

What constitutes a trade?

Part 02-02-06

This document should be read in conjunction with section 21 of the Taxes Consolidation Act 1997

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Executive Summary

The purpose of this manual is to provide general guidance on the classification of activities as trading. This manual sets out guidance on what constitutes trading and includes information from a body of previously decided cases which will assist taxpayers and Divisions.

1. General

Section 21 TCA 1997 sets the general rate of corporation tax at 12.5 %. That rate applies (subject to certain exceptions set out in Section 21A) to trading income of companies taxed under Case 1 of Schedule D.

Section 3(1) TCA 1997, defines “trade” as including “every trade, manufacture, adventure or concern in the nature of trade”. As the word “trade” is not specifically defined, the term takes on the generally accepted meaning.

Guidance as to what constitutes “trading” is available from case law and from a set of rules known as the Badges of Trade. The Badges of Trade were originally set out in the 1954 report of the UK Royal Commission on Taxation (See appendix A for details of the Badges of Trade).

2. Guidance on trading issues

Whether or not, in any situation, a trade is being carried on is determined by an examination of the facts of the particular case and by interpreting those facts in the context of the badges of trade and of case law in so far as it applies. There is an infinite variety of possible factual circumstances so that no fixed formula can be applied to determine whether or not an activity can be classed as “trading”. In the vast majority of cases there will be no doubt about whether the activities constitute trading.

However a number of issues have emerged from cases since the introduction of the 12.5% rate and these are set out below:

2.1 Trading Presupposes Activity

Trading presupposes that the company concerned is carrying on business activities from which its income derives. The activities will vary depending on the nature of the trade and will require people with the skill and authority necessary to carry them out. Outsourcing of activities would not necessarily prevent a company’s income being taxed as trading income. Where outsourcing is involved the company must provide details of how it conducts, manages and controls the outsourced part of its business.

2.2 Distinction between Trading and Investment

Certain types of activity are more likely to be in the nature of an investment rather than a trade. In general where a company owns an asset and the mere ownership of that asset produces an income, the company's income from this asset will not be trading income. Routine ancillary services such as invoicing or accounting would not change the nature of the income to trading income where it is primarily generated by the ownership of the asset. The ancillary activities merely involve the management of the income flow from the investment.

The activities of companies whose sole activity is the management and exploitation of intellectual property can sometimes be difficult to evaluate in terms of whether there is a trade being conducted. The nature of the property of such companies varies widely and can include brand names, patents, software, process formulations and know-how. Because intellectual property is an asset the mere ownership of which yields an income, there are significant hurdles to be cleared before the income of a company from licensing such property could be regarded as trading income.

The case of **Noddy Subsidiary Rights Company Ltd v. CIR43 TC 458** is often quoted as an authority in favour of the proposition that the mere ownership of an asset and receipt of royalties can be a trade. However, in that case there was evidence of a high degree of activity associated with trying to promote the brand, seeking out and evaluating licensees and of dealing with third parties.

At one end of the scale, a company whose only activity is the licensing of the rights to intellectual property, and the on-licensing of such rights, is unlikely to be regarded as trading. The property licensed to it is not developed in any way. The company is merely a conduit through which the rights to the intellectual property pass. At the other end of the scale, income of a company that actually creates the intellectual property by engaging in R & D, continues to develop it and bears the costs and the associated risks and actively promotes and licenses out the rights for its use to multiple third parties would invariably be regarded as trading income.

Not all of the income of a trading company will necessarily be classified as trading income. In this regard Revenue published a Guidance Note: – **Deposit Interest – Whether a Trading Receipt**, this is now to be found in Tax and Duty Manual (TDM) [Part 02-02-07](#).

2.3 Group Structures

Where a company seeking trading status is a member of a group and another group company or companies have an involvement in the conduct of the particular trade, Revenue would need to be satisfied as to the role of the various companies. In particular the company seeking trading status in respect of an activity must establish that it carries on sufficient activity to be trading. Evidence in relation to the levels of authority and responsibility across the group will clarify where the real decision-making lies, and information in relation to the deployment of assets and personnel will clarify the business activities carried on by each company. An explanation of the

commercial reasoning and the business objectives behind a particular group structure will be helpful in understanding the underlying strategic business purpose and the value added by the applicant company.

3. Advance opinions

In general, the Revenue Technical Service do not offer an opinion in advance of a transaction. Furthermore in the vast majority of cases there will be no doubt about whether activities would constitute trading.

However, for certain complex issues arising on corporate restructurings or new inward investment projects where clarity is required on whether a particular activity constitutes the “carrying on of a trade” opinions may be sought.

Appendix B provides examples of cases where an opinion was provided on whether an activity was accepted as constituting trading. All of these opinions were based on the specific information provided in each particular case.

The procedures set out by Revenue’s Service to Practitioners and Business Taxpayers guidelines should be followed and the full details of the facts and circumstances should be set out by practitioners.

A request for an opinion should always include a description of the proposed activity and contain all the information necessary to enable Revenue to reach a conclusion in relation to the issues outlined above. Any areas of doubt should be highlighted and reasons given as to why it is considered that trading status would be appropriate in the circumstances. In particular, the following details should be given:

- Outline of the trade to be carried on. If there is potential for viewing these activities as investments, explain why it is considered that trading should apply.
- the main activities involved in the conduct of the trade and the functions undertaken at senior level to manage the trade.
- the number of people at management level, their skills and authority level.
- the number and skill level of the other people who will carry out the functions involved in the conduct of the trade.
- In relation to a group structure that might give rise to the concerns outlined above, provide the information set out in that paragraph.

It should be noted that, as set out in TDM [Part 37-00-40](#), in the case of new foreign direct investment projects, where the taxpayer concerned does not have an Irish tax registration, applications for opinions in advance of establishment in Ireland should be addressed to:

Corporation Tax Branch,
Business Taxes Policy and Legislation Division,
New Stamping Building,
Dublin Castle,
Dublin 2

This includes cases that, on establishment, would be managed by one of Revenue's Divisions.

However, where a taxpayer, which is currently dealt with by LCD requires opinions/confirmations in relation to an activity to be carried on by a new subsidiary or a new branch any request should be made to the Case Manager in LCD dealing with the taxpayer's affairs.

An opinion will not be given where Revenue suspects that the transaction(s) may be, or may be part of, a scheme or arrangement for the purposes of tax avoidance.

An opinion given is based on the specific facts relevant to that case and its particular circumstances only and should not be relied upon for any other case.

It should be noted that all opinions/confirmations issued by Revenue are subject to a maximum validity period of 5 years, or such shorter period as may have been specified by Revenue when providing the opinion/confirmation. Further information on [Revenue Opinions/Confirmations](#) is available on the Revenue website.

Appendix A

Note on the “Badges of Trade”

The Tax Acts do not set out any specific rules for distinguishing between trading and non-trading income. However, a fairly well established set of guidelines have been laid down by the courts in various decided cases over the years. These are known as the “Badges of Trade” and were originally set out in the 1954 report of the UK Royal Commission on Taxation, these include: -

1. The subject matter of the sale.

Whilst almost any form of property can be acquired to be dealt in, those forms of property, such as commodities or manufactured articles, which are normally the subject of trading, are only very exceptionally the subject of investment. Again, property, which does not yield to its owner an income, or personal enjoyment merely by virtue of its ownership is more likely to have been acquired with the object of a deal than property that does.

2. The length of period of ownership.

Generally speaking, property meant to be dealt in is realised within a short time after acquisition. But there are many exceptions from this as a universal rule.

3. The frequency of similar transactions.

If realisations of the same sort of property occur in succession over a period of years or there are several such realisations at about the same date a presumption arises that there has been dealing in respect of each.

4. Supplementary work.

If the property is worked up in any way during the ownership so as to bring it into a more marketable condition, or if any special exertions are made to find or attract purchasers, such as the opening of an office or large-scale advertising, there is some evidence of dealing. When there is an organised effort to obtain profit there is a source of taxable income. But if nothing at all is done, the suggestion tends the other way.

5. The circumstances that were responsible for the realisation.

There may be some explanation, such as a sudden emergency or opportunity calling for ready money that negates the idea that any plan of dealing prompted the original purchase.

6. Motive.

There are cases in which the purpose of the transaction and sale is clearly discernible. Motive is never irrelevant in any of these cases and can be inferred from surrounding circumstances in the absence of direct evidence of the seller's intentions.

It is however, important to appreciate that the "whole picture" must be taken into account, so that the weight to be given to the various factors may vary according to circumstances. Furthermore, it is important to recognise that any given factor may be present to a greater or lesser degree, and that the absence (or presence) of any single factor is unlikely to be conclusive in its own right.

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Appendix B

Classification of Trading Activity					
Case number	Date Received	Number of Employees	Description of Activity	Opinion and Reason	
114	Dec-11	2	Irish company entering into a loan facility agreement with a group company.	Not Case 1	Not Case 1. The interest is being earned on one inter-group loan. The activities of the company are merely activities undertaken to manage the income flow from the loan facility. Other than the one inter-group loan the company is not engaged in the trade of lending. The interest income earned is correctly taxed under Schedule D, Case III.
115	Dec-11	100	Existing company that expanded its activities to include the treasury management operations for group companies.	Case 1 confirmed	Case 1 confirmed on the basis that the company has employees that have the relevant skills, expertise, experience and authority to carry out the treasury operation of the group companies.
116	Jan-12	1	Company established to exploit the Intellectual Property of an individual.	No opinion given	No Opinion given as Intellectual Property is an asset the mere ownership of which yields an income in its own right. The company would have to show that it has undertaken a high degree of activity in exploiting the I.P. This was not a matter that can be agreed in advance.
117	Jan-12	Existing company	Existing company that has restructured its activities resulting in transfer of all new Irish business to the UK. The servicing of existing Irish customers will continue to be carried out by the Irish Company.	Case 1 confirmed	Case 1 confirmed on the basis that the company was already trading and will continue to trade until the contracts of current Irish customers expire.

118	Dec-11	12 Initially	New company established to handle the Non-US business of a group. Initially the company will be responsible for growing the international business of the group and will be responsible for all non-US sales of the group.	Case 1 confirmed	Case 1 confirmed on the basis that the key management team of the company will have the skill, expertise and authority to carry on the relevant trading activities of the company.
119	Jan-12	2 Initially rising to 14	Company established to provide payroll payment solutions.	Not Case 1	Not Case 1. The company had no physical presence in Ireland. The income derived by the company would not be considered trading income.
120	Feb-12	Existing Company	Existing company that intends to acquire a number of inter-group loans.	No advance opinion given.	No advance opinion given
121	Nov-10	6 Initially	Company established to provide Treasury functions to group companies.	Case 1 Confirmed	Case 1 confirmed on the basis that the company will actively enter into and conclude group financing transactions. The Irish directors have the necessary skills, qualifications, experience and authority to perform the day-to-day activities of the company.
122	Mar-12	Existing Company	Existing company that intends to make a loan to another group company.	Not Case 1	Not Case 1. A single loan to a group company would not constitute a trading activity.
123	May-12	Existing Company	Provision of finance to a leasing company.	Case 1 Confirmed	Case 1 confirmed on the basis that the company is involved in activities covered by Section 403(1)(d) TCA 1997
124	May-12	Not Stated	Company established to carry out R & D and exploit the resulting IP by way of granting licences to use the IP.	Case 1 Confirmed	Case 1 confirmed on the basis that the company will exploit IP by all means possible. A general manager, with the relevant expertise and skill, has been recruited to seek out potential opportunities for the exploitation of the IP product, licensing and development opportunities.

125	May-12	4	Company established to carry out R & D and exploit the resulting IP by way of granting licences to use the IP.	Case 1 Confirmed	Case 1 confirmed on the basis that the company will actively enter into and conclude group financing transactions. The Irish directors have the necessary skills, qualifications, experience and authority to perform the day-to-day activities of the company.
126	Jun-12	Not Stated	Company established to exploit group Intellectual Property [I.P.].	Case 1 Confirmed	Case 1 confirmed on the basis that the Board will actively manage and exploit the I.P. and the performance of licensees. The Board will also be actively involved in the seeking out of new licensees.
127	Jun-11	Not Stated	Company re-organisation.	No advance opinion given	No advance opinion given. Whether the new Irish resident company will be carrying on a trade cannot be determined until after the company re-organisation has taken place.
128	Jul-12	30 Initially	Company established to manage the European operations of a Group. Initial activities will include sales, administration, marketing, training, and distribution services.	Case 1 Confirmed	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry out the management of the European operations of the group.
129	Jul-12	11 Initially	Company established to have overall responsibility for the manufacture and sale of group products and to exploit the Intellectual Property of both existing and newly generated Intellectual Property.	Case 1 Confirmed	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
130	Nov-12	1 Initially	Provision of operational services to third party franchisees.	No opinion given.	No opinion given. The income generating activities of the company are carried out by other group companies.
131	Nov-12	Not Stated	Group company established to carry out aircraft conversion, leasing and other aircraft management activities and services.	Case 1 confirmed.	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.

132	Dec-12	30 - 50 within 24 months	Company established to provide management and consultancy services to other group companies.	Case 1 confirmed.	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
133	May-12	1 Initially rising to 5	Company established to provide Treasury functions to group companies.	Case 1 confirmed.	Case 1 confirmed on the basis that the company will actively enter into and conclude group financing transactions. The staff have the necessary skills, qualifications, experience and authority to perform the day-to-day activities of the company.
134	Feb-13	25 Initially rising to 100	Company established to provide services to other group companies including research and development and vendor management and purchasing support services.	Case 1 confirmed	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
135	Dec-12	9 Initially rising to 20 by the end of 2014	Company established to develop and manage the non-U.S. business operations of the group. Activities to be carried on include product development, customer service, technical service, and administrative and finance services.	Case 1 confirmed	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
136	Dec-12	23 by the end of 2013	Company established to develop and license software and provide services and technical support to customers.	Case 1 confirmed	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
137	Dec-12	1	Not disclosed. A description of the company's activities could lead to identification of the company.	Not Case 1.	The company was not considered to be carrying on a Case 1 trade as there seemed to be no commercial basis for its activities

138	Jan-13	25-35 Initially	Company established to provide sales, account management and technical support to non-U.S. business operations of the group with a view to the Irish Company becoming the principal for all non-US transactions of the Group.	Case 1 confirmed	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
139	Apr-13	4-6 initially	Company established to carry out the management functions for key geographic areas of a group.	Case 1 confirmed	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
140	May-13	Existing company	An existing company that intends to acquire and develop a portfolio of Intellectual Property (I.P.)	Case 1 confirmed	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
141	Jun-13	4 Initially	Company established to carry out group finance and treasury operations.	No opinion given	No opinion given as insufficient information regarding the operations of the company was supplied.
142	Jun-13	Not stated	Company established to exploit Intellectual Property [I.P.]	Not Case 1.	The company was not considered to be carrying on a Case 1 trade as the company would not be exploiting the Intellectual Property [I.P.] to such a degree to be considered to be Trading.
143	May-13	Existing company	An existing company that intends to undertake the treasury functions of a group.	Case 1 confirmed	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed treasury operations.
144	Jun-13	20-24 Initially	Company established to undertake the European business of a US company.	Case 1 confirmed	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.

145	May-13	Existing company	Existing Company that intends to exploit Intellectual Property [I.P.] of a group company.	Not Case 1.	The company was not considered to be carrying on a Case 1 trade as the company would not be exploiting the Intellectual Property [I.P.] to such a degree to be considered to be trading.
146	Aug-13	Not stated	Company established to provide financing.	No opinion given	No opinion given as insufficient information regarding the operations of the company was supplied.
147	May-13	13 Initially rising to 300 by the end of 2016	It is not possible to publish details of this case as to do so would enable the company to be identified.	Case 1 confirmed	It is not possible to publish details of this case as to do so would enable the company to be identified.
148	Sep-13	6 Initially	Company established to undertake the non US business of a company.	Case 1 confirmed	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
149	Dec-13	1 Initially	Company established to provide Treasury functions to group companies.	Case 1 confirmed	Case 1 confirmed on the basis that the key management team of the company will have the skill, expertise and authority to carry on the relevant trading activities of the company.
150	Jan-14	5 Initially	Company responsible for developing, protecting and exploiting internet media video for the group companies.	Case 1 confirmed	Case 1 confirmed on the basis that the key management team of the company will have the skill, expertise and authority to carry on the relevant trading activities of the company.
151	Jan-14	Not stated	New company established to exploit, manage & develop Intellectual Property [I.P.] of a group company.	Case 1 confirmed	Case 1 confirmed on the basis that the key management team of the company actively manage, develop, licence and exploit IP acquired. The board will be responsible for developing the brand enhancement strategy and setting strategic direction.

152	Feb-14	Not stated	Company established for the sales and marketing of branded products, and the sourcing of new products and licenses.	Case 1 confirmed	Case 1 confirmed on the basis that the key management team of the company will have the skill, expertise and authority to carry on the relevant trading activities of the company.
153	Apr-14	25 Initially	The company will develop, manufacture and distribute software developed by it and other group companies.	Case 1 confirmed	Case 1 confirmed on the basis that the key management team of the company will have the skill, expertise and authority to carry on the relevant trading activities of the company.
154	Apr-14	Not stated	The company will provide business development, marketing, promotion, and support services to group companies.	Case 1 confirmed	Case 1 confirmed on the basis that the key management team of the company will have the skill, expertise and authority to carry on the relevant trading activities of the company.
155	Jul-14	Not stated	As the licensee for all non-US territories the company will sell software as a service solutions and services to non-US customers.	Case 1 confirmed	Case 1 confirmed on the basis that the key management team of the company will have the skill, expertise and authority to carry on the relevant trading activities of the company.
156	Jul-14	Existing company	The company will act as principal service provider for the EMEA region with the right to market and sell solutions in the EMEA region.	Case 1 confirmed	Case 1 confirmed on the basis that the key management team of the company will have the skill, expertise and authority to carry on the relevant trading activities of the company.
157	Jul-14	3 Initially	The company will be responsible for the procurement and inventory management for the Group.	Case 1 confirmed	Case 1 confirmed on the basis that the key management team of the company will have the skill, expertise and authority to carry on the relevant trading activities of the company.
158	Jul-14	5 Initially	Hosting & technical support services.	Not Case 1	Insufficient level of activity and it cannot be determined that the company is carrying on a trade the income from which would be subject to tax under Case 1 of Schedule D.
159	Sep-14	Not stated	Holding of image rights.	Not Case 1	No staff and no board meetings. There is no turnover and therefore does not meet the requirements of the Badges of Trade. The company will not engage in any activity other than to receive payments.

160	Oct-14	3 Initially	Not disclosed. A description of the company's activities could lead to identification of the company.	Case 1 confirmed	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
161	Dec-14	3 Initially	Limited risk distributor of parent company's products. Assisting other group companies in the US & UK.	Not Case 1	There is an insufficient level of activity, and it cannot be determined that the company is carrying on a trade the income from which would be subject to tax under Case 1 of Schedule D.
162	Feb-15	Existing company	Expansion of the existing company's group treasury function to the provision of intra group loans.	Case 1 confirmed	Case 1 confirmed on the basis that the company will actively enter into and conclude the inter group loan transactions. The Irish directors have the necessary skills, qualifications, experience and authority to perform the day-to-day activities of the company.
163	Jun-15	Not stated	A company that will subcontract all activity to a linked company.	No opinion given	There is an insufficient level of activity, and it cannot be determined that SPV is carrying on a trade the income from which would be subject to tax under Case 1 of Schedule D.