

Guidance Note – Investment Management Services

(Section 1035A Taxes Consolidation Act, 1997 – inserted by section 51 Finance Act, 2003)

1. Introduction

Section 1035A of the Taxes Consolidation Act, 1997, provides an exception to the general rule, that the profits of a trade exercised in the State by a non-resident person is liable to tax in the State. This note explains the provisions of section 1035A and gives guidance on its application.

2. General purpose of section 1035A

Whether or not, in any situation, a non-resident person exercises a trade in the State is determined by an analysis of the facts – (e.g. what activities are undertaken in the State, by whom are they undertaken and with what authority) – and interpreting those facts in the context of the relevant legislation and Case Law. Case Law indicates, inter alia, that if a resident person, acting in the State on behalf of the non-resident person, has the capacity to conclude contracts on behalf of the non-resident person, then it is likely that the non-resident person is exercising a trade in the State through the resident person and thereby chargeable to tax in the State on all or part of the profits of that trade. Whereas this indicator from Case Law evolved primarily from considerations of trades involving the sale of goods, it creates uncertainty as to the tax treatment of a non-resident engaged in a financial trade who avails of the services of an investment manager located in the State. It is usual that such an investment manager will have the power to conclude contracts on behalf of the non-resident and this raises uncertainty as to the exposure (if any) of the non-resident person to Irish tax. The purpose of section 1035A, therefore, is to provide, in so far as possible, certainty for non-residents seeking to avail of investment management services provided in the State.

3. **The core provision of section 1035A**

The core provision of section 1035A is contained in subsection (3). This subsection removes the charge to Irish tax on the profits (for a chargeable period) of a trade exercised in the State by a non-resident person solely through an Irish resident agent where throughout the chargeable period—

- the agent is an authorised agent;
- the trade is a financial trade; and
- the agent is independent in relation to the non-resident person.

While subsection (3) removes the charge to income tax on certain non-resident persons, its provisions, by virtue of section 1040 of the Taxes Consolidation Act 1997, extend to corporation tax otherwise chargeable on certain non-resident companies.

4 **Definitions** (subsection (1))

4.1 *Authorised agent*

An authorised agent is defined as a person who either—

- acts as an investment business firm which has been given authorisation to so act, either—
 - from the Central Bank of Ireland under section 10(1) of the Investment Intermediaries Act, 1995, or
 - from the relevant authority of another Member State of the EU, under a corresponding legal provision of that State;
- acts as an authorised member firm which has been given authorisation to so act either—
 - from the Central Bank of Ireland under section 18 of the Stock Exchange Act 1995, or
 - from the relevant authority of another Member State of the EU, under corresponding legal provisions of that State, or
- is a credit institution duly authorised by virtue of Directive No. 2000/12/EC of 20 March 2000.

4.2 *Investment business firm*

Investment business firm is defined by section 2 of the Investment Intermediaries Act 1995 to mean any person, other than a member firm within the meaning of the Stock Exchange Act, 1995, who provides one or more investment business services to third parties on a professional basis (other than an individual acting solely for the account of an investment business firm or an insurance undertaking or a credit institution).

4.3 *Investment business services*

Investment business services has a broad definition (see section 2 of the Investment Intermediaries Act, 1995.)

4.4 *Financial trade*

A financial trade is the trade of a non-resident person, which is carried on through such an authorised agent under and within the terms of its authorisation.

Note: Under section 2(6) of the Investment Intermediaries Act 1995 an investment business firm does not include inter alia a person who provides investment business services only to—

- undertakings of which it is a subsidiary,
- its own subsidiaries; or
- other subsidiaries of the same parent undertaking.

In other words, where services are provided only to the same-group entities, the person is exempt from the requirement to be authorised. However where services are provided to both same-group and a third party clients, authorisation is required and such authorisation extends to and includes all clients of the person (including same-group).

5. Requirement for authorised agent to be independent in relation to the non-resident person (subsection (2)(a))

An authorised agent, through whom a non-resident person exercises a financial trade in the State, is independent in relation to the non-resident person if—

- the agent does not otherwise act for the non-resident person (ancillary services such as back office administration services will be allowed provided they are also carried out independently),
- when acting on behalf of the non-resident person, the agent acts—
 - in an independent capacity, and
 - in the ordinary course of the agent's business, and
- the profits of the non-resident's trade, to which the agent (and certain connected persons) is beneficially entitled, is limited (see paragraph 7 below).

An independent agent will typically be responsible to the non-resident person for the results of their work but not subject to significant control with respect to the manner in which that work is carried out or the conduct of the work. The fact that the non-resident person is relying on the special skill and knowledge of the authorised agent is an indication of independence. The provision of information to the non-resident person in connection with the investment business will not necessarily be taken as a sign of dependence provided that the information is not provided in the course of seeking approval from the non-resident person for the manner in which the investment business is to be conducted.

6 Requirement for authorised agent to act, in an independent capacity, on behalf of a non-resident person. (Subsection(2)(b))

The legislation expresses the concept in the negative so that the agent will not be acting in an independent capacity on behalf of the non-resident person unless the legal, financial and commercial aspects of the relationship between them are such as would be expected of a relationship between persons carrying on independent businesses. The underlying theme is that the agent must be carrying on business on its own account with a view to the realisation of profit from its activities where the amount of those profits and the nature of those

activities are not contingent on any “connection” (if any) which the agent has with the non-resident customer or customers. Therefore there is no prohibition, as such, on an agent acting for only one non-resident person, or on an agent (being a subsidiary company) acting for its parent company. (The concept of connection being interpreted in the light of the statutory definitions in section 10 of the Taxes Consolidation Act, 1997).

7 Limitation on the authorised agent’s share (if any) of the profits of the non-resident’s trade. (Subsection (4))

It may often be the case that the authorised agent’s income from acting on behalf of the non-resident is received by way of agreed remuneration, whether a fixed figure, or one based on a share of the profits generated in the non-resident’s trade. There is no restriction in respect of such remuneration provided it is on an arm’s length basis. However, where an agent is providing investment management services for third parties, it is not uncommon that the agent, from a marketing perspective, will be required to demonstrate its bona fides by also being an investor in the non-resident’s trade. It is in respect of this investment that a restriction applies. The restriction applies to the aggregate amount of the profits of a non-resident’s trade, for a chargeable period, to which the agent and its resident connected persons, have, or may acquire, a beneficial entitlement by reason of—

- an interest the agent has in all or any of the property from which the profits are derived, or
- any interest in, or rights in relation to, the non-resident person which the agent has.

The restriction is that the agent and its resident connected persons cannot in any chargeable period, in the aggregate, have, or be entitled to acquire, by virtue of such interests, more than 20 per cent of the profits of the trade of the non-resident. Professional fees paid to the authorised agent are not included in the 20 per cent ceiling provided that they would be allowable as deductions in arriving at taxable income. In recognition that this restriction may not always

be complied with, particularly in a “start up” situation, the Revenue Commissioners can set it aside on a temporary basis.

8 Foreign SPVs with Irish Investment Managers

Investors generally invest in securitisation SPVs by acquiring debt instruments (eg bonds or loan notes) issued by the SPVs. This is a fundamental difference between SPVs and regulated funds (such as UCITS). As, in general, SPVs do not make any readily identifiable ‘profit’, it is difficult to apply the 20% test. Consequently, in this regard Revenue will accept that where the Irish investment manager holds less than 20% of the total principal amount of the issued notes of the SPV, on the date that the manager first acquired the notes, then it would be treated as meeting the ‘20% test’ requirement.

Enquiries with regard to this Guidance Note should be addressed to—

Office of the Revenue Commissioners,
Corporate Business and International Division,
Stamping Building,
Dublin Castle,
Dublin 2

Updated September 2009