Certain non-resident companies within the charge to corporation tax (section 25 TCA 1997)

Part 02-02-04

This document should be read in conjunction with section 25 of the Taxes Consolidation Act 1997

Document last reviewed February 2024

Introduction

This manual outlines the corporation tax treatment of certain non-resident companies within the charge to corporation tax under the provisions of section 25 Taxes Consolidation Act 1997 (TCA 1997).

1. Trade carried on through a branch or agency by a non-resident company and non-resident corporate landlords

Section 25 TCA 1997 sets out the scope of the charge to corporation tax for non-resident companies. A non-resident company is not within the charge to corporation tax unless it-

a) carries on a trade in the State through a branch or agency (i.e. the concept of "Permanent Establishment"), or
b) has-
   (i) profits or gains which are chargeable to tax under Case V of Schedule D, or
   (ii) chargeable gains (other than gains realised on development land) which are attributable to assets, the profits or gains from which were chargeable under Case V of Schedule D.

Where a non-resident company carries on a trade in the State through a branch or agency, the company is chargeable not only on trading income arising directly or indirectly through or from the branch or agency but also on any other income arising from property or rights used by, or held by or for, the branch or agency and on any chargeable gains attributable to the branch or agency.

A branch or agency is synonymous with a Permanent Establishment (PE) which is the term used in our Double Taxation Agreements. A PE is defined in Article 5 of the OECD Model Tax Convention on Income and on Capital[1] (MTC) as a "fixed place of business through which the business of an enterprise is wholly or partly carried on".

When examining whether a PE exists, the relevant double taxation agreement (DTA) should always be consulted as differences can exist between individual DTAs and the MTC. For example, in the Double Taxation Treaty between Ireland and the United Kingdom[2,3] a PE includes "a building site or construction or installation project which lasts for more than six months" while in the MTC it is only a PE if it lasts for more than 12 months.

[1] OECD Model Tax Convention on Income and on Capital (November 2017)
[2] The Double Taxation Relief (Taxes on Income and Capital Gains) (United Kingdom) Order 1976 (S.I. No. 319 of 1976)
[3] The Double Taxation Relief (Taxes on Income and Capital Gains) (United Kingdom of Great Britain and Northern Ireland) Order 1998 (S.I. No. 494 of 1998)

2. Chargeable Profits (Section 25(2) TCA 1997)

2.1 Branch or agency

The chargeable profits of a non-resident company carrying on a trade in the State through a branch or agency are –

(a) any trading income arising directly or indirectly through or from the branch or agency,

(b) any income from property or rights used by, or held by or for, the branch or agency (for example, patent royalties received by the branch), but this shall not include distributions received from companies in the State, and

(c) chargeable gains attributable to the branch or agency.

In the case of chargeable gains attributable to the branch or agency of a non-resident company, the mechanism used to bring those gains within the charge to corporation tax is to bring into charge chargeable gains accruing to a non-resident company which, apart from the Corporation Tax Acts, would be chargeable to capital gains tax and to exclude gains on the disposals of assets which were not used in or for the purposes of the trade of the branch or agency and which were not used, held or acquired for the purposes of the branch or agency.

2.2 Non-resident landlords

Where a non-resident company is chargeable to tax under Case V of Schedule D in respect of any profits or gains, that company will be chargeable to corporation tax in respect of those profits or gains.

A gain which accrues to a non-resident company on the disposal of an asset, the profits or gains from which the company were chargeable to tax under Case V of Schedule D, or would have been but for an insufficiency of profits or gains, is within the charge to corporation tax. The only exception to this rule is where a gain is realised on the disposal of development land, in which case the gain is within the charge to capital gains tax.

2.3 Other relevant provisions

Distributions received from resident companies are, in most cases, excluded as distributions and are not within the charge to corporation tax by virtue of section 129. There are, however, exceptions to this general rule. For example, sections 726(2) and 727(1) TCA 1997 require that distributions by resident companies to a non-resident life assurance company are to be taken into account in computing the liability of the latter company to corporation tax.

Section 1040 TCA 1997 provides that the provisions of sections 1034 to 1039 and 1046 TCA 1997, relating to the assessment and charge of income tax on persons not resident in the State are applicable to corporation tax chargeable on companies not resident in the State.

3. Trade not carried on in the State through a branch or agency by a non-resident company and company not a non-resident corporate landlord

A non-resident company which does not carry on a trade in the State through a branch or agency is chargeable to income tax in respect of income arising from sources within the State, other than profits or gains from assets in the State to which Case V of Schedule D applies. This is also the case where a non-resident company has a branch or agency within the State but has income not attributable to the branch or agency.

Similarly, capital gains tax is levied on the chargeable gains of a non-resident company where it has no branch or agency in the State or where, if it has a branch or agency in the State, the gains are not attributable to the branch or agency, with the exception of chargeable gains arising on assets, the profits or gains of which were chargeable to corporation tax under Case V of Schedule D, which are subject to corporation tax (as noted in section 2.2).

4. Set-off of tax deducted (section 25(3) TCA 1997)

Subject to section 729 TCA 1997 which makes special provisions for overseas life assurance companies, where a non-resident company receives a payment under deduction of income tax and the payment forms part of its income for the purposes of corporation tax, the income tax deducted from the payment is to be set-off against the company's corporation tax liability for the accounting period in which the payment falls. Accordingly, although by virtue of section 21(2)(b) TCA 1997 the payment is not chargeable to income tax, the company unless wholly exempt from corporation tax is not entitled to claim repayment of the income tax until the corporation tax liability for the particular accounting period has been determined.