tax treaty (“Qualifying Country”);
- ▣ under domestic law, where the dividend is paid to a company resident in a Qualifying Country and which is not controlled (more than 50%) by Irish residents;
- ▣ under domestic law, where the dividend is paid to a company that is under the ultimate control of persons resident in a Qualifying Country;
- ▣ under domestic law, where the dividend is paid to a non-resident company, the principal class of whose shares is listed and regularly traded on a recognised stock exchange in a treaty country or another Member State, or on another stock exchange approved by the Minister for Finance. This exemption also applies where the recipient of the dividend is a 75% or more subsidiary of such a listed entity;
- ▣ under domestic law, where the dividend is paid to a non-resident company that is wholly owned (directly or indirectly) by two or more companies, the principal class of each which is listed (and regularly traded) on a recognised stock exchange approved by the Minister for Finance; and
- ▣ in accordance with the EU Parent-Subsidiary directive, where the dividend is paid by a subsidiary company to its EU parent.

All of the foregoing persons must make a declaration in a specific format laid down in the legislation in order to avail of the above exemptions. If there are no changes in circumstances the exemption should remain operative for five years. The Act reduces the administrative requirements that must be complied with for an Irish company to pay a dividend free of withholding tax to a non-resident company. The requirement for the non-resident company to provide a tax residence and/or auditors certificate to obtain exemption from dividend withholding tax has been removed. Instead a self assessment system applies under which the non-resident company will provide a declaration to the Irish resident company that it is a qualifying non-resident company.

Deduction of cost

Generally the expenses of management are deductible against a holding companies taxable profit. Furthermore, an Irish holding company will generally obtain (on a paid basis) a deduction for interest on loans relating to the acquisition (or lending) of shareholdings subject to certain restrictions.

Controlled Foreign Corporation ("CFC") Legislation

Ireland does not currently have CFC legislation.

Thin Capitalisation

Irish tax legislation does not contain thin capitalisation rules, but it does re-characterise certain interest payments in certain cases as non-deductible interest.

Transfer Pricing

The Act introduced limited transfer pricing ("**TP**") rules into Ireland. The new TP rules only apply to certain transactions conducted in a trading context and as holding companies are not considered to be carrying on a trade for Irish tax purposes, the new limited TP rules should not be applicable.

VAT

VAT will not arise if the holding company's activity is limited to the holding of shares as the company will not be deemed to be a taxable person for VAT purposes. Consequently pure holding companies are not required to register for VAT. This means that any VAT incurred (in Ireland or elsewhere) on costs attributable to the holding activities are not recoverable by the holding company.

A holding company may however be required to register for and account for VAT in respect of the receipt by it of certain services from abroad e.g. services of non Irish lawyers, accountants, consultants, etc (such services are commonly referred to as “B2B supplies”) or on the acquisition of certain goods. To the extent that a holding company is engaged in both exempt activities and VATable activities it will be required to register for and charge Irish VAT as appropriate in respect of its VATable activities.

However if the holding company takes a direct or indirect role in the management of subsidiaries and charges a fee in respect of this, such companies are engaged in an economic activity and are consequently considered to be taxable persons. They are therefore entitled to deduct VAT incurred (in Ireland or elsewhere) on costs relating to this economic activity only. General costs are eligible for partial VAT recovery by reference to a suitable apportionment calculation.

The standard rate of VAT is currently 21%.

Other taxes

There are no other (significant) taxes to be taken into account for holding companies.

Disposition of shares in an Irish holding company

Capital Gains Tax

Capital Gains Tax for non-Irish tax residents arises on the disposition of shares only where those shares derive the greater part of their value from Irish situated minerals or mining rights or Irish real property. The current rate of Capital Gains Tax is 25%.

Stamp Duty

Stamp duty is a one-off tax on documents implementing certain transactions.

The transfer of shares attracts stamp duty at a rate of 1% (based on the fair market value of the shares). There are various reliefs for transactions involving associated companies and group re-organisations. In addition, some groups have used a company incorporated in, for example, the Channel Islands but tax resident in Ireland. In that way, no stamp duty arises on the transfer of shares but as the holding company is tax resident in Ireland all of the benefits outlined for establishing a holding company in Ireland remain applicable.

Ceasing operations in Ireland

Migration of residence

A company which is incorporated in Ireland will be regarded as tax resident in Ireland unless;

- ▣ the company is treated as resident in a country by virtue of a double tax treaty entered into between that country and Ireland; or
- ▣ if the company or a related (50% or more) company has trading operations in Ireland and either
 - ▣ the company is ultimately controlled (more than 50%) by tax residents of an EU Member State or a country with which Ireland has a double tax treaty, or
 - ▣ the company or a related company is quoted on a recognised stock exchange of an EU Member State (including Ireland) or a country with which Ireland has a double tax treaty.

For companies which fall within one of the above exceptions and for companies which are not incorporated in Ireland, tax residence is determined by reference to where the central management and control is exercised.

Thus, it may be possible to “migrate” an Irish resident company to another jurisdiction by changing the location of its central management and control. There is no statutory definition of “management and control” and the courts generally place considerable emphasis on where the board meeting of directors are held.

Exemption from capital gains tax exit charge for companies migrating from Ireland

Irish legislation provides for a charge to capital gains tax for companies ceasing to be Irish resident which own assets at the time of the cessation of residence. The legislation deems the company to have disposed of all its assets, other than assets situated in Ireland and used for the purposes of an Irish trade or used or held for the purposes of an Irish branch or agency, whether at that time or subsequently. The disposal is deemed to take place at market value. The participation exemption is not available to the deemed disposal on migration, however there is an exclusion from capital gains tax for companies of which not less than 90% of the issued share capital is held by a foreign company, which is effectively defined as a company resident in a country with which Ireland has a double taxation agreement.

Liquidation of holding company

On liquidation gains and losses are deemed to be gains and losses of the company and it should therefore be possible for gains arising on the disposal by the liquidator of shareholdings (which meet the necessary conditions) to benefit from the participation exemption and therefore be exempt from capital gains tax.

Distributions to shareholders made on liquidation

Where a shareholder receives a distribution on liquidation such a distribution is not regarded as a dividend and instead may be subject to capital gains tax in the hands of the shareholder. It is however very unlikely that such a distribution to a non-resident shareholder would attract a liability to capital gains tax given the fact that a liability to such only arises on shares deriving their value from Irish minerals or mining rights or from Irish real property.

Tax Treaty Network

Ireland has a large tax treaty network which is continually expanding. The signing of new treaties in 2010 brings to 59 the number of tax treaties signed by Ireland (49 of which are fully in force). A list of countries with which Ireland has ratified tax treaties and with whom Ireland has signed but not yet ratified tax treaties is included in Appendix 1. Pursuant to the Finance (No.2) Act 2008 companies resident in countries with which Ireland has signed but not yet ratified tax treaties will be entitled to avail of any of the exemptions available to companies resident in countries with which Ireland has fully ratified tax treaties. This welcome amendment greatly expands Ireland's network of tax treaties for many of Ireland's domestic tax reliefs.

Conclusion

An Irish resident holding company will be subject to the Irish corporation tax system as well as to Irish VAT and withholding taxes. The Irish corporation tax system is recognised as uncomplicated and is associated with low compliance costs. On the tax side the main advantages to using an Irish Holding Company are; the absence of controlled foreign company legislation, the absence of thin capitalisation rules, the availability of a deduction from interest on monies borrowed to acquire certain shareholding, the capital gains tax participation exemption, the taxation regime for foreign dividends and the extensive tax treaty network.

Furthermore there are many favourable non-tax factors to be considered when examining Ireland as a location for a holding company. These include factors such as Ireland being English speaking, having a flexible labour market, being a common law jurisdiction and being a long established member of the EU. In addition, the Irish government and regulators have both adopted a business friendly approach to Irish holding companies.

The combination of favourable tax and non-tax factors make Ireland a destination of choice for many holding companies.

APPENDIX 1

Ireland has signed comprehensive double taxation agreements with 59 countries, of which 49 are in effect.

- ▣ *Albania (signed 16 October 2009)
- ▣ Australia
- ▣ Austria
- ▣ *Bahrain (signed 29 October 2009)
- ▣ Belarus
- ▣ Belgium
- ▣ *Bosnia & Herzegovina (signed 3 November 2009)
- ▣ Bulgaria
- ▣ Canada
- ▣ Chile
- ▣ China
- ▣ Croatia
- ▣ Cyprus
- ▣ Czech Republic
- ▣ Denmark
- ▣ Estonia
- ▣ Finland
- ▣ France
- ▣ *Georgia (effective from 1 January 2011)
- ▣ Germany
- ▣ Greece
- ▣ *Hong Kong (signed 22 June 2010)
- ▣ Hungary
- ▣ Iceland
- ▣ India
- ▣ Israel
- ▣ Italy
- ▣ Japan
- ▣ Korea
- ▣ Latvia
- ▣ Lithuania
- ▣ Luxembourg
- ▣ Macedonia
- ▣ Malaysia
- ▣ Malta
- ▣ Mexico
- ▣ *Moldova (effective from 1 January 2011)
- ▣ *Morocco (signed 22 June 2010)

- ▣ [Netherlands](#)
- ▣ [New Zealand](#)
- ▣ [Norway](#)
- ▣ [Pakistan](#)
- ▣ [Poland](#)
- ▣ [Portugal](#)
- ▣ [Romania](#)
- ▣ [Russia](#)
- ▣ [*Serbia](#) (effective from 1 January 2011)
- ▣ [Slovak Republic](#)
- ▣ [Slovenia](#)
- ▣ [South Africa](#)
- ▣ [Spain](#)
- ▣ [Sweden](#)
- ▣ [Switzerland](#)
- ▣ [*The Republic of Turkey](#) (effective 1 January 2011)
- ▣ [*United Arab Emirates](#) (signed 1 July 2010)
- ▣ [United Kingdom](#)
- ▣ [United States](#)
- ▣ [Vietnam](#)
- ▣ [Zambia](#)

*The Republic of Ireland has signed a double taxation agreement and although not yet in force has the force of law by virtue of section 826 (1) TCA 97. Consequently Ireland will allow dividends, interest and patent royalties etc to be paid gross to the above countries free of withholding tax even though the new agreements are not yet in force.

Negotiations for new agreements with Armenia, Kuwait, Montenegro, Saudi Arabia, Singapore and Thailand have been concluded and are expected to be signed shortly.

Negotiations for new agreements with the following countries are at various stages: Argentina, Azerbaijan, Egypt, Tunisia, and Ukraine.

It is also planned to initiate negotiations for new agreements with other countries during the course of 2010.

Date: September 2010
Author: David Lawless, Sean Murray and Paul Moloney

 CONTACT US

Our Offices

Dublin

33 Sir John Rogerson's Quay,
Dublin 2,
Ireland.
Tel: +353 1 667 0022
Fax.: +353 1 667 0042

Boston

26th Floor,
225 Franklin Street,
Boston, MA 02110,
United States of America.
Tel: +1 617 217 2866
Fax: +1 617 217 2566

New York

245 Park Avenue
39th Floor
New York, NY 10167
United States
Tel: +1 212 792 4166
Fax: +1 212 792 4167

Tokyo

12th Floor,
Yurakucho Itocia Building
2-7-1 Yurakucho, Chiyoda-ku
Tokyo 100-0006, Japan
Tel: +813 6860 4885
Fax: +813 6860 4501

e-mail: enquiries@dilloneustace.ie
website: www.dilloneustace.ie

Contact Points

Date: September 2010

For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the team members below.

David Lawless

e-mail: david.lawless@dilloneustace.ie
Tel : +353 1 667 0022
Fax: + 353 1667 0042

Sean Murray

e-mail: sean.murray@dilloneustace.ie
Tel : +353 1 667 0022
Fax: + 353 1667 0042

Paul Moloney

e-mail: paul.moloney@dilloneustace.ie
Tel : +353 1 667 0022
Fax: + 353 1667 0042

DISCLAIMER:

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

Copyright Notice:

© 2010 Dillon Eustace. All rights reserved.

DILLON  EUSTACE

DUBLIN CORK BOSTON NEW YORK TOKYO

33 Sir John Rogerson's Quay, Dublin 2, Ireland.
www.dilloneustace.ie

In alliance with Arendt & Medernach