Company Residence in the State

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Table of Contents

1. Company Residence in the State - changes made in Finance Act 2014 3

2. Companies that are not incorporated in the State 4

3. Transition Period to 31st December 2020 for companies incorporated before 1 January 2015 4

4. Company residence rules for companies incorporated before 1 January 2015: Pre-Finance Act 2014 provisions.....6

5. Application of the general rule established by case law 7

6. Residence of SE or SCE (Section 23B TCA 1997).....8

7. Companies resident in the State: income tax on payments made or received (section 24 TCA 1997) 8

1. Company Residence in the State - changes made in Finance Act 2014

Residence is a material factor for companies in determining tax liability and for the purpose of applying many provisions of tax legislation. A company resident in the State is liable to corporation tax on its worldwide profits, not just its Irish source profits. A company not resident in the State is not within the charge to corporation tax unless it carries on a trade in the State through a branch or agency and, where it does so, the company is chargeable to tax on all of its branch profits. For reference see Tax and Duty Manual Part 02-02-04 Non-resident companies within the charge to corporation tax [section 25 of the Taxes Consolidation Act 1997 (TCA)].

Prior to Finance Act 2014, company residence was determined with regard to the long-established common law rules based on central management and control (see Part 5 below). These rules were supplemented by statutory anti-abuse provisions in section 23A TCA (inserted by Finance Act 1999), which provided that in certain specific circumstances a company incorporated in the State would be regarded as resident in the State (see part 4 below).

The rules in relation to company residence were significantly revised in Finance Act 2014. Section 43 of Finance Act 2014 substituted a new section for section 23A to provide that a company incorporated in the State will be regarded as resident for tax purposes in the State, unless it is treated as resident in a treaty partner country by virtue of a double taxation treaty. While the common law rule based on central management and control remains in place, it is subject to the statutory rule for determining company residence based on incorporation in the State set out in section 23A TCA. The statutory rule also provides for continuation of the alignment of company residence with the treatment of company residence in double taxation treaties. Where a company is regarded as resident in a territory other than the State and not resident in the State for the purposes of a tax treaty, the company shall be regarded as not resident in the State for tax purposes under domestic law.

An incorporation rule for determining the tax residence of a company incorporated in the State applies to companies incorporated on or after 1 January 2015. For companies incorporated in the State before this date, a transition period applies until 31 December 2020 and section 23A as it was before the 2014 Finance Act amendment (see part 4 below) continues to apply during the transition period except in circumstances where there is both a change in ownership and a major change in the nature and conduct of the business of the company in the relevant period (see part 3 below) in which case the incorporation rule will apply from the date of the change in ownership.

The transition period ended on 31st December 2020. Accordingly, the provisions set out in section 23A TCA 1997 (as amended by Finance Act 2014, section 43) are to be considered when ascertaining if a company is to be regarded as resident in the State. The information set out below will remain useful in relation to looking at a company's residence status during the transition period, and also provides an overview of the legislation and concepts relating to a company's residence status.

2. Companies that are not incorporated in the State

The changes to company residence rules made by Finance Act 2014 do not prevent a foreign-incorporated company that is centrally managed and controlled in the State being resident in the State for tax purposes. For such companies, the common law rule of company residence, based on central management and control, continues to apply (see part 5 below). Accordingly, a company that is incorporated in a foreign jurisdiction and is centrally managed and controlled in the State will be resident in the State for tax purposes.

3. Transition Period to 31st December 2020 for companies incorporated before 1 January 2015

Section 23A as substituted by Finance Act 2014 has effect from 1 January 2015. However, with regard to companies incorporated before 1 January 2015, the substituted section has effect:

(i) after 31 December 2020, or
(ii) from the date, after 31 December 2014, of a change in ownership of the company where there is a major change in the nature or conduct of the business of the company within the relevant period,

whichever is the earlier.

"**relevant period**" as referred to in (ii) above, means a period beginning on the later of 1 January 2015 or the date which occurs one year before the date of the change in ownership of the company and ending 5 years after the date of that change in ownership.

Accordingly, for companies incorporated before 1 January 2015, the new residence rules in section 23A, as substituted by Finance Act 2014, will apply after 31 December 2020, unless there is both a change of ownership of the company and a major change in the nature or conduct of the business within the relevant period, in which case the new residence rules will apply from the date of the change of ownership. Where there is an on-going business in the company (i.e. with no major change), the transitional period to the end of 2020 will continue to apply even if ownership changes before that time.

For the purposes of the references to a change in ownership, Schedule 9 (other than paragraph 4) of the TCA 1997 will apply as if references in Schedule 9 to sections 401 or

679(4) of the TCA were references to the commencement provisions in Finance Act 2014, section 43(2)(b) and (c). This means that there will be a change in the ownership of a company if –

- A single person acquires more than 50% of the ordinary share capital of the company,
- 2 or more persons each acquire a holding of 5% or more of the ordinary share capital of the company and those holdings together amount to more than 50% of the ordinary share capital of the company, or
- 2 or more persons each acquire a holding of the ordinary share capital of the company, and the holdings together amount to more than 50% of the ordinary share capital of the company, but disregarding a holding of less than 5% unless it is an addition to an existing holding and the 2 holdings together amount to 5% or more of the ordinary share capital of the company.

Paragraph 4 of Schedule 9 states that a transaction or circumstance taking place before the change in ownership will not be taken into account, in determining whether there is any subsequent change in ownership. This paragraph will not apply for the purposes of references to a change in ownership of a company in section 43(2) of Finance Act 2014, so that such a transaction or circumstance can be taken into account in applying the transitional provisions.

"**a major change in the nature or conduct of the business of a company**" means –

(i) a major change in the nature or conduct of a trade, within the meaning of section 401(1)(a) or (b) of the TCA, carried on by the company. This includes:
   - a major change in the type of property dealt in, or services or facilities provided, in the trade, or
   - a major change in customers, outlets or markets of the trade, or

(ii) the commencement by the company of a new trade, or

(iii) a major change arising from the acquisition by the company of property or of an interest in, or right over, property.

In relation to (iii) above, a major change in the business of the company could arise if there was a major change in the type or range of assets held by the company. For example, if a company holding assets such as a deposit account or shares were to acquire intangible assets for licensing to other companies, this could constitute a major change in the business of the company.

4. Company residence rules for companies incorporated before 1 January 2015: Pre-Finance Act 2014 provisions

Prior to Finance Act 2014, the general rule for determining company residence was the common law rule by virtue of which a company is resident in the State for tax purposes if the central management and control of the company is in the State (see part 5 below re application of the general rule established by case law). This rule is now subject to section 23A as amended by section 43 of the Finance Act 2014 and continues to apply to companies that are incorporated in other jurisdictions. This rule also applies on a transitional basis to Irish companies that were incorporated in the State prior to 1 January 2015 (see part 3 above).

Statutory anti-abuse provisions supplementing this general, common law, rule were included in section 23A (inserted by Finance Act 1999) that was applicable before the change in Finance Act 2014. This section provided that in certain specific circumstances a company would, by virtue of being incorporated in the State, be regarded as resident in the State for tax purposes. Broadly, the 'old' section 23A (pre-Finance Act 2014) provided that where a company is incorporated in the State and neither it, nor any company related to it, carries on a trade in Ireland, the company would be regarded as resident in the State for tax purposes, unless it would be treated as not being so resident for the purposes of a double taxation treaty.

This narrowly focused incorporation rule does not apply where the company is a 'relevant company' that carries on a trade in the State or is related to a company that carries on a trade in the State. A 'relevant company' is a company that either:

- is ultimately controlled by persons resident in the EU (including Ireland) or in a country with which Ireland has concluded a double taxation treaty, or
- is, or is related to, a company the principal class of the shares of which is substantially and regularly traded on one, or more than one, recognised stock exchange in an EU Member State or in a tax treaty country.

The 'old' Section 23A provided that a company which is regarded, for the purposes of a tax treaty, as resident in a territory other than the State and not resident in the State, is to be treated as not resident in the State for tax purposes. This provision takes account of clauses in many tax treaties which provide that where a company is resident in **both** Contracting States under their respective domestic laws, for the purposes of the tax treaty the company is to be treated as resident in one State and not the other. This treaty alignment provision remains in place under the new section 23A.

The 'old' Section 23A also provided that where by reason of a mismatch of residence rules with a treaty-partner country, an Irish-incorporated company would neither be resident in that country nor resident in the State and, accordingly, would not otherwise be resident in any country, the company would be treated as resident in the State. This provision was introduced in section 39 of Finance (No. 2) Act 2013 and addressed a mismatch situation

where an Irish-incorporated company that is managed and controlled in a treaty-partner country is not regarded as resident for tax purposes in any territory because-

(i) the company would not be resident for tax purposes in the treaty-partner country, because it is not incorporated in that country, and
(ii) the company would not be resident in the State for tax purposes because it is not managed and controlled in the State.

This change ensured that an Irish-incorporated company could not be 'stateless' in terms of its place of tax residence, as a result of a mismatch between Ireland's company residence rules and those of a treaty partner country. This provision applies from 24 October 2013 for companies incorporated on or after that date and from 1 January 2015 for companies incorporated before 24 October 2013. For companies incorporated before 1 January 2015 this provision will continue to apply for the transitional period. However, it does not apply to companies incorporated on or after 1 January 2015.

5. Application of the general rule established by case law

The general common law rule for determining company residence is based on principles set out in case law, in accordance with which a company's residence for tax purposes is determined by the location of its central management and control. Under this rule, a company is resident in the State for tax purposes if it is centrally managed and controlled in the State. This was the primary rule for determining a company's tax residence prior to the changes in Finance Act 2014 and it applied to both Irish-incorporated companies and foreign-incorporated companies. Post Finance Act 2014, this rule will continue to apply to foreign-incorporated companies, while it will also apply on a transitional basis to Irish companies incorporated before 1 January 2015.

This management and control rule emerged as a result of judicial decisions set down in case law. The most significant cases were **De Beers Consolidated Mines Ltd. v. Howe, 1906, 5 T.C. 198, and Todd v. Egyptian Delta Land and Investment Co. Ltd., 1928, 14 T.C. 119.** The former case found that a company's residence is where its real business is carried out and the real business is carried out where the central management and control actually abides. The latter case found that a company resides where its real business is carried on.

The central management and control test was endorsed in **Bullock v Unit Construction Co Ltd 38 TC 712.** This case is of importance in emphasizing the point that location of central management and control is a question of fact and is to be determined having regard to the specific situation of each company. It was held that a company was resident where the superior or directing authority was. Factors to be taken into account in establishing where a company's central management and control is located include, for example, where the important questions of company policy are determined, where the majority of directors reside, where the negotiation of major contracts is undertaken, where meetings of the board of directors is held and where the company's head office is located.

The principles developed in **De Beers** and other cases decided by the UK courts were confirmed by the Irish High Court in the 1947 case of **WJ Tipping (Inspector of Taxes) v Louis Jeancard, 1947, 2 ITR 68.**

Broadly speaking, the management and control test will consider the highest level of control including such matters as the formulation of company policy, major investment decisions, negotiation of major contracts and acquisitions or disposals of businesses rather than normal day to day business transactions.

6. Residence of SE or SCE (Section 23B TCA 1997)

An SE[1] or SCE[2] which has its registered office in the State shall, subject to section 23A, be treated as resident in the State for tax purposes. An SE or SCE that transfers its registered office out of the State is not to be regarded as causing the SE or SCE to cease to be resident in the State. The Regulations covering an SE or SCE require the entity to have its head office in the same Member State as its registered office. As head office broadly equates to place of management and control, it is likely that the SE or SCE will be managed and controlled where its registered office is. The move of registered office from the State to another Member State does not of itself cause the SE or SCE to cease to be resident in the State. However, the accompanying move of head office is likely to involve management and control ceasing to be in the State and, consequently, the company ceasing to be resident in the State. [Section 23B(1) and (2)]

7. Companies resident in the State: income tax on payments made or received (section 24 TCA 1997)

Certain payments (for example, annuities or other annual payments) made by a resident company must be paid under deduction of income tax at the standard rate. Where a resident company receives an annual payment from which income tax has been deducted, the tax deducted from the payment is allowed as a credit against the company's corporation tax liability for the accounting period in which that payment is taken into account.

[See Part 8 ("Annual Payments, Charges and Interest") Chapter 1 ("Annual Payments") and Chapter 3 ("Principal provisions relating to the payment of interest") TCA 1997 for more details]. A similar provision, in section 25 TCA 1997, applies to non-resident companies.

[1] European public limited-liability company

[2] European Cooperative society [see section 60(a) Finance Act 2006 for full definitions]