Controlled Foreign Company Rules

Part 35b-01-01

This document should be read in conjunction with sections 835I – 835YA of the Taxes Consolidation Act and Tax and Duty Manual Part 04A-01-02

Document last updated January 2025

Table of Contents

Executive Summary

This manual provides an overview of the Controlled Foreign Company ('CFC') rules that were introduced by Finance Act 2018. It reflects the amendments introduced by Finance Act 2020 in section 835YA (see section 11 of this manual for further details) regarding defensive measures in respect of jurisdictions listed on the EU Code of Conduct list of non-cooperative jurisdictions for tax purposes. It has been updated to reflect Pillar Two related amendments introduced by Finance (No.2) Act 2023 and amendments to the CFC rules following the introduction of the participation exemption in respect of certain qualifying foreign distributions in Finance Act 2024.

The manual sets out information in relation to:

1. what a CFC is, the meaning of 'control' and how it is established, the meaning of associated companies, the meaning of accounting periods and how residence is determined in accordance with Part 35B,

2. the meaning of the CFC charge including how it arises, the meaning of undistributed income and the meaning of creditable tax,

3. the exemptions that apply including the low profit margin exemption, the low accounting profit exemption and the exempt period exemption,

4. the reliefs available for, both, certain distributions and certain disposals of shares or securities in a CFC,

5. the effective tax rate exemption including how to determine the amount of foreign tax paid by a CFC, what the corresponding chargeable profits in the State are and what the corresponding corporation tax in the State is, and

6. defensive measures that have been introduced in respect of CFCs resident in jurisdictions listed on the EU Code of Conduct list of non-cooperative jurisdictions for tax purposes.

Introduction to CFC rules

Part 35B of the Taxes Consolidation Act, 1997 (TCA) implements Articles 7 and 8 of the EU Anti-Tax Avoidance Directive (ATAD) provisions on CFCs. The CFC rules are an anti-abuse measure, designed to prevent the artificial diversion of profits from controlling companies to offshore entities in low or no-tax jurisdictions (the CFCs).

The rules operate by attributing undistributed income of the CFCs, arising from non-genuine arrangements put in place for the essential purpose of avoiding tax, to the controlling company, or a connected company in the State for taxation, where the controlling company, or a connected company, carry out relevant Irish activities (i.e. significant people functions (SPFs) or key entrepreneurial risk-taking functions (KERTs) in the State).

The rules require an analysis as to the extent to which the CFC would hold assets or bear risks were it not for the controlling company, or a connected company, undertaking the SPFs or KERTs (hereinafter any reference to 'SPFs' can be taken to include KERTs) in relation to those assets and risks. A company is considered to have control of a subsidiary where (in broad terms) it has direct or indirect ownership of, or entitlement to, more than 50% of the CFC's issued share capital, voting power or distribution amount.

A number of exemptions are provided for including exemptions for CFCs with low accounting profits or a low profit margin or where the CFC pays a comparatively higher amount of tax in its territory than it would have paid in the State (although these exemptions will not be available to CFCs resident in a jurisdiction listed on the EU list of non-cooperative jurisdictions for tax purposes). A one-year grace period is also allowed in respect of newly acquired CFCs where certain conditions apply. Relief is also available on certain distributions and on certain disposals of shares or securities in a CFC.

The CFC rules will not apply where the arrangements, under which SPFs are performed, have been entered into on an arm's length basis or are subject to the Transfer Pricing regime under Part 35A, TCA. To prevent double taxation, a credit will be available for any tax paid by the CFC on the same income which is subject to the CFC charge in the State, whether arising in its jurisdiction or any other jurisdiction (including the State) on the chargeable income of the CFC. The rules came into effect from 1 January 2019.

Essentially, a CFC charge can arise in the following circumstances:

- There must be a CFC resident in a foreign territory.
- It must be controlled by a company resident in the State.
- The controlling company, or a company connected with it, must carry out relevant Irish activities i.e. Irish SPFs, relating to those assets or risks.
- The arrangements between the CFC and the controlling company, and a connected company(s) where relevant, must be non-genuine and they must be in place for the essential purpose of securing a tax advantage.
- Irish transfer-pricing provisions have not applied or the arrangements have not been entered into at arm’s length.
- The exemptions that are available must not apply.

This manual is designed to take the user through the various concepts that arise in the CFC legislation.

1 CFCs and the meaning of ‘control’ [sections 835I and 835J]

1.1 Controlled Foreign Company [section 835I]

A CFC is a non-resident company controlled by a company or companies resident in the State, known as a ‘controlling company’ or ‘controlling companies’.

A ‘company’ is defined as a body corporate or an unincorporated association.

If, under, Irish principles a foreign entity is considered to be a partnership, the CFC rules should be applied to ‘look through’ the partnership in order to trace and attribute (to an Irish resident company i.e. the potential controlling company) the ownership interests held in a body corporate by the partnership[1].

1.2 Controlling company [section 835I]

A ‘controlling company’ is a company resident in the State which controls a CFC.

1.3 Control [section 835J]

The concept of ‘control’ underpins the relationship between a parent and its subsidiary and determines whether a company will be considered a CFC or not[2].

For the purposes of the CFC rules, a person[3] (being a body corporate or an individual) ‘controls’ a company if the person can control or acquire control, either directly or indirectly, of the company’s affairs.

[1] A partnership’s income will be presumed to accrue, or to have accrued, to the partners in the partnership.

[2] The CFC charge can only arise to companies known as ‘chargeable companies’ and the charge is limited by reference to the chargeable company’s proportionate shareholding in the CFC. While a company may be a controlling company it does not automatically mean that a CFC charge can arise to it.

[3] The ‘control’ rules operate to attribute participation to all shareholders i.e. companies and individuals. The CFC charge can only arise to companies (known as ‘chargeable companies’). Please see section 4 of this manual for further information.

- A person is regarded as having control of a company if the person has or is entitled to acquire, directly or indirectly:

  - the majority of the issued share capital or voting power,
  - an amount of capital that entitles the person, in circumstances where there would be a total distribution of income, to more than 50 per cent of the distribution, or,
  - such rights that entitle the person to more than 50% of the distributable assets on a winding up or otherwise (e.g. on a redemption of share capital or on a repayment of loans to the company), or,
  - any part of the share capital, where as a result the person would be able to control the composition of the board of directors. This can include circumstances where the person has what is known as a 'golden share'.

- A person is treated as entitled to acquire voting power, share capital or rights if that person is entitled to acquire those things in the future or will at a future date be entitled to acquire them. It is intended that this section captures present rights to future acquisitions[4]. Therefore, a person who sells their shareholding in a company but retains the right to repurchase the shares at a future date will be considered to be a person entitled to acquire the shares at a future date.

- The rights or powers of a nominee of a person are attributable to the person on whose behalf the nominee has those rights or powers.

- The rights and powers of an 'associated company' are to be regarded as belonging to that person. Please see 1.6 for further details.

- The rights and powers of a person and of the person's associates are to be regarded as belonging to that person.

[4] This provision is not intended to capture bona fide commercial transactions such as mergers or acquisitions, where the rights to the share acquisition are not unconditional. For example, a person who, under a share purchase agreement, may purchase shares in a company within a period of time provided conditions precedent are fulfilled, will not be treated as a person 'entitled to acquire [the shares] at a future date'.

- The position is similar in relation to the rights and powers of any company (or more than one company) which the person or the person and the person's associates' control. The rights and powers of nominees of an associate are also included but not those of associates of an associate.

- If the rules, as outlined above, can be applied in such a way so as to enable control of the company to be exercised by persons resident in the State, they are to be so applied.

- The terms 'participator', 'associate', 'director' and 'loan creditor' are given the same meaning as they have in Part 13. Please refer to the Tax and Duty Manual on Close Companies (Part 13-01-12) for further information.

1.4 Indirect control [section 835J(1)]

A company can be said to control subsidiaries that are held indirectly by it through other companies. The control test also attributes to a company the rights of companies who are its 'associated companies' (see 1.6 for further details).

1.5 Applying the control test

Where two persons hold entirely equal shares in a company neither may 'control' the company. However, where one party has an additional right to the greater part of the assets upon a winding up, that person will be deemed to 'control' the company for the purposes of the legislation.

Where two or more persons each hold equal shares in a company and the rights and interests of any person cannot be attributed to the others because they are not associated then it can be said no person exercises 'control' of the company for the purposes of the CFC provisions.

1.6 'Associated companies' [sections 835I(2) and 835J(4)]

1.6.1 An 'associated company' is defined and a company will be treated as associated with another where:

- either company, directly or indirectly, is entitled to acquire at least 25% of the issued share capital or voting power of the other company,
- one of them is beneficially entitled to at least 25% of any profits available for distribution to equity holders of the other company, or,
- a third person, directly or indirectly, is entitled to acquire at least 25% of the issued share capital or voting power of both companies or is beneficially entitled to at least 25% of any profits available for distribution to equity holders of each company.

1.6.2 If A has a 25% shareholding in B it is associated with B. If B has a 25% shareholding in C, B is associated with C. A, however, will not be associated with C by virtue of its indirect shareholding of approximately 6% in C. The rights and powers of B in C **are not attributed** to A for the purposes of determining whether C is **an 'associated company'** of A.

In contrast, when determining **'control'**, the rights and powers of a company **are attributed** to its associated companies. This means that in the set of circumstances above, B's 25% interest in C would be attributed to A as A and B are 'associated companies'. The 25% interest in C that has been attributed to A would not satisfy the control test. A does not 'control' C in this example.

1.6.3 Examples demonstrating rules for 'associated companies'

The following examples 1-3 (Figure 1) below demonstrate the rules for 'associated companies' **only**. Examples dealing with the concept of 'control' are dealt with at 1.6.4 below.

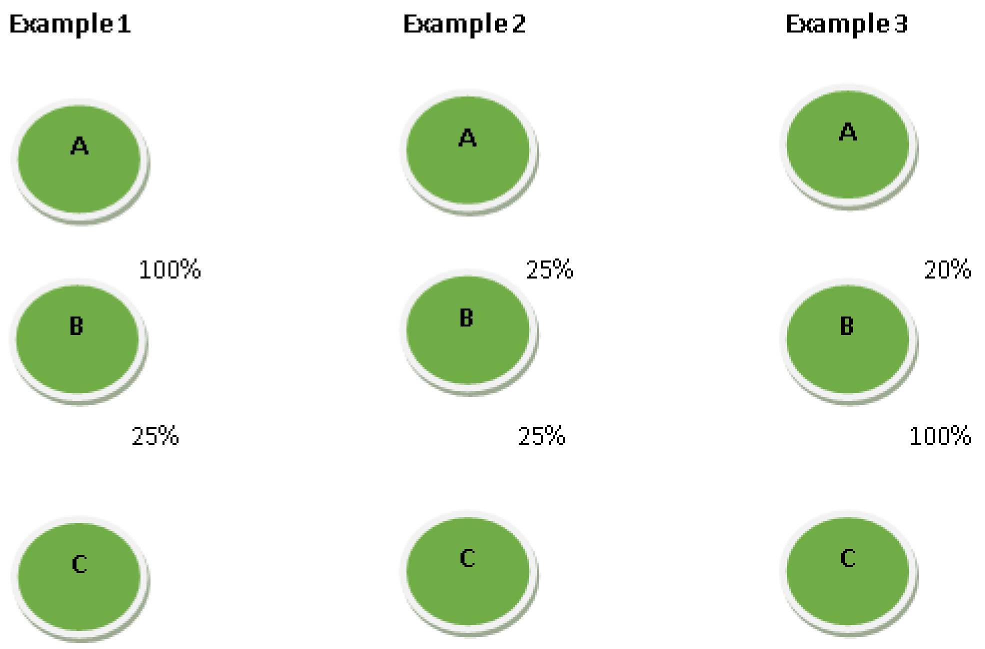


Figure 1: Associated companies - see explanations in Examples 1, 2 & 3 below

Test of 'associated companies'

Example 1

- A is associated with B as its shareholding in B of 100% exceeds the 25% or greater shareholding requirement.
- B is associated with C based on a 25% direct shareholding.
- On the basis of indirect participation, A is associated with C based on A's indirect participation rights in C of 25%.

Example 2

- A is associated with B based on a 25% direct shareholding.
- B is associated with C based on a 25% direct shareholding.
- A is not associated with C based on an indirect shareholding of approx. 6% (25% of 25%).

Example 3

- A is not associated with B based on its 20% direct shareholding. The 25% requirement has not been met.
- B is associated with C based on a 100% direct shareholding.
- A is not associated with C based on A's indirect participation rights of only 20% in C (20% of 100%).

1.6.4 Examples demonstrating rules for ‘control’

Examples 4-6 (Figure 2) demonstrate the application of the rules for ‘control’.

Figure 2: Application of 'control' - see explanations in Examples 4, 5 & 6 below

Test for ‘control’

Example 4

- A controls B as A’s shareholding in B exceeds 50%.
- A does not control C. The 25% interest B has in C is attributed to A because A and B are ‘associated companies’ based on the 100% shareholding A has in B. It is not enough for A to satisfy the ‘control’ test, however, as the test for ‘control’ requires, directly or indirectly, a greater than 50% interest.
- B does not control C because B does not have a greater than 50% interest in C.

Example 5

- A controls B as A’s shareholding in B meets the greater than 50% requirement.
- A controls C. This is on the basis that B’s 51% interest in C is attributed to A under the rules of control because B is an ‘associated company’ of A due to A exceeding the 25% interest requirement in B.

Example 6

- A does not control B because it does not have a greater than 50% interest in B.
- A, however, controls C. A and B are associated based on a 25% or greater shareholding that A has in B. Therefore, B's 100% interest in C can be attributed to A. In this example, A does not control B, but it does control C.

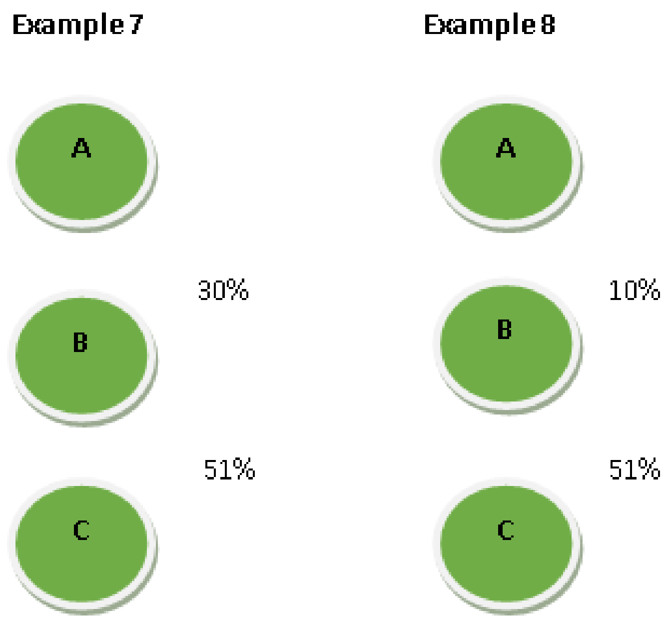


Figure 3: Associated companies and 'control' - see explanations in Examples 7 & 8 below

Example 7 (Figure 3)

- A and B are associated companies because A holds 30% of B.
- B and C are associated companies because B holds 51% of C.
- A does not control B as it does not hold a greater than 50% interest in B.
- A controls C because B's 51% holding in C is attributed to A as A and B are associated.

Example 8 (Figure 3)

- A does not control B as A does not hold a greater than 50% interest in B.
- B is not an associated company of A as it does not meet the 25% shareholding requirement.
- B controls C because B holds a 51% shareholding in C.

- A does not control C. The 51% shareholding B holds in C cannot be attributed to A because A and B are not associated companies.

Note: the application of the control rules can result in a company controlling another company in a wide variety of ways. However, the CFC charge is limited to the direct or indirect proportionate shareholding in the controlled foreign company. This is explored further in Section 4 on the CFC charge.

Example 9 (Figure 4)

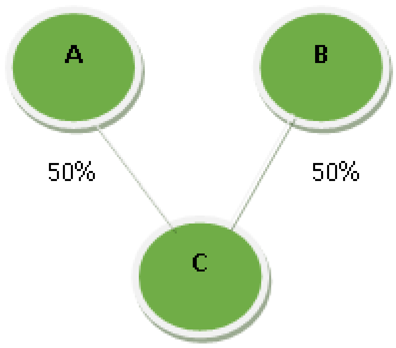


Figure 4: Associated companies and 'control' - see explanation in Example 9

Test for 'associated company'

- A is associated with C as A meets the 25% or greater interest requirement in C.
- B is associated with C as B meets the 25% or greater interest requirement in C.
- A and B are not associated. As neither company has any interest in the other the 25% interest requirement is not met. Further there is no common person entitled to at least a 25% interest in both A and B.

Test for 'control'

Neither A nor B 'control' C as neither company is entitled to the greater part of the share capital, voting power or assets in C.

Note: the rights in A and B cannot be attributed to the other for the purposes of the 'control' test because they are not associated with each other.

Example 10 (Figure 5)

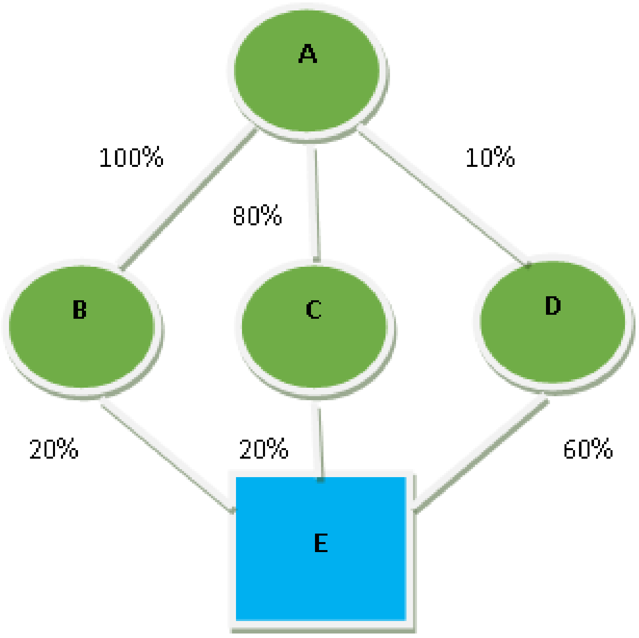


Figure 5: Associated companies and 'control' - see explanation in Example 10

Test for 'associated company'

- A is associated with B and C because its participation meets the 25% requirement. A is not associated with D by virtue of its 10% shareholding in D.
- B and C are associated with each other because a third person (A) holds at least a 25% shareholding in each of B and C. Neither B nor C are associated with D.
- A is associated with E as it is indirectly beneficially entitled to a 42% interest in it. (100% of 20%) + (80% of 20%) + (10% of 60%) = 20%+16%+6% = 42%
- E is, therefore, also associated with B and C because a third person, A, is directly or indirectly entitled to at least a 25% interest in each of B, C and E.

Test for 'control'

- As B and C are associated companies of A, the 20% interests that B and C have in E are imputed to A under the control rules.
- A's indirect shareholding in E through D is added on which amounts to 6%. A's total holding in E therefore amounts to 46% and as such it does not control E.

Example 11 (Figure 6)

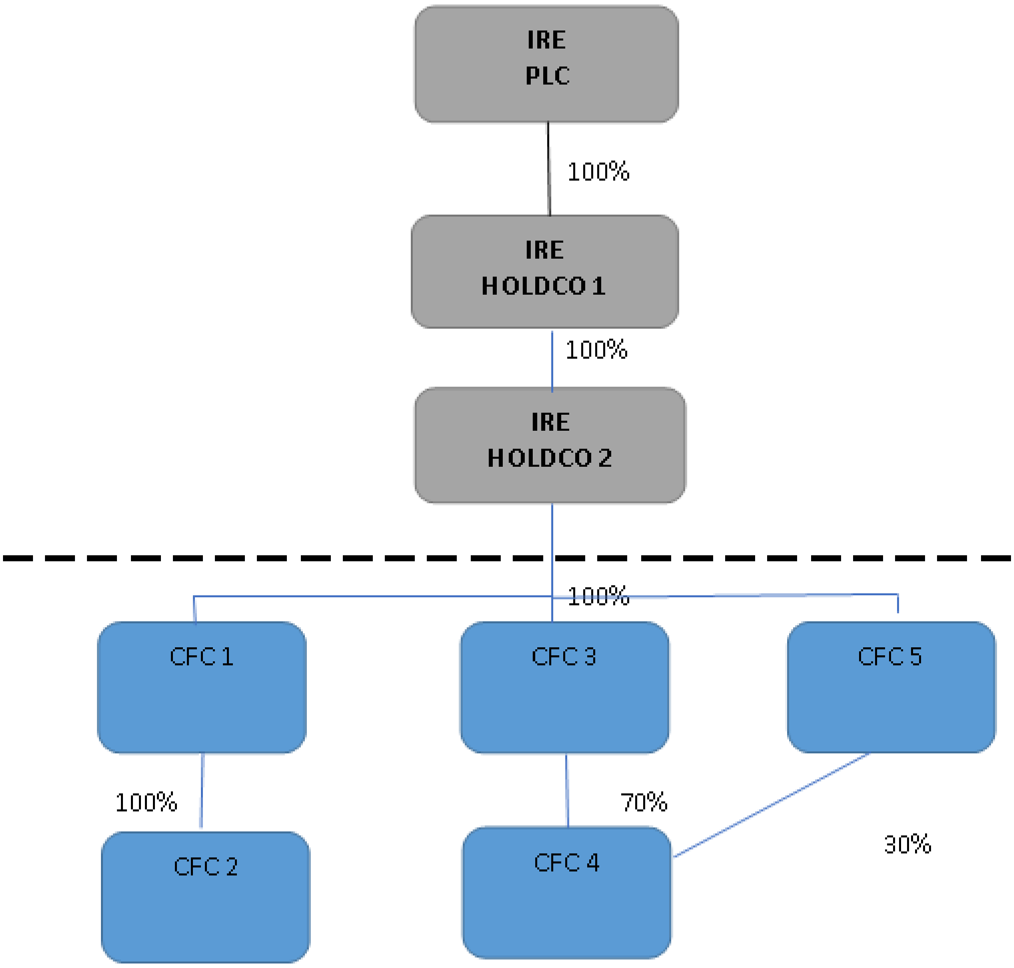


Figure 6: Associated companies, control and residency - see Example 11 for explanations

Facts

This Irish corporate group structure includes a number of non-resident subsidiaries and three separate Irish resident controlling companies.

Associated Companies

The test for 'associated company' requires the identification of a 25% relationship between two companies. IRE PLC, IRE HOLDCO 1 and IRE HOLDCO 2 are associated with all companies. Whether companies are 'associated companies' is relevant for the purposes of the 'control' test. IRE PLC, IRE HOLDCO 1 and IRE HOLDCO 2 are associated companies of each other because there is a common person, IRE PLC, who directly or indirectly, is beneficially entitled to 100% of their share capital, voting power and profits available for distribution.

Controlling companies

IRE PLC, IRE HOLDCO 1 and IRE HOLDCO 2 are each controlling companies as they are Irish resident companies that control either directly or indirectly a greater than 50% interest in all the non-resident subsidiaries. This fact makes each of the non-resident subsidiaries a CFC, comprising CFCs 1 to 5.

Example 12 (Figure 7)

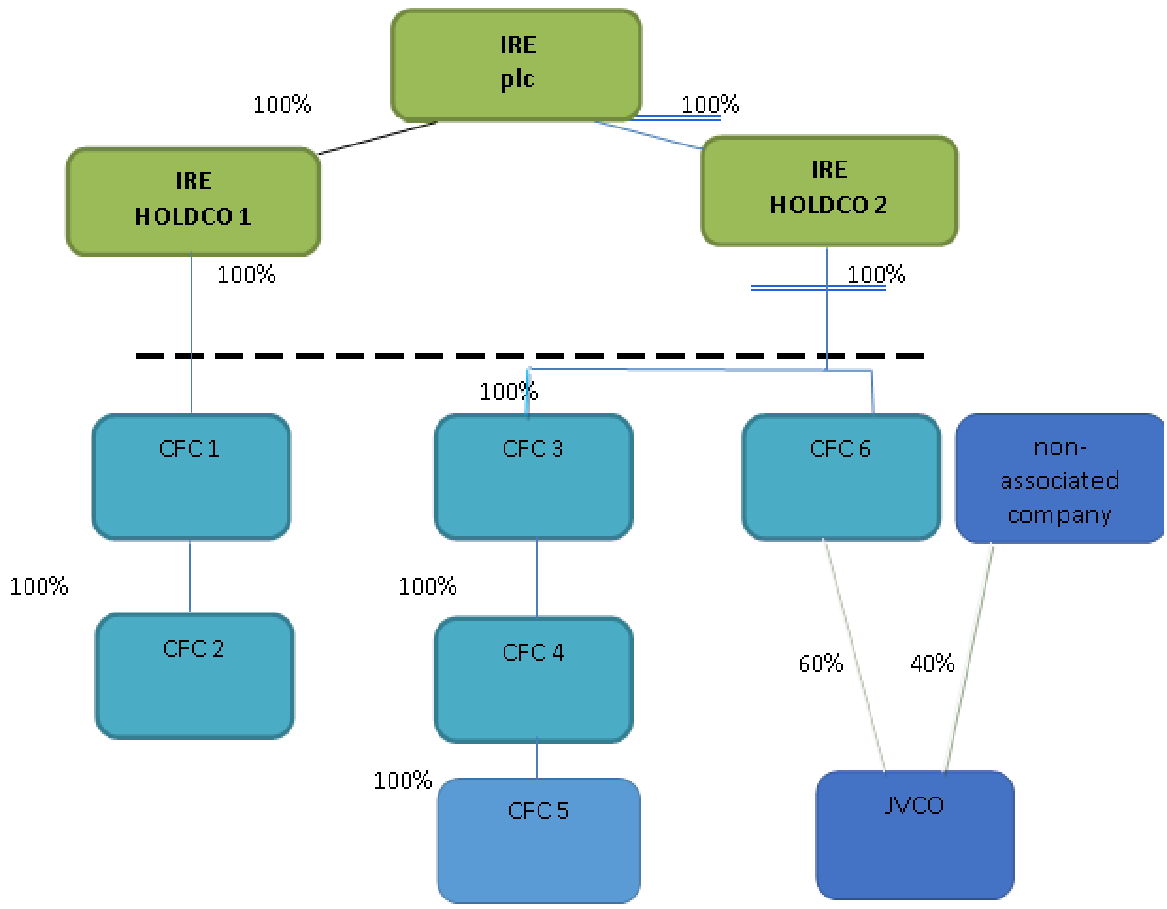


Figure 7: Joint venture and 'control' - see Example 12 for explanations

Facts

This example illustrates the meaning of 'control' in the context of a joint venture company held by a corporate group. CFC 6 has a 60% holding in the joint venture entity (JVCO) and the remaining 40% shareholding is held by a non-resident company. This other corporate shareholder is described as a non-associated company because no participator in the joint venture corporate shareholder holds any interest in any member of IRE plc group. There are a number of CFCs as well as three separate Irish resident controlling companies.

Associated companies

All companies are associated companies of each other, apart from the non-associated company, because a third person, in this case, IRE plc is directly or indirectly entitled to a beneficial interest of at least 25% in each company, including the Irish resident companies and the non-resident companies. JVCO will be considered a CFC and an associated company where it falls within the definition of a 'company' i.e. that it is a body corporate or an unincorporated association.

Controlling companies

As above, IRE plc holds, directly or indirectly, a 25% shareholding interest in all the companies (apart from the non-associated company). Therefore, all the companies are 'associated companies' of IRE plc and of each other[5]. As each company is an associated company of each other, the rights and powers of each company is attributed to the rest for the purposes of the 'control' test.

A controlling company must be an Irish resident company. Each of IRE plc, IRE HOLDCO 1 and IRE HOLDCO 2 is a controlling company in relation to each of the foreign resident subsidiaries, CFC 1 – 6. JVCO will be considered a CFC where it falls within the definition of a 'company' i.e. that it is a body corporate or an unincorporated association. In the event that it is a company it will be a CFC of each of IRE plc, IRE HOLDCO 1 and IRE HOLDCO 2 also.

Example 13 (Figure 8)

Facts

This example also illustrates the meaning of 'control' in the context of a joint venture company held by a corporate group. CFC 6 has a 50% holding in the joint venture entity (JVCO) and the remaining 50% shareholding is held by a non-resident company. This other corporate shareholder is described as a non-associated company because no participator in the joint venture corporate shareholder holds any interest in any member of IRE plc group. There are a number of CFCs as well as three separate Irish resident controlling companies.

[5] Although it is required to trace indirect ownership through intermediate holdings, the rights and powers cannot be **attributed** to other companies for the purposes of establishing that one company is an associated company of another. Further, under section 835J(4), the rights and powers of associates of associates cannot be attributed to another company for the purposes of establishing control. In this example, each company is an associated company of the other, based on their shareholding relationship with the ultimate 3rd party shareholder, IRE plc. The rights and powers of each company can only be attributed to each Irish resident company for the purposes of establishing 'control'.

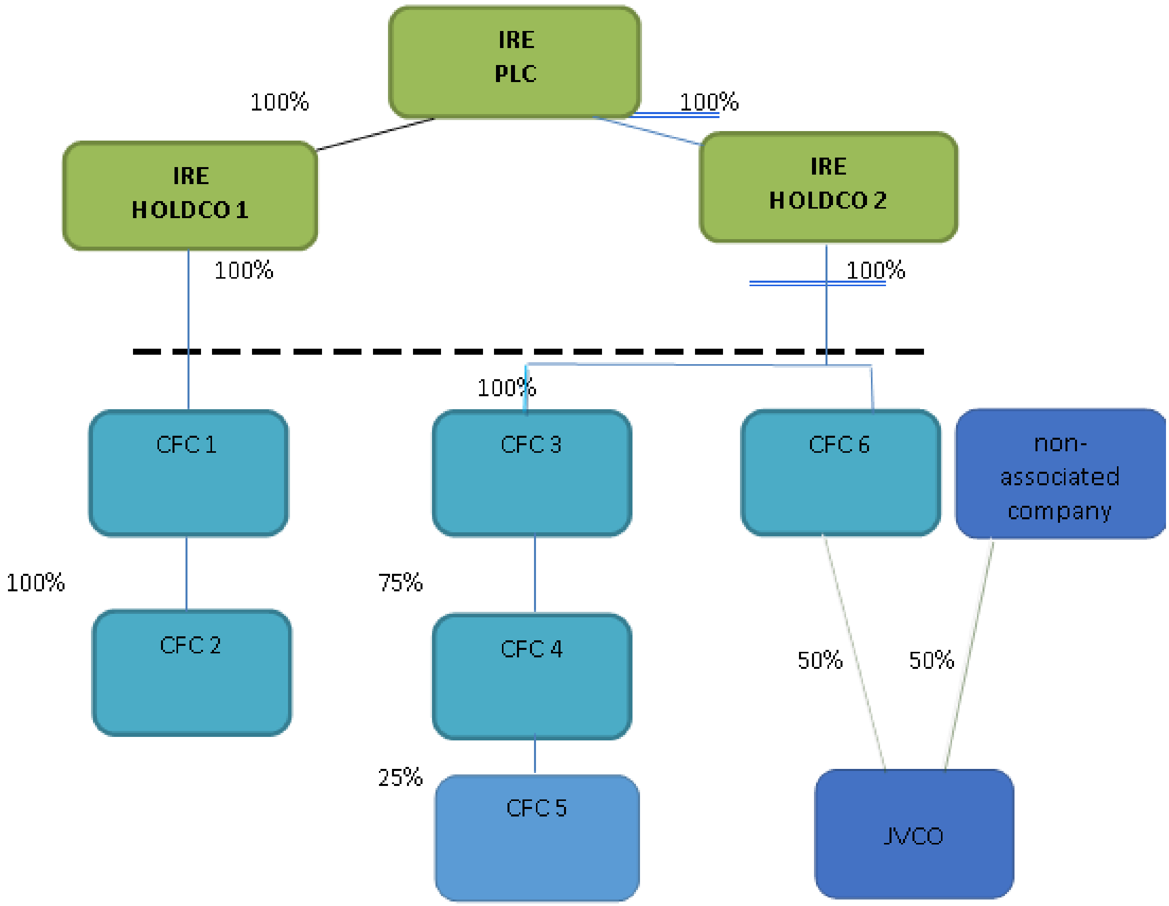


Figure 8: Joint Venture and 'control' - see Example 13 for explanations

Associated companies

- IRE PLC, IRE HOLDCO 1 and IRE HOLDCO 2 are associated with CFC 1, CFC 2, CFC 3, CFC 4, CFC 6 and JVCO because a third person, IRE PLC, is directly or indirectly entitled to 25% in those companies too. JVCO will be considered a CFC where it falls within the definition of a ‘company’ i.e. that it is a body corporate or an unincorporated association. The only subsidiary that is not associated with the Irish resident companies is CFC 5 because IRE PLC and IRE HOLDCO 2 are only entitled (indirectly) to an 18.75% interest in it.
- CFC 5 is an associated company of CFC 4 only.

Controlling companies

- Each of IRE PLC, IRE HOLDCO 1 and IRE HOLDCO 2 is a controlling company of each CFC apart from CFC 5 because all the other companies are associated companies of each other and therefore the rights and powers of each associated company can be attributed to the Irish resident companies for the purposes of the control test. They are not associated companies of CFC 5 when their indirect ownership rights in CFC 5 are traced through CFC4.
- As CFC 4 is an associated company of each Irish resident company, CFC 4's 25% interest in CFC 5 is attributed to them but this is not sufficient to meet the greater than 50% interest required for the 'control' test.
- As CFC 6 is an associated company of each Irish resident company, its rights and powers in JVCO can be attributed to them. However, no Irish resident company can be considered to be a controlling company in relation to JVCO as this attribution only entitles them to a 50% interest in JVCO. The non-associated company is also entitled to a 50% interest in JVCO. Neither company enjoys a greater interest and therefore no Irish resident company can be said to 'control' JVCO for the purposes of the CFC rules.

Example 14 (Figure 9)

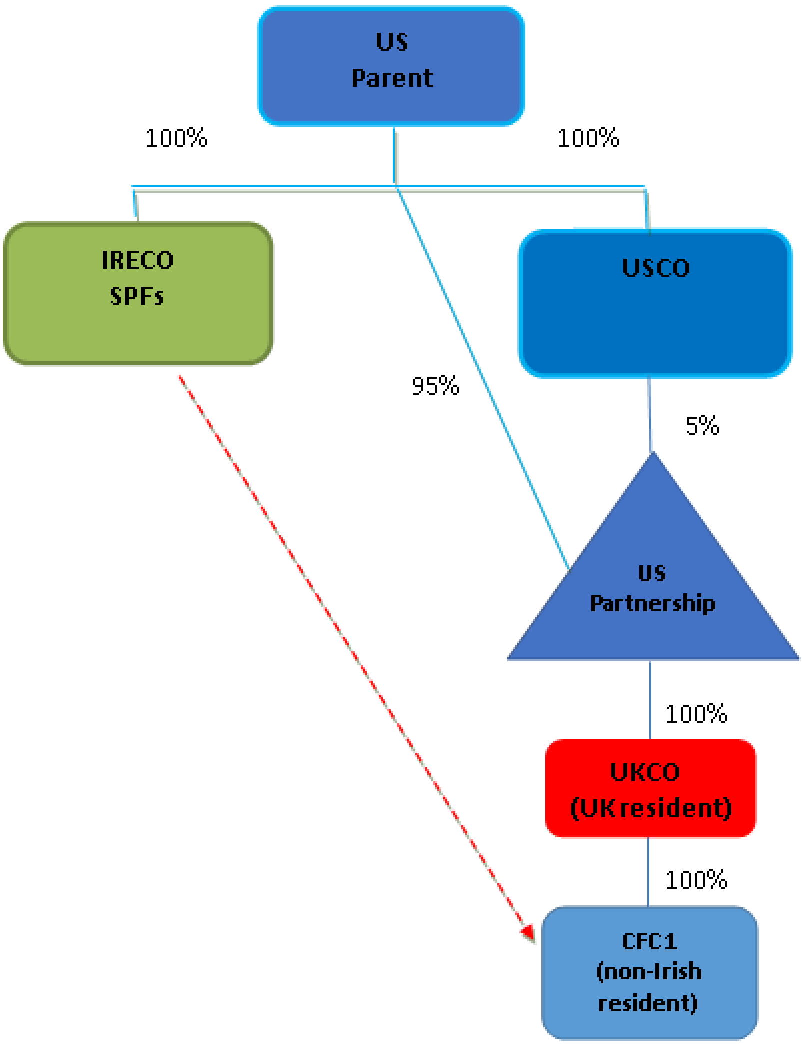


Figure 9: US multinational and 'control' - see Example 14 for explanation

Facts

This example illustrates the interaction of the concepts of control (including the attribution of rights of associated companies) in the context of a US multinational holding structure. For the purposes of this example, the US general partnership is considered to be a partnership for Irish tax purposes. Therefore, the US general partnership will be 'looked through' in tracing the ownership rights of companies in the corporate structure. The partners' interests in the partnership (95% held by US Parent and 5% held by USCO) are treated as being their interests held in UKCO (whose shares are held through the US partnership).

Associated company

- Each of US PARENT, IRECO, USCO and UKCO is an 'associated company' of each other. This is because there is a common person US PARENT who directly or indirectly is beneficially entitled to 100% of their share capital, voting power and profits available to equity holders.

Controlling company

- Within the group structure above, the rights held in CFC 1 by its UK resident parent, UKCO are attributed to IRECO because UKCO is an associated company and rights of associated companies are attributed to a company.
- IRECO is, therefore, the controlling company of CFC 1 because of the attribution of shareholding rights of its associates and because it is an Irish resident company.
- Although UKCO is the parent of CFC 1, it is not Irish resident and therefore is not a controlling company under the CFC rules.

Example 15 (Figure 10)

Facts

This example illustrates the application of the concepts of control in the case of a partnership, including the attribution of rights of partners as 'associates' within the meaning of Part 13.

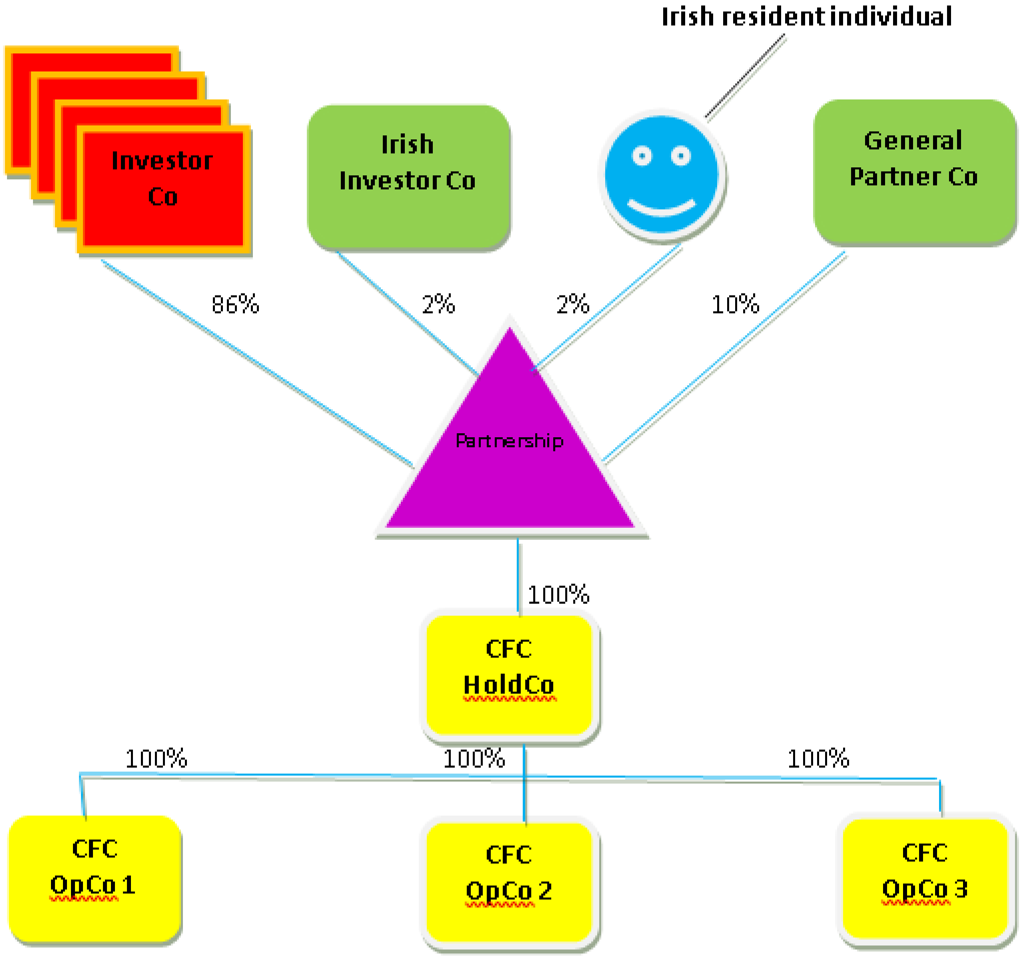


Figure 10: Partnership and 'control' - see Example 15 for explanation

Associate

The meaning of ‘associate’ in accordance with section 433, Part 13 can include a partner of a participator. The rights of an ‘associate’ can be attributed to the company.

Controlling company

An Irish company who holds interests in a non-resident company by virtue of being a partner in a collective investment fund could be a ‘controlling company’ within the meaning of the CFC legislation by reason of the fact that it can ‘control’ non-resident companies held by a fund partnership.

Even though Irish Investor Co holds only a 2% interest in the partnership itself, the definition of ‘control’ in the legislation provides for the attribution of rights of ‘associates’. These can include fellow partners in the partnership.

A ‘controlling company’ is defined as a company which is resident in the State and which controls (directly or indirectly) a controlled foreign company (CFC). Therefore, although the Irish resident individual may ‘control’ the CFCs too by virtue of the attribution of rights, it can never be a ‘controlling company’.

Example 16 (Figure 11)

Facts

A and B are individuals. A is resident in Ireland and B is resident in the UK. It is assumed that the individuals are not relatives and are not otherwise ‘associates’ within the meaning of section 433, TCA.

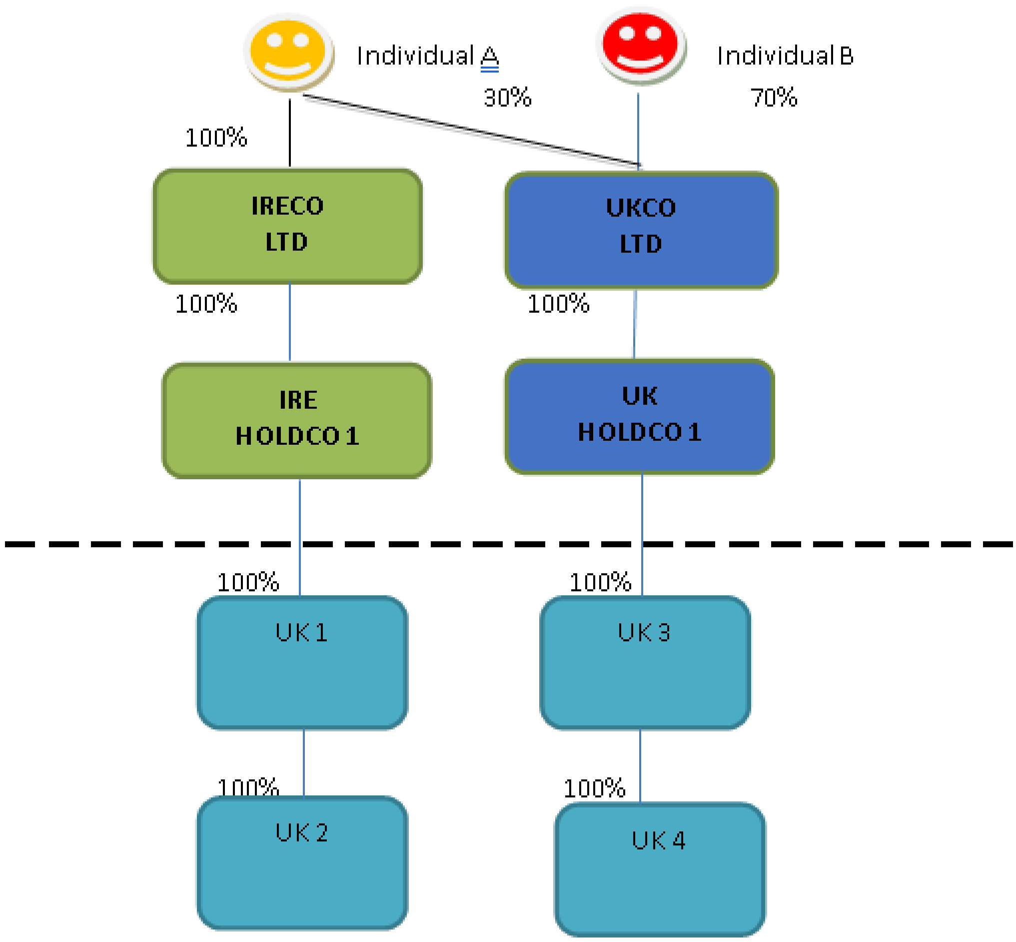


Figure 11: Individuals, residency and 'control' - see Example 16 for explanations

Associated companies

Individual A holds 30% of UKCO Ltd. Therefore, UKCO Ltd is an associated company of IRECO Ltd because Individual A, a third person, holds at least 25% of the share capital and voting rights in both companies.

Controlling company

Only IRECO Ltd and IRE HOLDCO Ltd can be controlling companies. In identifying companies that are 'controlled' by IRECO Ltd, the rights of associated companies (including rights held by UKCO Ltd) are attributed to it. IRECO Ltd is a controlling company, not only of its wholly owned subsidiaries UK 1 and UK 2, but also of UK HOLDCO 1, UK 3 and UK 4.

Example 17 (Figure 12)

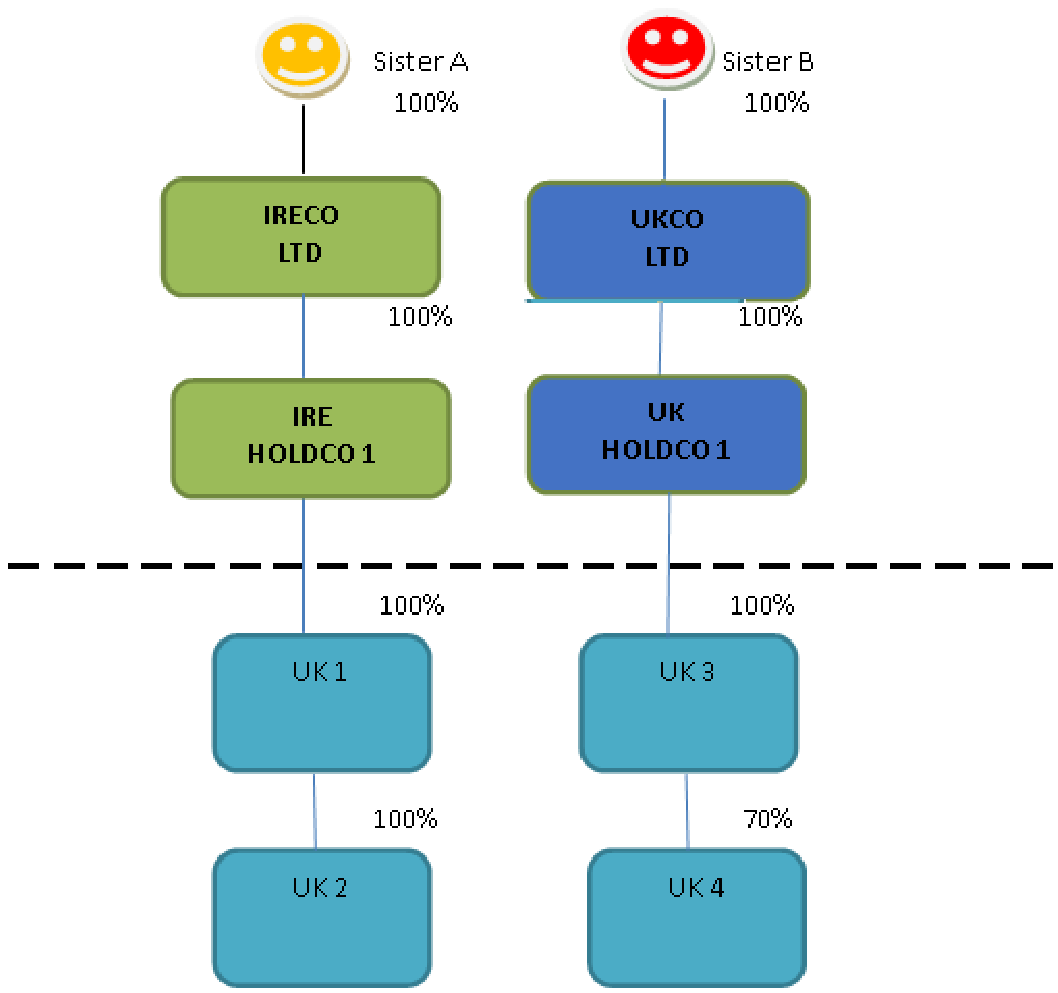


Figure 12: Associated individuals, residency & 'control' - see Example 17 for explanations

Facts

A and B are individuals. A is resident in Ireland and B is resident in the UK. A and B are sisters.

Associates

Individuals A and B are sisters and are therefore ‘associates’ within the meaning of section 433, TCA 1997

Controlling company

A ‘controlling company’ is defined as a company which is resident in the State and which controls (directly or indirectly) a controlled foreign company (CFC). Only IRECO Ltd and IRE HOLDCO Ltd can be controlling companies.

In this example, there is no common shareholding by one individual in companies controlled by their relative. As A and B are associates, the rights and powers of B can be attributed to A. However, the rights and powers of associates of associates cannot be attributed under the provisions of ‘control’. So, B’s rights and powers cannot be attributed to IRECO Ltd through A.

Further the rights and powers of B are not attributed to A under the definition of ‘associated company’. The attribution of ownership rights between associated companies does not go so far as to attribute shareholding interests of the associate (in this example a relative) of one individual in a company to a company controlled by the individual in which their associate holds no interest.

Therefore, IRECO Ltd is not a controlling company in respect of the companies, UK 3 and UK 4. It is, however, a controlling company in respect of the companies UK 1 and UK 2.

2 Accounting periods [section 835K]

2.1 General

The CFC rules apply to accounting periods of controlling companies commencing on or after 1 January 2019. This section explains the rules for determining the accounting period of a CFC.

2.2 Beginning of a CFC's accounting period

A CFC's accounting period begins on the date it becomes a CFC. A CFC's accounting period is also deemed to begin immediately after the end of the previous accounting period where the company was a CFC for the previous accounting period and continues to be a CFC after the end of that accounting period.

An entity becomes a CFC when an Irish company becomes its respective controlling company for the purposes of the legislation.

Note: a CFC could have an accounting period to a specific date in its jurisdiction of residence, however the CFC rules may impose the deemed commencement of a new accounting period, for example, by virtue of the fact of it becoming a CFC for the purposes of the CFC legislation.

2.3 End of a CFC's accounting period

A CFC's accounting period ends when the company:

- ceases to be a CFC[6],
- becomes or ceases to be resident in a territory, or,
- ceases to have any sources of income.

In accordance with section 27 of the TCA, the following events will also trigger the ending of an accounting period:

[6] e.g. the CFC is dissolved, or the controlling company is dissolved or bought out by a non-resident company etc.

- the expiration of 12 months from the beginning of the accounting period,
- the ending of a period (not exceeding 12 months) for which a company makes up its accounts or, if there is a period for which it does not make up accounts, the ending of that period,
- the company beginning or ceasing to trade or to be within the charge to corporation tax in respect of its trade or (if more than one) of all its trades, or,
- the company beginning or ceasing to be resident in the State.

2.4 Winding up

An accounting period ends and a new one begins when a CFC commences to be wound up. Thereafter, an accounting period ends on the expiration of 12 months from the beginning of the winding up or at the completion of the winding up. These rules apply to the exclusion of the rules set out above concerning the start/end of accounting periods.

The date a winding up commences is the date:

- when the resolution for the winding up of the company is passed by the company, or,
- of the presentation of the winding up petition to the court if no winding up resolution has previously been passed by the company and provided a winding up order is made on the petition, or,
- of the doing of any other act for a like purpose in the case of a winding up otherwise than under the Companies Act, 2014.

2.5 Determination of accounting period

Revenue is authorised to determine which accounting date is to apply where a company carrying on more than one trade makes up accounts for those trades to different dates and does not make up accounts for the whole of its activities.

Where the beginning or end of a CFC’s accounting period is uncertain, a Revenue officer may determine the accounting period, for a period of no more than 12 months, until further facts are available.

Revenue shall issue a notice in writing to the controlling company of any determination made. A controlling company may appeal any determination made by a Revenue officer within 30 days of the notice issuing.

2.6 Examples

2.6.1 Example 1

An Irish parent, IreCo Ltd, is a controlling company and has a 12-month year end of 31 March 2019. This is outside the scope of the CFC legislation as the rules only apply to controlling companies whose accounting periods begin on or after 1 January 2019. The accounting period of the controlling company commencing on 1 April 2019, however, falls within the scope of the CFC legislation.

2.6.2 Example 2

IreCo Ltd has an accounting period year end of 31 December 2019. This period begins on 1 January 2019 and thus is within the scope of the CFC rules. It has a subsidiary that meets the residence and control conditions and its accounting period runs from 1 January 2019 to 31 December 2019. This is also the first accounting period of the CFC that is within the scope of the CFC rules.

2.6.3 Example 3

Taking the example of the IreCo Ltd from Example 1, 1 April 2019 is the date that the controlling company first becomes subject to the rules. It has a subsidiary that would be considered a CFC (i.e. the residence and control conditions are met). Therefore, regardless of the accounting period the CFC has in its local jurisdiction (it runs a calendar year from 1 January – 31 December), the CFC's accounting period is deemed to begin on 1 April 2019.

The CFC's accounting period will end 12 months later or the date the CFC makes up its accounting period in its own jurisdiction whichever is the earliest. In this instance, the accounting period will end on 31 December 2019. This is the date to which the CFC makes up its accounting period in its own jurisdiction and is earlier than the 12-month year end of 31 March 2020.

2.6.4 Example 4

Continuing on from example 3, IreCo Ltd has an accounting period beginning 1 April 2020. IreCo Ltd's subsidiary continues to be considered a CFC. The CFC's relevant accounting period shall be the accounting period ending 31 December 2020 as it ends during IreCo Ltd.'s accounting period ended 31 March 2021. The start date is 1 January 2021, the day immediately after the end of the previous accounting period.

2.6.5 Example 5

IreCo Ltd with a 31 December 2019 year end establishes a subsidiary (its CFC) on 1 August 2019 which acquires its first source of income on 1 September 2019. The CFC prepares its first financial accounts for the 17-month period ended 31 December 2020.

This 17-month, financial accounting period is two accounting periods for the purposes of the CFC rules. The first accounting period of the CFC begins when it first becomes a CFC upon its formation on 1 August 2019 and is deemed to end 12 months later[7] on 31 July 2020 (in accordance with section 27). A second accounting period then begins on 1 August 2020 and ends 5 month later at the date that the CFC draws up its financial accounts to the financial period year end of 31 December 2020.

The first period of the Irish parent that is potentially within the scope of the CFC rules is the 12-month period ended 31 December 2019. This is because it begins on or after 1 January 2019.

However, as both the 12-month accounting period ended 31 July 2020 and the 5-month accounting period ended 31 December 2020 end in 2020, they are only within the scope of the CFC rules for the accounting period of the Irish chargeable company ended 31 December 2020. This is because the CFC's accounting periods that come within the scope of the CFC rules are those which end within the accounting period of a chargeable company that is within the scope of the CFC rules.

[7] As this is the earlier date than the date of the accounting period which is 31 December 2020.

2.6.6 Example 6

Companies who adopt a mean accounting date

Companies can prepare annual financial statements, e.g. by adopting a 52-week/53-week period end which results in the annual financial accounting end date varying around a mean accounting date such as 31 December. Companies can adopt the mean accounting date as their actual accounting period end for corporation tax return purposes e.g. prepare their annual tax return to a single date of 31 December instead of preparing returns by reference to the actual date.

Where a company prepares its annual financial statements to a mean accounting date and the company has adopted the mean accounting date as its tax accounting period end-date for corporation tax purposes, this date shall be taken as the date of the financial year end in applying the CFC rule. For example, if a parent has a mean accounting date of 31 December and prepares its 2018 accounts to 28 December, its first accounting period in scope of the CFC rules will be the annual accounts to the mean accounting date of 31 December 2019 which, for tax purposes, begins on 1 January 2019 and ends on 31 December 2019 (notwithstanding that, for accounting purposes, the accounting period will begin on 30 December 2018 and end on, say, 28 December 2019).

2.6.7 Example 7

Acquiring a CFC from a non-resident third party.

An Irish plc has a calendar year accounting period. It acquires a UK company and its subsidiaries on 1 June 2019. The acquired group has a financial year end to 30 June 2019. The acquired group members prepare 18-month financial accounts post acquisition from 1 July 2018 to 31 December 2019 in line with the financial account date of the Irish parent.

An accounting period of the acquired group members is deemed to begin on 1 June 2019 when they first become CFCs. This first accounting period in the scope of the CFC rules for the acquired group ends 7 months later at the 31 December 2019 financial year end. This is because the accounting period ends 12 months after it begins or the date to which the accounts are made up, whichever is the earliest. In this case it is the latter date of 31 December 2019.

2.6.8 Example 8

Acquiring a CFC from another Irish resident company

An Irish PLC has a 31 December 2020 financial year end. It acquires an Irish company (Company B) and its non-Irish resident subsidiaries from a third party on 1 June 2020. The acquired group has a financial year end to 30 June. The acquired group member will not prepare 2020 accounts to 30 June but instead will prepare 18-month financial accounts from 1 July 2019 post acquisition to 31 December 2020, in line with the financial accounting date of the new parent.

Company B prepared accounts from 1 July 2019 to 30 June 2020 and thus the acquired subsidiaries were already CFCs within the scope of the Irish CFC rules[8]. The 18-month financial accounting period of the CFCs is two accounting periods for the purposes of the CFC rules; a 12-month and a 6-month period.

The first accounting period in scope of the CFC rules for the acquired group members began on 1 July 2019 and ends on 30 June 2020 with the second period commencing on 1 July 2020 and ending on 31 December 2020. Both accounting periods end within the 31 December 2020 accounting period of the new Irish parent and are potentially within the scope of a CFC charge on the new Irish controlling company.

[8] The controlling parent's accounting period begins after 1 January 2019 and the CFC's accounting period will end within that period so they are CFCs for the purposes of the legislation. If, however, the circumstances were the same but exactly a year earlier, the subsidiaries would not be CFCs for the purposes of the legislation as the accounting period of the controlling company wouldn't have begun on or after 1 January 2019.

3 Determination of residence [section 835M]

3.1 Overview

A CFC is regarded as resident, for an accounting period, in the territory where it is subject to tax by reason of:

- domicile,
- residence, or,
- place of management.

If the CFC changes its place of tax residence during the accounting period, but remains resident outside of Ireland, it remains a CFC.

3.2 Two or more possible residencies

Where two or more territories could be regarded as the place of residence by reason of domicile, residence or place of management, a CFC shall be regarded as resident:

- where the company's place of effective management is situated;
- if the company's place of effective management is situated in two or more territories, where more than 50% of the company's assets are situated, or,
- where neither of the above applies, where more than 50% of the company's assets are situated.

The company's assets' 'amount' or worth is determined by reference to the market value of the assets immediately before the end of the accounting period. Market value should be construed in accordance with section 548 TCA.

3.3 Incorporation or where company formed

Where neither of the conditions under 3.1 or 3.2 applies, a company shall be regarded as being resident where it is incorporated or formed.

3.4 Double Tax Treaty

If a company is regarded as resident in a territory under the terms of a double tax treaty, in accordance with section 826(1) TCA, then, notwithstanding paragraphs 3.1, 3.2 or 3.3, the company will be regarded as resident in that territory.

3.5 Summary

Where taxpayers are seeking to determine where a CFC is resident;

3.5.1 the first step is to determine whether the CFC is considered resident in a territory under the terms of a double tax treaty;

3.5.2 if there is no double tax treaty or the terms of the double tax treaty do not establish residence, then residence will be determined by reference to where the CFC is subject to tax by reasons of domicile, residence or place of management;

3.5.3 if there is more than one possibility of residence by reason of domicile, residence or place of management, the company will be resident in the territory where the company's place of effective management is situated;

3.5.4 if there is more than one possibility of residence by reason of the place of effective management or if there is no place of effective management, the CFC will then be regarded as resident in the territory where more than 50% of the company's assets are situated;

3.5.5 if the residence of the CFC can still not be determined then the CFC shall be regarded as resident where it is incorporated or formed.

3.6 Examples

3.6.1 Double Tax Treaty

Hong Kong does not have a general concept of residence. There is no need to go through the various steps, however, as it has a double tax treaty with Ireland which will assist in determining residence. If, under the double tax treaty, a Hong Kong incorporated company is considered to be a resident of

Hong Kong, then the company will be considered resident in Hong Kong for the purposes of the CFC legislation.

3.6.2 No concept of corporate residence

Bermuda does not have a double tax treaty with Ireland. Nor does Bermuda define corporate residence as Bermudan corporations' income and profit are not subject to tax in Bermuda. Therefore, a Bermudan CFC should be regarded as resident where it is incorporated or formed.

4 The CFC charge [sections 835I, 835Q, 835R and 835S]

4.1 Overview

A CFC charge will arise on an amount equal to the undistributed income of a CFC or a CFC group (meaning all the CFCs of a controlling company) attributable to the relevant Irish activities performed by the controlling company, or a company connected with the controlling company, and there are non-genuine arrangements in place for the essential purpose of securing a tax advantage. ‘Connected’ should be construed with its meaning set out in section 10, TCA.

The undistributed income of a CFC that is subject to a CFC charge is known as ‘chargeable income’. The CFC charge arises on ‘chargeable’ companies for the accounting period in which the accounting period of the CFC ends. The CFC rules apply in respect of accounting periods of a controlling company commencing on or after 1 January 2019.

A ‘chargeable company’ means a controlling company or a company connected with the controlling company which performs either itself, or through a branch or agency, relevant Irish activities on behalf of a CFC group. A chargeable company can therefore include a non-resident company where it has an Irish branch or agency performing relevant Irish activities.

Where more than one CFC exists with the result that there is a ‘CFC group’, it will be necessary to identify the undistributed income referable to the respective relevant Irish activities in respect of each CFC. Each amount of undistributed income can then be aggregated to determine the CFC charge that arises on the chargeable company.

It cannot, however, create a net loss position. The undistributed income would be reduced to nil in each respective case.

4.2 Meaning of ‘connected’

As above, ‘connected’ should be construed with its meaning set out in section 10, TCA. For example, a company and another company will be considered ‘connected’ where:

- the same person has control of both companies;
- a person has control of one company and persons connected with that person or that person and persons connected with that person have control of the other company,
- a group of 2 or more persons has control of each company and the groups consist of the same persons or could be regarded as consisting of the same persons if a member of either group was replaced by a person connected with that member,
- the latter has control of the former or the latter and persons connected with the latter control the former.

The members of a group of 2 or more persons who act together to obtain control of, or a holding in, a company are (in relation to that company) treated as connected with one another. The group members are also treated as connected with any person acting on the direction of any member of the group to obtain control of, or a holding in, the company.

4.3 Non-genuine arrangements put in place for the essential purpose of tax avoidance [section 835R]

4.3.1 Overview

For a CFC charge to arise on a chargeable company in respect of its CFC, non-genuine arrangements must be in place and those arrangements must exist for the essential purpose of a tax advantage.

4.3.2 Non-genuine arrangements

4.3.2.1 Whether an arrangement should be considered non-genuine requires an analysis to the extent to which:

- the CFC would not own the assets or bear the risks which generate the undistributed income but for the relevant Irish activities (Irish SPFs) and,
- it is reasonable to consider that the relevant Irish activities are instrumental in generating that income for the CFC.

4.3.2.2 Arrangement means:

- any transaction, action, course of action, course of conduct, scheme, plan or proposal,
- any agreement, arrangement, understanding, promise or undertaking whether express or implied and whether or not enforceable or intended to be enforceable by legal proceedings, and,
- any series of or combination of the circumstances described above.

Arrangement is widely defined and includes the various actions and activities which can be considered to be an arrangement for the purposes of identifying a non-genuine arrangement.

It includes arrangements entered into by one or two or more persons, whether acting in concert or not, whether or not entered into or arranged wholly or partly outside the State or whether or not entered into or arranged as part of a larger arrangement or in conjunction with other arrangements. Double Tax Treaties are excluded from the definition of 'arrangement'.

The broad definition is designed to cover all types of non-genuine activities which are connected to a CFC, whether related to the acquisition and holding of assets by the CFC or the management of business risks related to its assets by the CFC.

4.3.2.3 'reasonable to consider'

This is an objective test that looks at whether a reasonable person, who is in possession of all the relevant facts, would reasonably consider that the relevant Irish activities i.e. the Irish SPFs were instrumental in generating the income.

4.3.2.4 'instrumental'

The word 'instrumental' takes its everyday meaning i.e. that the relevant Irish activities served as a means by which the income was earned.

4.4 Relevant Irish activities [section 835I]

4.4.1 Overview

'Relevant Irish activities' means relevant functions (i.e. SPFs or KERTs) that are performed in the State (and are therefore Irish SPFs or KERTs). For a CFC charge to arise they must be performed by a chargeable person (i.e. a controlling company or a company connected with the controlling company) on behalf of a CFC or a CFC group where the SPFs or KERTs are relevant to:

- the legal or beneficial ownership of the assets included in the relevant assets and risks of the company or companies in the CFC group, or,
- the assumption and management of the risks included in the relevant assets and risks of the company or companies in the CFC group.

'Relevant assets and risks' means the assets which a CFC has, or has had at any time, and the risks which a CFC bears or has borne at any time, where those assets or risks would not have been employed or undertaken but for relevant functions i.e. SPFs or KERTs performed in the State on behalf of the CFC. As outlined earlier, an arrangement between a controlling company/connected company and a CFC shall be regarded as non-genuine to the extent that the CFC would not have owned the assets or undertaken the risks that generated the income if it were not controlled by a company where the SPFs relevant to those assets / risks are carried out by that company or a connected company.

4.4.2 Significant people functions and key entrepreneurial risk-taking functions

The terms 'significant people functions' and 'key entrepreneurial risk-taking functions are difficult to capture in legislation and are, therefore, to be construed in accordance with the Organisation for Economic Co-operation and Development's (OECD) 2010 Report on the Attribution of Profits to Permanent Establishments (the 'Report').

SPF and KERT functions refer to the people functions within the enterprise that contribute to value creation and, as such, should be entitled to a share of the residual profit or loss. The Report does not try to give a general definition of SPFs or KERTs relevant to the assumption of risk or to the economic ownership of assets. Rather, it sets out how these functions are to be identified in the context of the activities of the business, typically as functions that require active decision-making.

For example, the Report notes that "the significant people functions relevant to the assumption of risks are those which require active decision-making with regard to the acceptance and/or management (subsequent to the transfer) of those risks. The extent of the decision-making will depend on the nature of the risk involved."

As the name suggests, the Report provides guidance on how to attribute the profits of a company to a permanent establishment (PE). The OECD approach is to adopt the 'separate entity' approach under which a PE is treated as a functionally separate and independent entity for the purposes of determining its business profits. An analysis is carried out as to its capital, assets and risks and those are attributed to the PE by reference to where the people functions, relevant to the assets and risks, are performed[9].

Where the significant functions relevant to the assumption and/or management of a risk are performed by people in the PE, that risk is attributed to the PE. Similarly, the economic ownership of an asset is attributed to the PE where the significant functions relevant to the economic ownership of that asset are performed by people in the PE. In the case of the CFC rules, the analysis will focus on where to attribute the functions in the context of controlling companies, connected companies and CFCs rather than PEs. The meaning of SPFs and KERTs should be construed in accordance with the approach to identifying such SPFs and KERTs adopted in the Report.

The relevant SPFs or KERTs will differ depending on the nature of the assets held by the CFC. For example, there are different SPFs or KERTs associated with holding and managing loans advanced to group members in comparison with SPFs and KERTs related to holding intangible assets and managing the business risks related to those intangibles.

In the case of the financial assets of financial enterprises, it is generally the case that the same SPFs will be relevant both to the assumption of risk and to the economic ownership of the assets. For this reason, it is necessary to distinguish between the SPFs of financial enterprises and the SPFs of other enterprises. SPFs of financial enterprises are described as KERTs in the OECD Report because of the special relationship between risks and financial assets in certain financial sectors. That terminology is not used for other sectors other than the financial sector.

[9] The SPFs or KERTs related to the shareholder's decision to establish and capitalise the CFC are not the SPFs or KERTs that are the subject of the CFC rules. These SPFs relate to the position of the shareholder of the CFC and not to either the assets or the business risks undertaken in relation the management of the assets of the CFC itself. The SPFs and KERTs in question for each CFC are those related to the assets of the CFC and the management of the CFC's business risks.

4.4.3 OECD Report principles

As above, there are no general definitions for SPFs/KERTs, but they could be said to include the conduct of fundamental business functions that lead to the assumption of risk, ownership of assets, or ongoing management of those risks and assets. Some general principles are outlined below. The Report provides that:

- significant people functions relevant to the assumption of risk and the significant people functions relevant to the economic ownership of assets will vary from business sector to business sector (e.g. such functions are unlikely to be the same for an oil extraction company and a bank) and from enterprise to enterprise within sectors (e.g. not all oil extraction companies or all banks are the same);
- an enterprise may have one or more significant people functions relevant to the assumption of risk and to the economic ownership of assets, each of which should be considered in the analysis. The extent of the overlap between the significant people functions relevant to the assumption of risk and the significant people functions relevant to the economic ownership of assets will also vary from business sector to business sector and from enterprise to enterprise within sectors;
- with regard to the allocation of assets and to determine the economic (or beneficial and legal) ownership of assets, it is necessary to consider all the facts and circumstances to determine the extent to which an asset is used in the functions of the entity in question, and the conditions under which the asset is used[10]. In the case of a financial asset of a financial enterprise, the creation and management of that asset is the SPF relevant to determining the initial economic ownership of the asset; and
- in relation to the allocation of risks, while risks will initially be attributed to the entity, inherent in or created by the entity's own significant people functions, regard should be had to any subsequent dealings or transactions related to the subsequent transfer of the risk or transfer of the management of those risks to another entity. A risk is to be attributed to the entity which bears the benefits and burdens of that risk and in particular the exposure to gains and losses arising from the realisation or non-realisation of that risk.

[10] The consequences of attributing economic ownership of assets for determining profits under the second step may depend upon the type of asset and the type of business in which the asset is used. For example, economically owning a tangible asset used in a manufacturing process does not necessarily, of itself, attribute to the economic owner of the asset the income from selling goods produced by using the asset. Attributing economic ownership of financial assets, on the other hand, attributes the income and expenses associated with holding those assets or lending them out or selling them to third parties. http://www.oecd.org/tax/transfer-pricing/45689524.pdf

4.4.4 Summary

A chargeable company is a controlling company, or a company connected with the controlling company that performs, either itself or through a branch or agency relevant Irish activities on behalf of a CFC or a CFC group. In order to be a controlling company, the company must be Irish resident. Relevant Irish activities mean SPFs or KERTs performed in the State.

This means that for a CFC charge to arise, the SPFs must be carried out by an Irish company or an Irish branch or agency of a non-resident company. The significance of this is that there must be an Irish nexus with the income. For example, individuals performing SPFs could be doing so in the course of their employment with the CFC or they could be performing duties in these roles for persons other than the CFC but 'on behalf' of the CFC. The SPFs that can trigger the CFC charge are those that are performed in the State on behalf of the CFC in relation to the assets and risks of the CFC.

If an Irish controlled CFC owned intellectual property but all the DEMPE[11] functions were performed by employees of a US company in the US then it is unlikely a CFC charge can arise. It would appear to be a matter for the US transfer pricing regime.

- Once the arrangements have been recognised, the risks and assets pertaining to those arrangements should be identified.
- The SPFs relevant to each risk and asset should be identified.
- The risks and assets should then be allocated accordingly, to the entity in which the SPFs, relevant to the assumption and or management of those risks and economic ownership of the assets, are performed.
- This may, for example, include identifying the individuals who perform the SPFs, the entity they perform them for, and the location at which they perform them.
- Consider whether the CFC would not own the assets or bear the risks that generate the undistributed income but for the relevant Irish activities referable to those assets and risks.

[11] 'DEMPE' means the development, enhancement, maintenance, protection and exploitation of intangibles.

For a CFC charge to arise there must be an Irish nexus with the income. The SPFs should be performed by individuals in Ireland on behalf of the CFC. See examples 8 and 9 at pages 70 and 72.

4.5 The essential purpose of securing a tax advantage

4.5.1 'essential purpose' test [section 835R]

When determining whether the essential purpose of an arrangements was to secure a tax advantage, it is necessary to consider what was the decisive factor of the arrangement. To be confident that the arrangements put in place are not susceptible to a CFC charge, taxpayers must be satisfied that securing a tax advantage was not the decisive factor in proceeding with the arrangements.

When comparing the 'essential purpose' test against the 'main purpose or one of the main purposes' test (which is a standard used elsewhere in the TCA and in other EU Directives), it is clear that the former necessitates a narrower interpretation. It is a less stringent test for taxpayers, to satisfy themselves that the essential purpose of an arrangement was to secure a tax advantage, rather than simply one of the main purposes.

4.5.2 Tax advantage [section 835I]

A 'tax advantage' means:

- a reduction, avoidance or deferral of any charge or assessment to tax, including any potential or prospective charge or assessment, or
- a refund of or a payment of an amount of tax, or an increase in an amount of tax, refundable or otherwise payable to a person including any potential or prospective amount so refundable or payable,

arising out of or by reason of an arrangement, including an arrangement where another arrangement would not have been undertaken or arranged to achieve the results or any part of the results, achieved or intended to be achieved by the arrangement. When determining whether a tax advantage exists, how the arrangement would be taxed in the State should provide the standard for comparison.

Factors that could be considered in determining whether the essential purpose of a transaction was to secure a tax advantage would include where:

- tax reliefs and allowances are utilised in a way in which they were not intended;
- transactions being re-labelled or re-characterised;
- transactions appear contrived and artificial and serve little or no purpose other than to gain a tax advantage;
- the end benefit seems too high in comparison to the real economic risk undertaken;
- the arrangements appear unduly complex considering the business aims;
- it is difficult to understand the arrangements, structure or transaction;
- it is difficult to rationalise the commercial reasons behind the arrangements;
- the arrangements involve unusual items such, without a clear reason, as the use of, tax havens, circular flows of funds and offshore companies.

The arrangements must have been undertaken for the essential purpose of securing a tax advantage.

Example 1

A decision has been made by an Irish resident parent that the group should expand its operations into the Far East. It is proposed that the group's operations in the Far East will ultimately extend throughout a number of countries in the region.
In exploring tax incentives that are available to attract investment into different jurisdictions, the group identifies a number of opportunities to establish new CFCs which could take advantage of:

- a tax holiday in Singapore available to companies establishing in an enterprise zone which carry out headquarter type activities for companies in the region. This includes the possibility of availing of the deferred taxation of offshore receipts arising to the Singaporean company until the receipts are repatriated to Singapore;
- the offshore exemption in Hong Kong in respect of receipts arising from a non-Hong Kong source;
- availing of reduced taxation and employment withholding taxes for expatriate employees in either Hong Kong or Singapore.

Notwithstanding that the CFCs when established could potentially avail of a range of tax advantages including tax exemption and deferral of tax (whether corporate income tax or payroll taxes for employees) the essential purpose for the business activities of the CFCs is not to secure a tax advantage but to expand the operations of the group in the Far East region.

The activities of the CFCs operating in these jurisdictions are therefore considered to have satisfied the essential purpose test.

Example 2

An Irish group has manufacturing facilities in Ireland and in the UK.

Concerned that the event of Brexit could mean delays in making delivery of its product to UK markets, it decides to expand its production operations in the UK. The product manufactured in the UK should be capable of meeting current customer delivery timelines without risk of delays arising when the UK leaves the EU. The additional investment in manufacturing production facilities is expected to be eligible in the UK for an accelerated entitlement to capital allowances on plant and machinery.

Although the investment may avail of a UK tax advantage compared to an equivalent investment in Ireland, the essential purpose of expanding production capacity is to protect against loss of business which could otherwise arise where Brexit gives rise to delays in the delivery of goods manufactured in Ireland to UK customers.

The arrangement has satisfied the essential purpose test.

Example 3

In order to extend its market presence in the UK and US (two of its most important customer markets) an Irish headquartered group decides to pursue a strategy of expanding through acquiring third party groups. The Irish parent company enters into negotiations with the group’s bankers and other potential lenders to arrange for debt facilities to be made available to a group member designated as the acquisition vehicle should an acquisition opportunity arise.

Having agreed the terms of purchase with third party vendors, the Irish parent establishes a new CFC in the UK in the case of the UK acquisition and capitalises it with a mixture of capital and debt to enable that CFC to fund its acquisition of the third-party target group. The tax advantage associated with deducting interest expense on debt whether in the UK or US acquisition is no different whether the group is funded from Ireland or elsewhere. There is therefore no comparative tax advantage in relation to this aspect of the transaction. The group establishes a low taxed CFC which will be capitalised from Ireland and will advance intragroup loans to the US and UK acquisition vehicles.

Although these arrangements could be said to realise a tax advantage in respect of the low rate of tax on income arising to the intra group lender company, the essential purpose of the intra group funding arrangements has been to fund a third-party acquisition and the test is satisfied.

Example 4 (Figure 13)

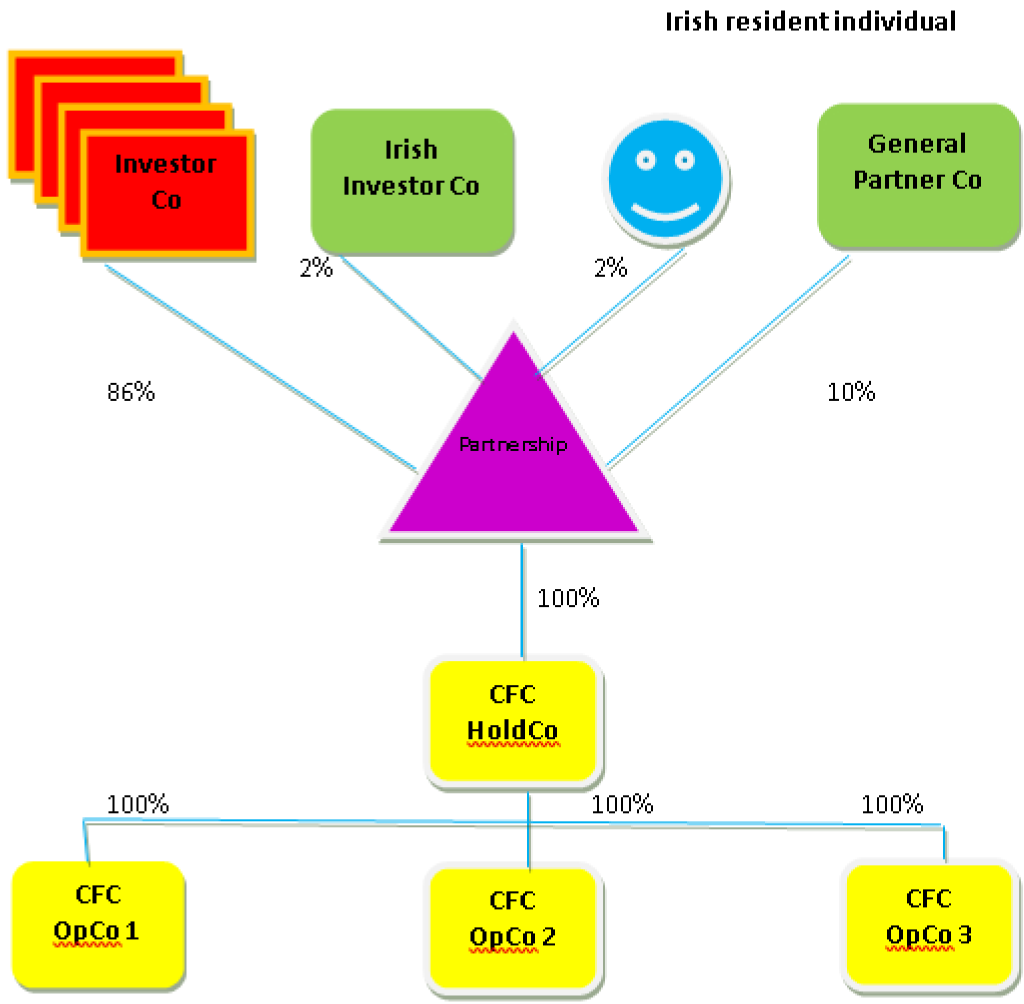


Figure 13: Implications for partners in collective investment funds - see explanations in Example 4

Facts

Taking the facts from Example 15 on page 23, it demonstrates how a company or individual investor who holds interests in a non-resident company by virtue of being a partner in a collective investment fund could find itself considered to 'control' non-resident companies held by a fund partnership because of the attribution of rights of 'associates' who include fellow partners in the partnership.

Controlling company

Each of the Irish resident corporate partners in the Irish partnership fund could be considered a controlling company in relation to CFC HoldCo, CFC OpCo1, CFC OpCo 2 and CFC OpCo 3. This is because partners are considered to be 'associates' of each other. The rights of an associate can be attributed to the company. Irish Investor Co is considered to be a controlling company of the CFCs by reason of the attribution of rights held by its fellow partners who are its ‘associates’.

Essential purpose

Irish Investor Co is a partner in a fund but is not otherwise connected with the fund manager or its affiliates. On the assumption that the company’s purpose for being a partner in the partnership which holds the CFCs is to make an investment through a collective investment structure and to secure an investment return on that investment, it would be expected that the essential purpose test will be met.

SPFs

General Partner Co who is a partner in the fund but also the fund manager, would need to consider if it, or a company connected with it, is performing relevant Irish activities in relation to the CFCs held under the funds structure. It may be that the arrangements in place between General Partner Co and the CFC’s held by the partnership fund are such that they would be entered into by persons dealing at arm’s length terms or are arrangements within the scope of the Irish transfer pricing provisions and thus are excluded from the scope of the CFC rules.

Where the essential purpose test has been satisfied, the CFC charge does not apply.

Example 5

An Irish parent company decides to establish a CFC in a country in South America to avail of a ‘nil’ tax rate. It outsources its intangible assets management service from its Irish subsidiary to the CFC. The SPFs relating to the intangible assets continue to be carried out in the State. The purpose for which the CFC was established was to divert profits from the Irish subsidiary to the CFC in order to avail of the tax advantage. The essential purpose test has failed and a CFC charge may arise on undistributed profits generated from the Irish SPFs provided all other necessary conditions are in place.

Example 6

An Irish based collective investment undertaking is exempt from tax in Ireland on income and gains arising to the fund. The fund invests in a foreign asset using a CFC resident in the asset jurisdiction so that appropriate commercial, legal and tax compliance risks associated with the investment can be managed. The CFC is a special purpose entity which uses a combination of equity and debt finance advanced by the fund to acquire the asset.

Had the asset been held by the Irish collective investment undertaking, income and gains from the asset would have been tax exempt in Ireland. There is, therefore, no tax advantage to be gained from an Irish comparator perspective in making the investment through the CFC. As a result, the essential purpose cannot be to secure a tax advantage and therefore the essential purpose test is considered to be satisfied by these CFC arrangements.

Example 7

A life insurance company sets up a wholly owned, foreign, special purpose company (the CFC) for the purposes of making an investment of policyholder funds e.g. investing in real estate assets in the jurisdiction of the CFC. Appropriate commercial, legal and tax compliance risks associated with the investment can be managed using this investment structure.

The profits from the investment will be returned by the life insurance company to its policy holders. This liability to pay out the return to policy holders is recognised as a deductible amount in computing the profits from its life assurance trade under Case I of Schedule D with the result that the transactions are 'tax neutral'.

There is, therefore, no tax advantage from an Irish comparator perspective in making the investment through the CFC and the essential purpose is considered to be satisfied by these CFC arrangements.

Example 8

An Irish insurance group sets up a regulated insurance subsidiary in an Asian country in order to access the Asian insurance market. The subsidiary achieves commercial benefits in that it can access local insurance markets not accessible to an Irish company. The company in the Asian country reinsures to Ireland for more efficient management of the risks and use of capital. The premiums are on arm's length terms.

The insurance company established in the Asian country may not meet the ETR test because of timing differences between the timing and recognition of its taxable profits and the measure of its profits under Irish tax principles. However, establishing a subsidiary in Asia was necessary in order to access markets that would otherwise be closed to an Irish company. The essential purpose test is considered to have been met in respect of arrangements. Meeting the ETR test is therefore irrelevant as a CFC charge cannot arise because the arrangements are not in place for the essential purpose of securing a tax advantage.

4.6 Disapplication of CFC charge section [section 835R]

The CFC charging section is disapplied in a number of instances outlined below.

4.6.1 Either the genuine arrangements or essential purpose test not met

The CFC charging section will not apply where either of the two elements that are required are not present:

- where the CFC did not at any time hold assets or bear risks under an arrangement where it is reasonable to consider that the essential purpose of which was to secure a tax advantage, or,
- where the CFC does not have any non-genuine arrangements in place.

Whether the CFC did not at any time hold assets or bear risks under an arrangement where it is reasonable to consider that the essential purpose of which was to secure a tax advantage is an objective test and not a subjective one. Therefore, it is not enough for a taxpayer to say, "I reasonably consider that the arrangements I entered into were not for the essential purpose of securing a tax advantage." That would be applying the test in a subjective manner. An objective test involves asking oneself a hypothetical question of what a reasonable person would reasonably consider, given the facts of the case.

4.6.2 Arm's length arrangements

The CFC charge is prevented from arising on undistributed income attributable to Irish SPFs, if the income arises out of arrangements where it is reasonable to consider that the arrangements would have been entered into by parties dealing with each other at arm's length.

As above, the 'reasonable to consider' test is an objective one.

4.6.3 Essential purpose is not to secure a tax advantage

The CFC charge is prevented from arising on undistributed income attributable to Irish SPFs, where it is reasonable to consider that the essential purpose of the arrangements is not to secure a tax advantage. This provision is reflected in the legislation at section 835(R)(5)(a)(II) and it means that if there is a mix of arrangements that are in place and some are in place for the essential purpose of securing a tax advantage and some aren't, then the income deriving from each should be segmented with the CFC charge arising only on the undistributed income that is attributable to the arrangements put in place for the essential purpose of securing a tax advantage. This contrasts with section 835R(10) where it's an all or nothing scenario.

4.6.4 Transfer pricing

The CFC charge will not arise on undistributed income attributable to Irish SPFs, if the income arises out of arrangements that are subject to the transfer pricing provisions under section 835C.

Where Ireland's transfer pricing regime does not extend to the non-genuine arrangements and is therefore not taxed under section 835C, the application of transfer pricing principles (i.e. the arm's length principle is applied in assigning a value to the undistributed income that can reasonably be attributed to Irish SPFs undertaken by the chargeable company) should ensure an equivalent amount of profits are taxed under the CFC charge.

4.6.5 Asset or risk that negligibly increase the CFC's undistributed income

An asset or risk, whether taken on an individual basis or taken together, is excluded from the relevant assets and risks if the CFC's undistributed income is only negligibly higher than it would have been if the CFC had not held the asset at all, or, had not borne the risk at all.

Negligible takes its ordinary meaning of an amount so insignificant as to be not worth considering.

This should be taken in the context of the particular CFC whose amount of undistributed income is being considered. For example, where the value of the undistributed income amount is €10,000 and it would have been €5,000 had the CFC not held the assets at all or borne the risk at all, the difference can hardly be said to be 'negligible'. However, where the income would have been €1,000,000 rather than €995,000 then it may be more reasonable to consider that difference 'negligible'.

4.7 'Chargeable' and 'undistributed' income

4.7.1 Overview

In accordance with section 835I, the 'chargeable income' means the undistributed income of a CFC that is subject to a CFC charge. This section of the manual sets out the rules for determining the CFC's amount of undistributed income that will become chargeable income.

The CFC charge arises on the CFC's undistributed income. The amount of undistributed income that the CFC charge can arise on is the portion included in the accounting profits of the company available for distribution that is attributable to the relevant Irish activities i.e. Irish SPFs[12] where those SPFs were instrumental in generating the income and the arrangements involving the SPFs were non-genuine (i.e. the CFC would not have owned the assets nor borne the risks that it did were it not for the Irish SPFs). A CFC charge will therefore arise if those arrangements were non-genuine and were put in place for the essential purpose of avoiding tax.

4.7.2 Determining the amount of undistributed income [sections 835Q and 835R]

4.7.2.1 Undistributed Income [section 835Q(1)]

The undistributed income of a CFC for an accounting period shall be its distributable profits for the accounting period after deducting any relevant distributions in respect of the accounting period.

Undistributed income = (distributable profits - relevant distributions)

4.7.2.2 Distributable profits

In determining the distributable profits of a CFC for an accounting period any local laws prohibiting the making of a distribution in the CFC's jurisdiction of residence should be ignored in accordance with section 835Q(2).

Under section 835R(3), the amount of distributable profits available is limited to the profits attributable to Irish SPF activities, ['relevant Irish

[12] Please see 4.4 for further details.

activities’] undertaken by the controlling company or a connected company (for example, in situations where the Irish SPFs have been outsourced to a connected company) for that accounting period.

This ensures that a CFC charge can only arise on income with an Irish nexus.

4.7.2.3 Applying an arm’s length principle to attribute undistributed income to relevant Irish activities [section 835R(4)]

A CFC charge will arise on the undistributed income of a CFC or a CFC group to the extent that it can be attributed to relevant Irish activities (Irish SPFs). The arm’s length principle is applied in assigning a value to the undistributed income that can reasonably be attributed to Irish SPFs undertaken by the chargeable company.

The application of the arm’s length principle to a transaction means that the amount charged by one related party to another for a product or service must be the same as would be charged between unrelated parties in comparable circumstances. ‘Arm’s length’ takes its meaning from its everyday use and guidance is available in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

If, for example, under a transfer pricing analysis, a chargeable company performing SPFs in Ireland is considered to exercise ‘control’ and to bear all the risks of ownership related to the CFC’s assets such that it and not the CFC is considered the ‘owner’ of the CFC’s assets, substantially all the undistributed income arising from these assets of the CFC should be attributed to the chargeable company, as appropriate.

If the CFC is considered the owner of its assets, the activities performed by the SPFs should be remunerated under arm’s length principles. An appropriate transfer pricing methodology should apply to determine just how much of the income of the CFC should be attributed to the Irish SPFs.

4.7.2.4 Circumstances that do not give rise to distributable profits

Where there is a loss for the accounting period with the result that there are no profits available for distribution, then no CFC charge will apply.

Profits available for distribution for an accounting period do not include retained earnings related to prior accounting periods.

Profits available for distribution for an accounting period do not include reserves which may be distributable under local law but which arose from capital contributed to the company during the period e.g. share premium, informal capital contribution reserve.

The profits available for distribution for the period is generally the profit after tax figure in the profit and loss account or income statement of the company's financial statements for the period (excluding profits in the character of capital gains).

Example

Assuming the functional currency is $ dollars, if a CFC has pre-tax accounting profits of $200 and an accounting tax charge of $10, then the profits available for distribution for the period will generally be $190.

If $50 of the accounting profits were considered to be attributable to relevant Irish activities, the accounting tax charge should be apportioned accordingly (i.e. 25% of $10) leaving a distributable profits (after-tax) amount of $47.5 being that proportion of the profits available for distribution for the period.

4.7.2.5 Relevant Distribution [section 835Q]

A relevant distribution is defined with a formula: A x (B/C). The distribution amount is apportioned by reference to the distributable profits available divided by the CFC's accounting profit.

For the purposes of the formula, it is the pre-tax figures that are used in respect of both the accounting profits and the distributable profits. This means that the tax deducted to get to the distributable profits in the above example, must be added back.

A = the distribution made in respect of the accounting period.

B = the distributable profits for the accounting period (pre-tax figure).
C = the CFC's accounting profits for the accounting period (pre-tax figure).

Example

Taking the example above, if a CFC has pre-tax accounting profits of \$200 and an accounting tax charge of \$10, then the profits available for distribution for the period will generally be \$190.

If \$50 of the accounting profits was attributable to relevant Irish activities, the accounting tax charge should be apportioned accordingly (i.e. 25% of \$10) leaving a distributable profits amount of \$47.5 being that proportion of the profits available for distribution for the period.

The CFC makes a distribution to the controlling company of \$30. The relevant distribution amount is defined by reference to the formula A x(B/C). For the purpose of B, the tax needs to be added back to give a distributable amount equal to \$50 in respect of 'B'.
30 x (50/200) which amounts to \$7.50.

The undistributed income of the CFC is the distributable profits, which is the accounting profits apportioned by reference to the amount attributable to relevant Irish activities i.e. (\$47.50) less any relevant distribution i.e. (\$7.50). The undistributed income amounts to \$40.00.

4.7.3 'distribution made in respect of the accounting period' [section 835Q]

4.7.3.1 Undistributed income cannot be reduced by income that has been distributed but has not suffered tax in the EU including Ireland. For an amount to be considered 'distributed' for the purposes of determining 'A' in the above formula, it must be distributed to:

- a person resident in a Member State that imposes tax on distributions received from outside that Member State without any reduction, for example, obtained via a participation exemption etc; or
- to a person resident in the State where a corporation tax exemption in respect of the distribution under section 831B is not

claimed i.e. the participation exemption for certain foreign distributions.

Member State means a state other than the State which is an EU Member State or EEA Member State.

4.7.3.2 The distribution must be paid or payable, during the accounting period, or within 9 months after the end of the accounting period.

4.7.3.3 The distribution must have been subject to tax in a Member State. This reference to 'tax' means a tax that has been suffered in the EU and must not be repaid or repayable.

4.7.3.4 A distribution made in respect of an accounting period will be considered to have been made from distributable profits of that accounting period with any excess coming from the most recently accumulated distributable profits.

4.7.3.5 A corporation tax exemption under section 831B must not be claimed in respect of the distribution.

4.7.4 A dividend that has been paid to an Irish parent/person resident in the State through an intermediary non-resident holding company will not be considered undistributed income (unless a claim for a corporation tax exemption was made in respect of the dividend income under section 831B which applies in respect of certain qualifying distributions).

Normal procedures that are commonly used by Irish resident taxpayers to evidence that a foreign dividend is paid from profits of a particular period can be used to evidence that a distribution is made from the CFC's profits available for distribution for an accounting period. This can be done in the same manner as taxpayers currently use dividend declarations or other resolutions made by the company to track distributions paid under the close company provisions or in tracing dividends to the underlying profits from which they are sourced under measures which afford relief from double tax.

4.7.5 Examples

4.7.5.1 Facts

A CFC has pre-tax accounting profits of €1,000, an accounting tax charge of €50 and profits after tax/profits available for distribution therefore of €950. The profits after tax for the accounting period is assumed to be the amount of the CFC's profits available for distribution to its members for the accounting period.

It is assumed that, based on a transfer pricing analysis (please see section 4.7.2.3 of this manual), 60% of the pre-tax accounting profits of the period i.e. €600, is considered to be reasonably attributed to the relevant Irish activities performed by a controlling company or a company connected with the controlling company for that period.

After taking into account the taxation charge of the CFC for the period which is accordingly apportioned by 60% (to give €30), €570 as apportioned with respect to the relevant Irish activities now represents the undistributed income included in the distributable profits for the period unless a relevant distribution is paid which reduces the undistributed income.

Post year end (but within 9 months of the end of that accounting period) the CFC pays a final dividend for the period to its Irish parent company.

4.7.5.2 Example 1

All of the CFC's profits available for distribution of €950 is paid as a dividend for the period to the Irish resident controlling company. The dividend does not qualify for a corporation tax exemption under section 831B and so the dividend is taxable in the hands of the recipient Irish resident controlling company.

The relevant distribution formula is A x (B/C):

A is the distribution amount of €950.

B is the amount of the distributable profits for the period referable to Irish SPFs. For the purposes of the formula, it is the pre-tax amount that should be used. In this example, the amount of pre-tax accounting profits of the company included in distributable profits of the period is assumed to be €600.

C is the pre-tax accounting profits shown in the profit and loss account i.e. €1,000.

The relevant distribution amount is €570 being €950 x (€600/€1,000).

The distributable profits of the CFC for the period (attributable to the relevant Irish activities) is €570.

It is assumed that the dividend is paid in circumstances which meets the necessary conditions and therefore the undistributed income of the CFC for the period is reduced to nil. This is because the undistributed income of the CFC is the distributable profits of €570 less the relevant distribution of €570.

4.7.5.3 Example 2

All of the CFC's profits available for distribution of €950 is paid as a dividend for the period to the Irish resident controlling company. The Irish company claims the corporation tax exemption available under section 831B in respect of the dividend. As the dividend has not suffered tax in the State, 'A' in the formula is €0. There is no relevant distribution amount.

The distributable profits of the CFC for the period (attributable to the relevant Irish activities) is €570.

A CFC charge will arise in respect of the chargeable amount of €570.

4.7.5.4 Example 3

The CFC pays a dividend of €570 for the period. This is an amount which equals the distributable profits of the CFC for the period attributable to relevant Irish activities.

The formula to determine the relevant distribution works as follows, A x (B/C):

- A is the distribution amount of €570.
- B is the amount of the distributable profits of the period. The amount of pre-tax accounting profits of the company included in distributable profits of the period is assumed to be €600.
- C is the pre-taxation amount shown in the profit and loss account i.e. €1,000.

The relevant distribution amount is €342 i.e. €570 x (€600/€1,000).

The relevant distribution formula operates to treat the dividend paid for the period as proportionately reducing distributable profits of the CFC attributable to relevant Irish activities and its other profits available for distribution for the period.

Where only part of the CFC's profits available for distribution for the period is paid as a dividend, the distributable profits attributable to relevant Irish activities will only be proportionately reduced.

In this example, the amount of distributable profits (i.e. referable to Irish SPFs) for the period is €570 and the relevant distribution amount is €342. If it is assumed that the dividend is paid in circumstances which meet the necessary conditions (i.e. paid to an Irish company where that company has not made a claim for the corporation tax exemption under section 831B) or a company in an EU Member State that imposes tax), the undistributed income of the CFC for the period is reduced to €228 (i.e. €570 less €342). This amount of undistributed income remains potentially assessable to tax as a CFC charge.

4.7.6 Undistributed income limited by participation [section 835R(4)]

4.7.6.1 Overview

The undistributed income is limited to an amount proportionate to the controlling and chargeable companies' shareholdings in the CFC through a formula as follows:

UI x AP, where,

- UI represents the undistributed income of the CFC (i.e. the distributable profits less any relevant distributions, that can reasonably be attributed to Irish SPFs) and

- AP is the aggregate of the controlling and chargeable companies' participation in the CFC expressed as a percentage of the total participation in the CFC.

4.7.6.2 'Participation' [section 835R(1)]

'Participation' means:

- a direct or indirect possession of, or beneficial right to, or right to acquire share capital,
- a direct or indirect right to exercise or acquire rights to exercise the voting power of a company,
- a beneficial right to any profits available for distribution to equity holders of a company.

A participation can be made up of rights held directly or indirectly. It does not include rights held by another party and attributed to the person for the purposes solely of applying the test related to the meaning of control in section 835J.

4.7.6.3 Examples

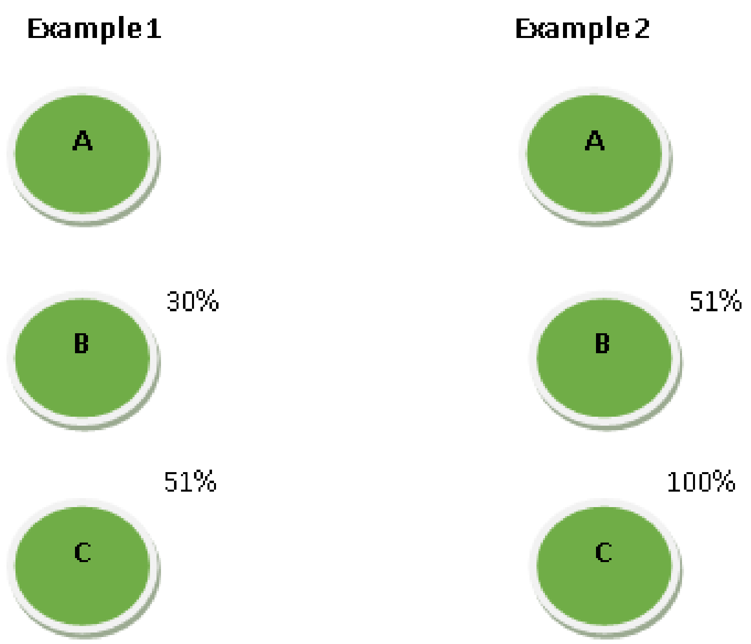


Figure 14: Undistributed income limitations – see Examples 1 & 2 for explanations

Example 1 (Figure 14)

In example 1, as A and B are associated, B’s 51% shareholding in C is attributed to A. As a result, A controls C. Therefore, a CFC charge may arise to A by reference to C. Should any CFC charge arise, however, it will be limited to A’s proportionate indirect shareholding in C, which in example 1 assumes it is 30% of 51% or approximately 15%.

Example 2 (Figure 14)

In example 2, A controls B and B controls C. A and B are associated companies so B’s 100% interest in C is attributed to A. A is deemed to hold 100% of C for the purposes of the control test and therefore A controls C.

Should a CFC charge arise to A in respect of C, however, the charge will be limited to A’s proportionate indirect shareholding of 51% in C (i.e. 51% of 100%).

Example 3 (Figure 15)

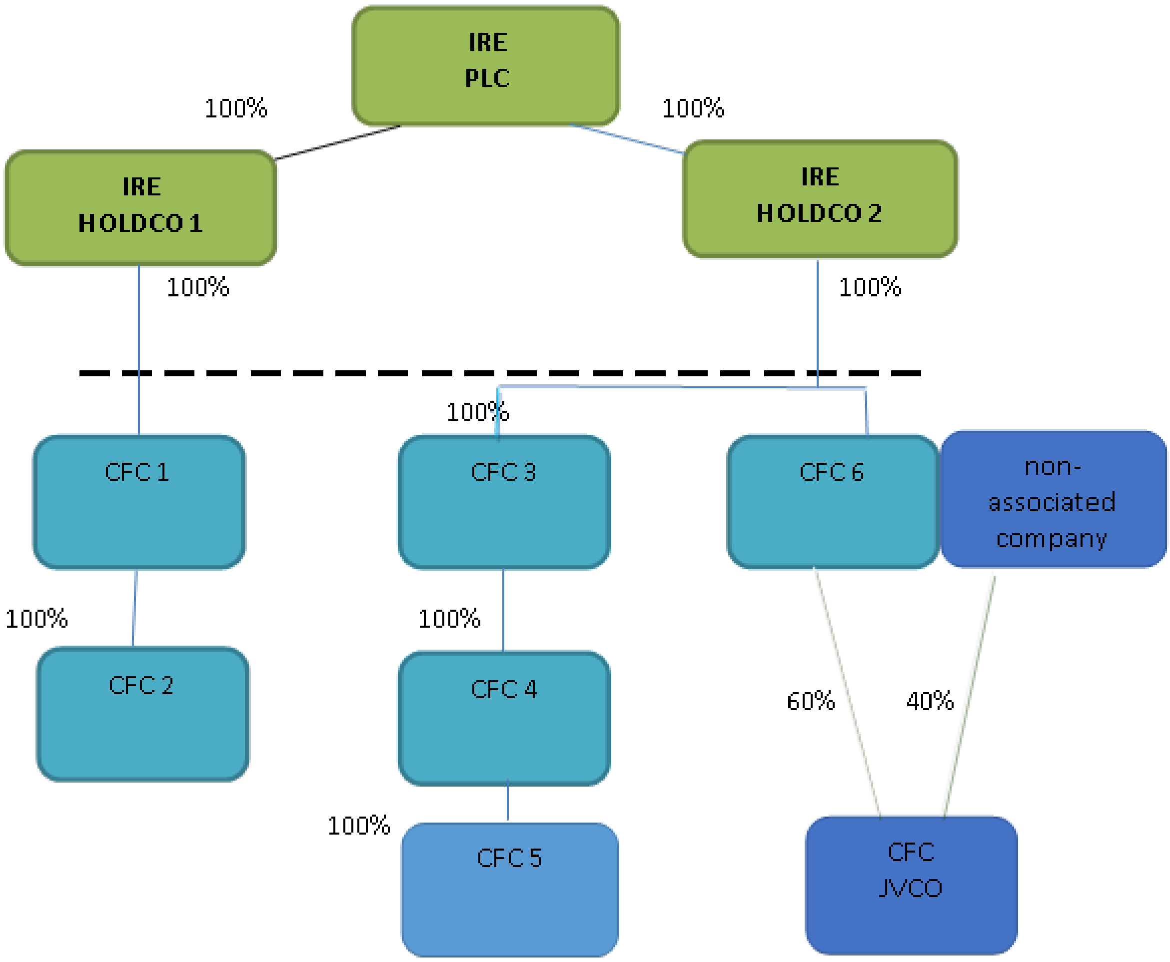


Figure 15: Limitations to CFC charge - see Example 3 explanations

Facts

The structure is taken from example 12 in Section 1 on page 18. CFC 6 has a 60% holding in the joint venture entity (JVCO) and the remaining 40% shareholding is held by a non-resident company. This other corporate shareholder is described as a non-associated company because no participator in the joint venture corporate shareholder holds any interest in any member of IRE plc group. There are a number of CFCs as well as three separate Irish resident controlling companies.

Participation

For the purposes of this example, the relevant Irish activities (Irish SPFs) are assumed to be performed by IRE HOLDCO 2 in relation to the CFC – JVCO. A CFC charge in relation to the undistributed income of JVCO, attributable to the Irish SPFs, is limited to IRE HOLDCO 2’s proportionate share of the total participation rights in JVCO.
As IRE HOLDCO 2’s aggregate share of the total participation rights in JVCO is traced through its holdings in CFC 6, its indirect share of the participation rights in JVCO is estimated as 100% x 60% (i.e. its 100% interest in CFC 6 x CFC 6’s 60% shareholding rights held in JVCO).

In this example, the CFC charge assessable upon IRE HOLDCO 2 is limited to 60% of the otherwise assessable CFC charge amount related to JVCO.

Note: Rights of 25% associated companies are attributable and aggregated in determining ‘control’ but the charge to tax under the CFC legislation is capped at the level of the proportionate share of the participation rights held directly or indirectly by the chargeable company in the CFC.

Example 4 (Figure 16)

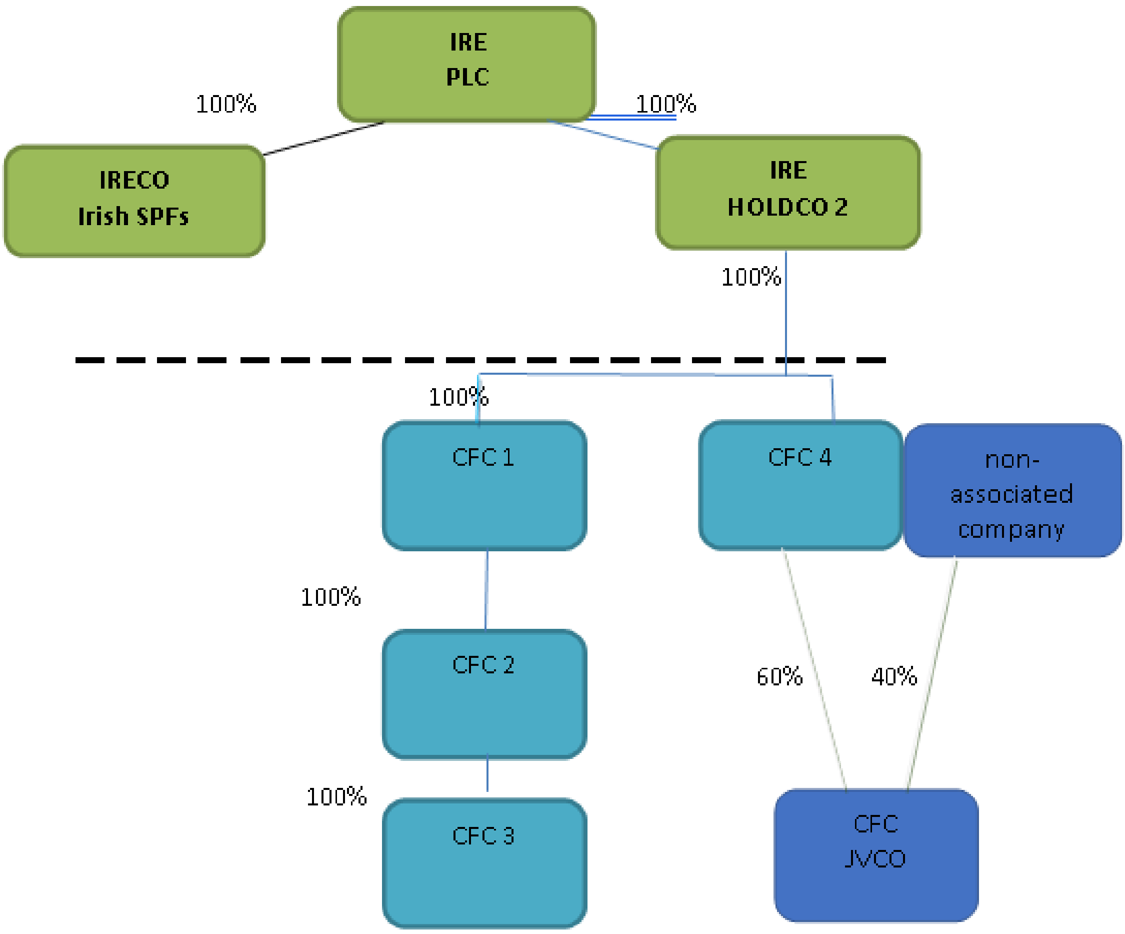


Figure 16: Chargeable companies, 'control' and CFC charge - see Example 4 explanations

Facts

In the Irish corporate group structure outlined in the diagram, there are a number of CFCs as well as three separate Irish resident controlling companies. There is an assumption that the relevant Irish activities are performed by IRECO in relation to one of the above CFCs 1 to 4. IRECO does not hold any interests in the CFCs.

Participation

The proportion of undistributed income upon which a CFC charge can arise depends on the controlling company's and chargeable company's aggregate participation in the CFC.

Controlling company

IRE HOLDCO 2 is the controlling company as it 'controls' CFC 1 – 4[13].

Chargeable company

A chargeable company is a controlling company, or a company connected with the controlling company which performs relevant Irish activities.

In this example IRECO and IRE HOLDCO 2 are connected companies because a third person, IRE PLC, beneficially holds a 100% shareholding in each company. Therefore, IRECO is the chargeable company.

CFC Charge

The CFC charge is limited to the aggregate participation interests of a controlling company, IRE HOLDCO 2, and its connected company who performs relevant Irish activities, IRECO. In this case, IRE HOLDCO 2's aggregate share of the total participation rights in the CFC must be taken into account in determining the amount of the CFC charge on IRECO as a connected company performing relevant Irish activities. As the CFC is a wholly owned subsidiary of IRE HOLDCO 2, 100% of the estimated CFC charge is assessable upon IRECO as a chargeable company.

CFC charge in relation to JVCO

If a CFC charge were to arise in relation to the undistributed income of JVCO, it would be limited to IRE HOLDCO 2's proportionate share of the total participation rights in JVCO. IRE HOLDCO 2's aggregate share of the total participation rights in JVCO is traced through its holdings in CFC 6 to determine its indirect share of the participation rights in JVCO. In this example, the CFC charge assessable upon IRECO is limited to 60% of the otherwise assessable CFC charge amount related to JVCO.

[13] IRECO can also be considered to be a controlling company. IRECO and IRE HOLDCO 2 are associated companies due to a third person, IRE PLC, beneficially holding a 100% shareholding in each company. Under the rules of 'associated companies' the shareholding interests in the CFCs held by IRE HOLDCO 2 may be attributed to its associated company, IRECO. This doesn't affect the amount of the CFC charge - it is limited by the proportionate shareholdings that IRE HOLDCO 2 holds in the CFCs.

Notes

Participation rights of the controlling company and its connected companies may be aggregated when determining the amount of the CFC charge where those connected companies perform relevant Irish activities.

A company with no shareholdings in a group can still find itself within scope of the CFC charge where it performs relevant Irish activities and it is connected to an Irish resident company that is a controlling company. This set of circumstances brings it within the definition of a chargeable company. However, if there is no Irish resident company in the fact pattern then it cannot be a chargeable company.

Example 5 (Figure 17)

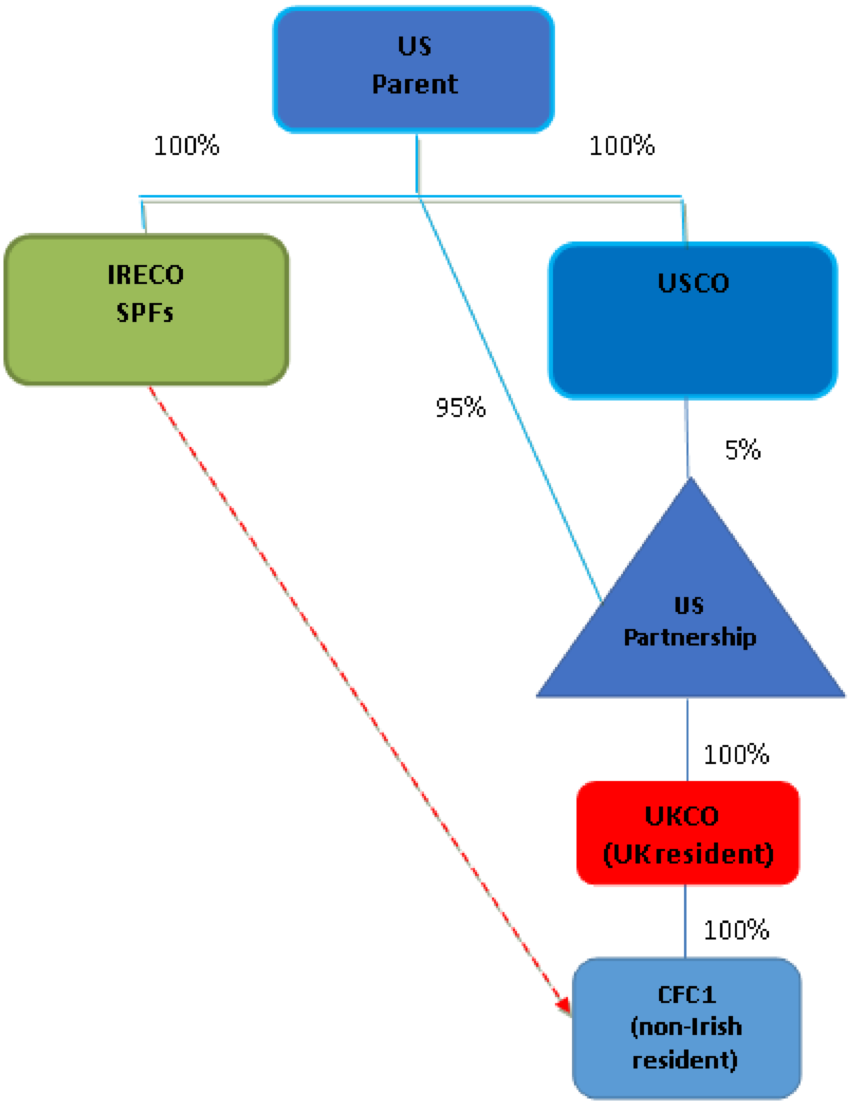


Figure 17: Implications for certain group entities – see Example 5 explanations

Facts

Group entities who perform relevant Irish activities may still be in scope of the charge if the relevant activities are performed in Ireland by a company who is not a parent of the CFC. In the example, UKCO and IRECO are connected companies because of their common parent company, US PARENT whose interests in UKCO are traced through its holding in the US partnership and in its subsidiary USCO. For the purposes of this example, we have assumed that relevant Irish activities are performed by IRECO in relation to CFC1 but that no relevant Irish activities are performed by UKCO.

Participation

The proportion of undistributed income upon which a CFC charge can arise depends on the controlling company's and chargeable company's aggregate participation in the CFC.

Controlling company

IRECO does not hold any direct or indirect interest in CFC 1. It is considered a controlling company because of the attribution to it of the shareholding interests in the CFC 1 held by UKCO, as an associated company.

Chargeable company

As IRECO performs the relevant Irish activities in relation to the CFC it is also the chargeable company.

CFC Charge

The CFC charge that arises is apportioned in relation to the aggregate participation interests of the controlling company and the chargeable company (IRECO in both cases)[14].

The CFC charge in relation to the undistributed income of the CFC is limited to IRECO's proportionate share of the total participation rights in CFC 1. As IRECO does not hold any direct or indirect interests in CFC 1, no CFC charge arises.

[14] UKCO could be a chargeable company if it performed relevant Irish activities through an Irish branch because it is connected with IRECO. For the purposes of this example, we have assumed that it does not perform relevant Irish activities.

Note: Participation rights of the controlling company and a chargeable company may be aggregated when determining the amount of the CFC charge. A company which is a controlling company solely because of the attribution of rights held by an associated company is not liable to a charge if it, or a connected company, do not perform relevant Irish activities or if it does not hold any direct or indirect interests in the CFC.

Example 6 (Figure 18)

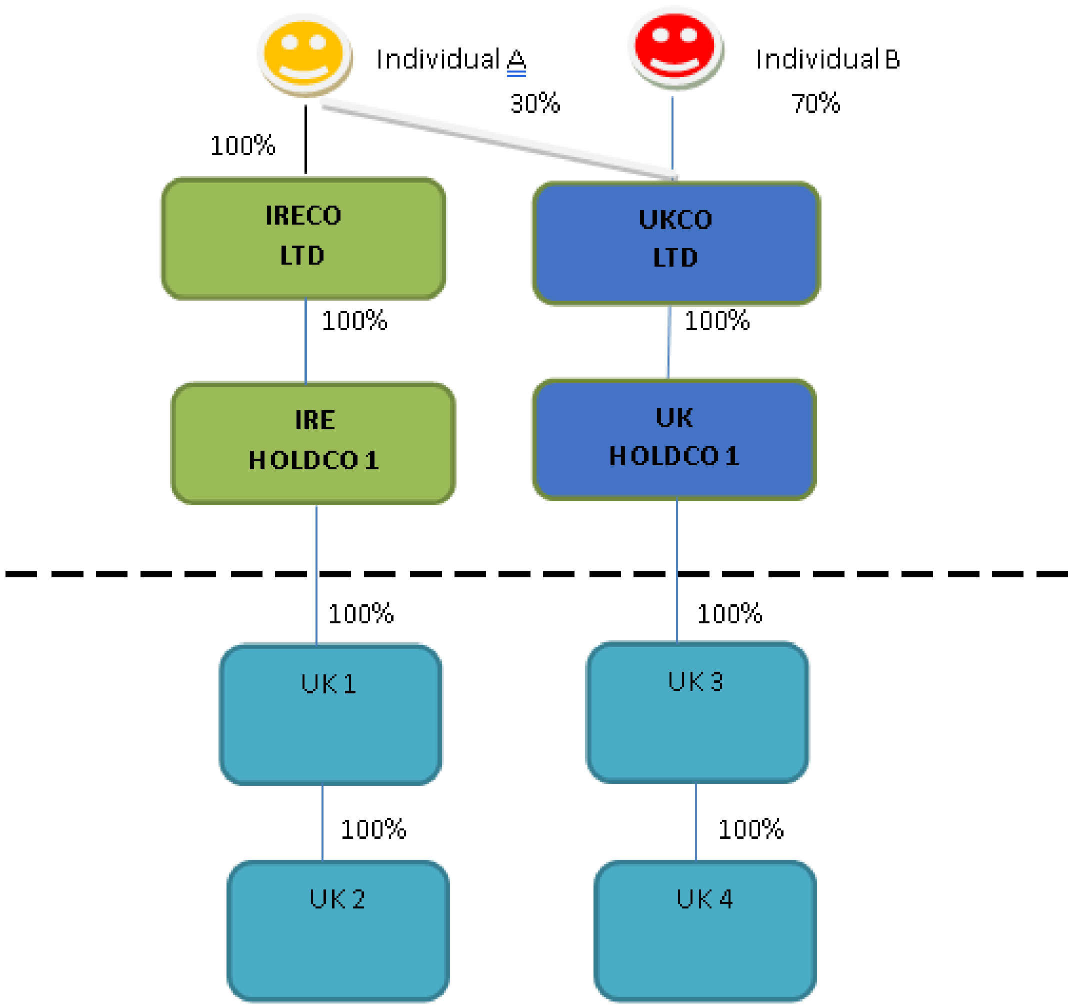


Figure 18: Scope of CFC charge - see Example 6 explanations

Facts

A and B are individuals. A is resident in Ireland and B is resident in the UK. It is assumed that the individuals are not relatives and are not otherwise 'associates' within the meaning of section 433, TCA 1997. IRECO Ltd performs Irish relevant activities in relation to any of UK HOLDCO 1, UK 3 or UK 4.

Participation

Rights of 25% associated companies are attributed and aggregated in determining ‘control’ but the charge to tax under the CFC legislation is capped at level of the proportionate share of participation rights held in the CFC. A ‘participation’ in a company includes a direct or indirect beneficial right to share capital, voting rights and profits available for distribution to equity holders in that company. Participation rights of connected persons can be taken into account in the context of identifying a chargeable company. In this example, the common relationship between A and UKCO Ltd is less than 50% which means that although UKCO Ltd is an associated company of IRECO Ltd (by virtue of a third person beneficially entitled to a 25% or more interest in both companies) it is not a connected company because A does not ‘control’ both companies.

Controlling company

The Irish resident company, IRECO Ltd controls UK 1, UK2 and UK 3 and UK 4 either through IRE HOLDCO 1 or through holdings of its associated company UKCO Ltd.

Chargeable company

IRECO Ltd is the chargeable company as it performs relevant Irish activities in respect of any of UK HOLDCO 1, UK 3 or UK 4 which are its CFCs.

CFC Charge

The CFC charge that might apply to the undistributed income of these CFCs is limited to IRECO Ltd.’s proportionate share of the total participation rights in these CFCs. As IRECO Ltd does not hold any participation rights in these companies, no CFC charge arises.

The scope of the CFC charge takes into account the aggregate participations of a controlling company and a connected company. As no company connected with IRECO Ltd holds a participation in UK HOLDCO 1 or UK 3 or UK 4, there are no further aggregate participation rights to take into account in determining if IRECO Ltd has a CFC charge.

Example 7 (Figure 19)

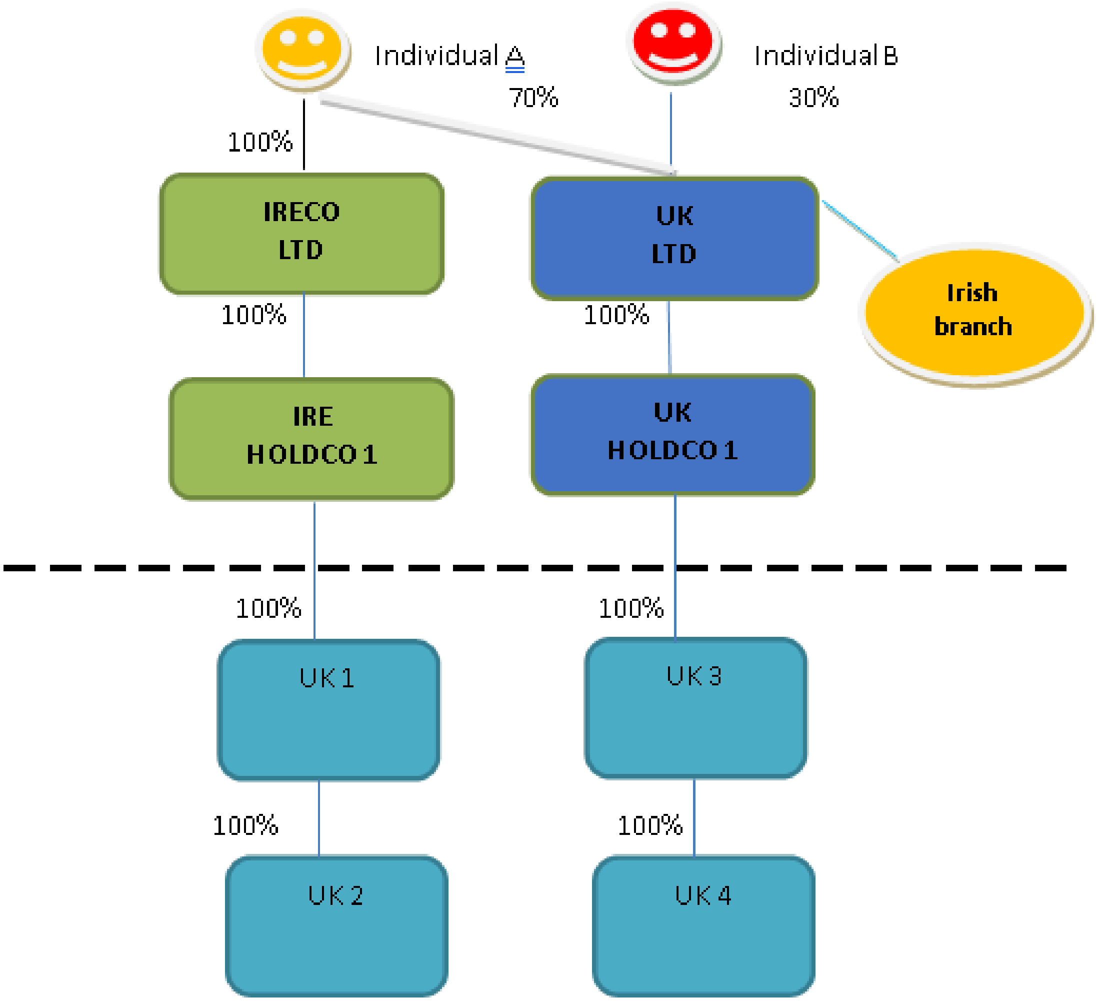


Figure 19: Scope of CFC charge - see Example 7 explanations

Facts

A and B are individuals. A is resident in Ireland and B is resident in the UK. It is assumed that the individuals are not relatives and are not otherwise ‘associates’ within the meaning of section 433, TCA 1997. Individual A holds 70% of the share capital and voting rights in UK Ltd and 100% of IRECO Ltd. UK Ltd carries out relevant Irish activities in respect of UK HOLDCO 1, UK 3 and UK 4 through its Irish branch.

Participation

Rights of 25% associated companies are attributed and aggregated in determining 'control' but the charge to tax under the CFC legislation is capped at level of the proportionate share of participation rights held in the CFC. Participation rights of connected persons can be taken into account in the context of identifying a chargeable company where the connected person carries out relevant Irish activities. In this example there is a common relationship of greater than 50% created by the shareholding of one individual in two companies which results in one company being a connected company with another.

Connected companies

The meaning of 'connected' is construed in accordance with section 10, TCA 1997. IRECO Ltd and UK Ltd are connected companies because they are held by a third person, Individual A, who exercises a greater than 50% common control over both companies. Individual A holds 100% and 70% of the share capital and voting rights in both IRECO Ltd and UK Ltd respectively.

Controlling company

As an Irish resident company, IRECO Ltd controls UK HOLDCO 1, UK 1, UK2 and UK 3 and UK 4. This is because UK Ltd is associated with IRECO Ltd as Individual A holds a 25% or more interest in both companies. UK Ltd's rights and powers are thus attributed to IRECO Ltd.

Chargeable company

UK Ltd is the chargeable company as it performs relevant Irish activities, in respect of any of UK HOLDCO 1, UK 3 and UK 4 which are its CFCs, through its Irish branch.

The CFC Charge

The CFC charge that applies to UK Ltd (as the chargeable company because it performs relevant Irish activities through its Irish branch) on the undistributed income of the CFCs owned by UK Ltd, being UK HOLDCO1, UK 3 and UK 4, is limited to the proportionate aggregate shareholding rights of the controlling company (IRECO Ltd) and the chargeable company, UK Ltd.

If it is assumed that there are no such relevant activities performed in Ireland, whether by UK Ltd through its Irish branch, by IRECO Ltd or its connected companies, being UK Ltd and its subsidiaries, there is no CFC charge.

If we assume, in the alternative, that IRECO Ltd carries out relevant Irish activities in respect of UK HOLDCO 1, UK 3 or UK 4, IRECO Ltd is a chargeable company and the controlling company. As IRECO Ltd is the only company performing relevant Irish activities, the proportionate CFC charge that might apply to the undistributed income of these CFCs is limited to the participation rights held by IRECO Ltd in these companies. In this scenario, the participation rights of IRECO Ltd held directly or indirectly in the CFCs, UK3 and UK4, is nil. Therefore, no CFC charge arises.

Example 8 (Figure 20)

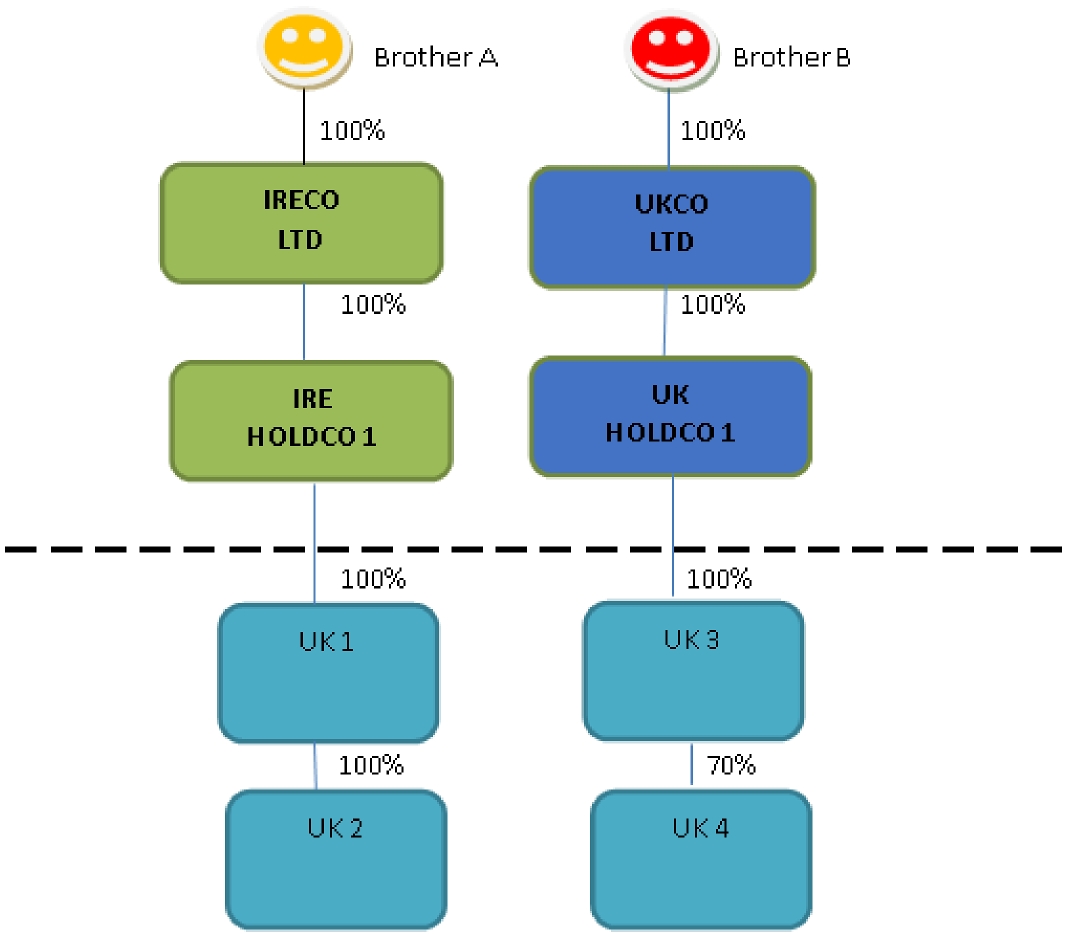


Figure 20: Limitation of ownership rights - see Example 8 for explanations

Facts

A and B are individuals. A is resident in Ireland and B is resident in the UK. A and B are brothers.

Participation

The participation rights of connected companies are taken into account. In this example, there is no common shareholding by one individual in the companies controlled by their relative.

Connected company

The meaning of 'connected' is construed in accordance with section 10, TCA 1997. IRECO Ltd and UK Ltd are connected companies because, under section 10, Brother A is considered to hold the rights of his associate, Brother B and therefore to exercise control over both IRECO Ltd and UK Ltd.

Controlling company

This is dealt with at page 25 in relation to a similar example, however, it is worth repeating here.

A 'controlling company' is defined as a company which is resident in the State and which controls (directly or indirectly) a controlled foreign company (CFC). Only IRECO Ltd and IRE HOLDCO Ltd can be controlling companies.

In this example, there is no common shareholding by one individual in companies controlled by their relative. As A and B are associates the rights and powers of B can be attributed to A. However, the rights and powers of associates of associates cannot be attributed under the provisions of 'control'. So, B's rights and powers in UK HOLDCO 1, UK 3 and UK 4 cannot be attributed to IRECO Ltd through A.

Further the rights and powers of B are not attributed to A under the definition of 'associated company'. The attribution of ownership rights between associated companies does not go so far as to attribute shareholding interests of the associate (in this example a relative) of one individual in a company to a company controlled by the individual in which their associate holds no interest.

Therefore, IRECO Ltd is not a controlling company in respect of the companies, UK 3 and UK 4. It is, however, a controlling company in respect of the companies UK 1 and UK 2.

The CFC Charge

A CFC charge cannot arise in respect of UK 3 and 4 because there isn't a controlling company for the purposes of the legislation.

A CFC charge could arise in respect of UK 1 and 2. IRECO Ltd and IRE HOLDCO 1 are controlling companies. If it is assumed that there are no such relevant activities performed in Ireland, whether by IRECO Ltd or its connected companies, being UK Ltd and its subsidiaries, there is no CFC charge.

If, however, either of those companies perform relevant Irish activities they would be chargeable companies in respect of UK 1 and 2.

As UK Ltd is connected with IRECO Ltd, if instead we assume that it performs relevant Irish activities through an Irish branch it could be a chargeable company. The CFC charge that might arise on the undistributed income of UK 1 and 2, is limited to the proportionate aggregate shareholding rights of the controlling company, IRECO Ltd, and the 'connected company', UK Ltd.

Even though UK Ltd has no participation rights in UK 1 or 2, the tax amount due would equal 100% of the charge due to IRECO Ltd.'s participation in UK 1 and 2.

Note: If we assume, in the alternative, that IRECO Ltd carries out relevant Irish activities in respect of any of UK Ltd, UK HOLDCO 1, UK 3 or UK 4, IRECO Ltd is not a 'chargeable company' because it is not connected to the controlling company. UK Ltd is not Irish resident.

Example 9

This example uses the circumstances from Example 2 at 4.7.5.3.

Facts

A CFC has pre-tax accounting profits of €1,000, an accounting tax charge of €50 and profits after tax/profits available for distribution therefore of €950. The profits after tax for the accounting period is assumed to be the amount of the CFC's profits available for distribution to its members for the accounting period.

It is assumed that, based on a transfer pricing analysis (please see section 4.7.2.3 of this manual), 60% of the pre-tax accounting profits of the period i.e. €600, is considered to be reasonably attributed to the relevant Irish activities performed by a controlling company or a company connected with the controlling company for that period.

After taking into account the taxation charge of the CFC for the period which is accordingly apportioned by 60% (to give €30), €570 as apportioned with respect to the relevant Irish activities now represents the undistributed income included in distributable profits for the period before any relevant distribution is paid.

Post year end (but within 9 months of the end of that accounting period) the CFC pays a final dividend for the period to its Irish parent company.

The CFC pays a dividend of €570 for the period. This is an amount which equals the distributable profits of the CFC for the period attributable to relevant Irish activities.

The formula to determine the relevant distribution works as follows, A x (B/C):

- A is the distribution amount of €570.
- B is the amount of the distributable profits of the period. The amount of pre-tax accounting profits of the company included in distributable profits of the period is assumed to be €600.
- C is the pre-taxation amount shown in the profit and loss account i.e. €1,000.

The relevant distribution amount is €342 i.e. €570 x (€600/€1,000).

The relevant distribution formula operates to treat the dividend paid for the period as proportionately reducing distributable profits of the CFC attributable to relevant Irish activities and its other profits available for distribution for the period.

Where only part of the CFC's profits available for distribution for the period is paid as a dividend, the distributable profits attributable to relevant Irish activities will only be proportionately reduced.

In this example, the amount of distributable profits (i.e. referable to Irish SPFs) for the period is €570 and the relevant distribution amount is €342. If it is assumed that the dividend is paid in circumstances which meet the necessary conditions (i.e. paid to an Irish company where the Irish company has not claimed a corporation tax exemption in respect of the dividend or paid to or a company in an EU Member State that imposes tax), the undistributed income of the CFC for the period is reduced to €228 (i.e. €570 less €342). This amount of undistributed income remains potentially assessable to tax as a CFC charge.

Indirect Participation

As above, a participation can be made up of rights held directly or indirectly. It does not, however, include rights held by another party and attributed to the person for the purposes solely of applying the test related to the meaning of control. The controlling company has an 80% participation in the CFC so €228 x 80%. If no exemption applies, the CFC charge would amount to €182.40.

Example 10 - Genuine arrangements test

Facts

A CFC is resident in Luxembourg for corporate income tax purposes ('LuxCo'). LuxCo is performing intra group financing activities e.g. the advance and administration of loans to group entities in foreign territories. LuxCo is taxed on a low effective corporate income tax rate which fails the ETR test. It also fails the essential purpose test. It is considered to be a CFC from an Irish tax perspective. Its Irish parent must consider whether income should be included as taxable income of IrishCo under the CFC charge.

Genuine arrangements test

LuxCo controls the decision to lend, and the terms on which monies are advanced, to group companies. It does more than exercise stewardship functions, but it carries out its intra-group lending activities with the benefit of significant support and analysis from its group management based in Ireland.

In the case of these intra-group lending activities, the relevant KERT is the decision whether to lend the money and on what terms. Where such decision making is done in Luxembourg (and not in Ireland) the arrangements are considered to meet the requirements of the genuine arrangements test.

If Irish Co's support arrangements with LuxCo arise in the course of a trade taxable under Case I, Irish transfer pricing principles should require IrishCo to reflect this pricing adjustment in its taxable Case I income. This might be done by LuxCo paying a service fee or commission to the loan origination team based in Ireland.

In circumstances where the genuine arrangements test is not met, and either the arrangements are not on arm's length terms or Ireland's transfer pricing regime does not extend to these arrangements, the application of transfer pricing principles under the CFC rules should see an equivalent amount of profits taxed as a CFC charge where the arrangements fail the non-genuine arrangements test. This is because the CFC charge taxes an amount that would be payable by persons dealing at arm's length in relation to those activities.

Example 11

Facts

A CFC is based in Bermuda ('BermudaCo'). It is not resident for corporation tax purposes in Ireland and owns intangible assets ('IP') that are exploited by the group. BermudaCo is subject to a nil rate of tax on its profits in Bermuda. It is a CFC and it is assumed for the purposes of this example that it has failed the essential purpose test.

Genuine arrangements test - BermudaCo licenses its IP to group entities.

Most of the SPFs relating to the DEMPE functions are performed by employees of IrishCo. BermudaCo has a board of directors which exercises control over key decision-making in relation to the ownership and development of the IP but there are also SPFs related to the exploitation of the IP based in Ireland.

Where the Irish SPFs are considered to be instrumental in generating the income of the company, BermudaCo will not meet the genuine arrangements test. Transfer pricing principles apply to determine the amount of the undistributed income of the company that can reasonably be attributed to the IrishCo.

Transfer pricing principles

Under transfer pricing principles, BermudaCo may earn an appropriate return for its ownership of the IP. However, some of its profit is attributable under the CFC charge based on an arm's length amount payable for the SPFs related to the exploitation of IP based in Ireland as determined under OECD transfer pricing principles.

If the IrishCo arrangements arise in the course of a trade taxable under Case I, Irish transfer pricing principles should require IrishCo to reflect this pricing adjustment in its taxable Case I income. The CFC charge would not apply where the pricing adjustment is already made under the Irish transfer pricing regime.
Where Ireland's transfer pricing regime does not extend to such arrangements, the application of transfer pricing principles under the CFC charge should see an equivalent amount of profits taxed under the CFC charge where the arrangements fail the non-genuine arrangements test. This is because the CFC charge taxes an amount that would be payable by persons dealing at arm's length in relation to those activities. If, alternatively, the SPFs are performed in the US and not Ireland, a CFC charge may not arise.

Example 12 (Figure 21)

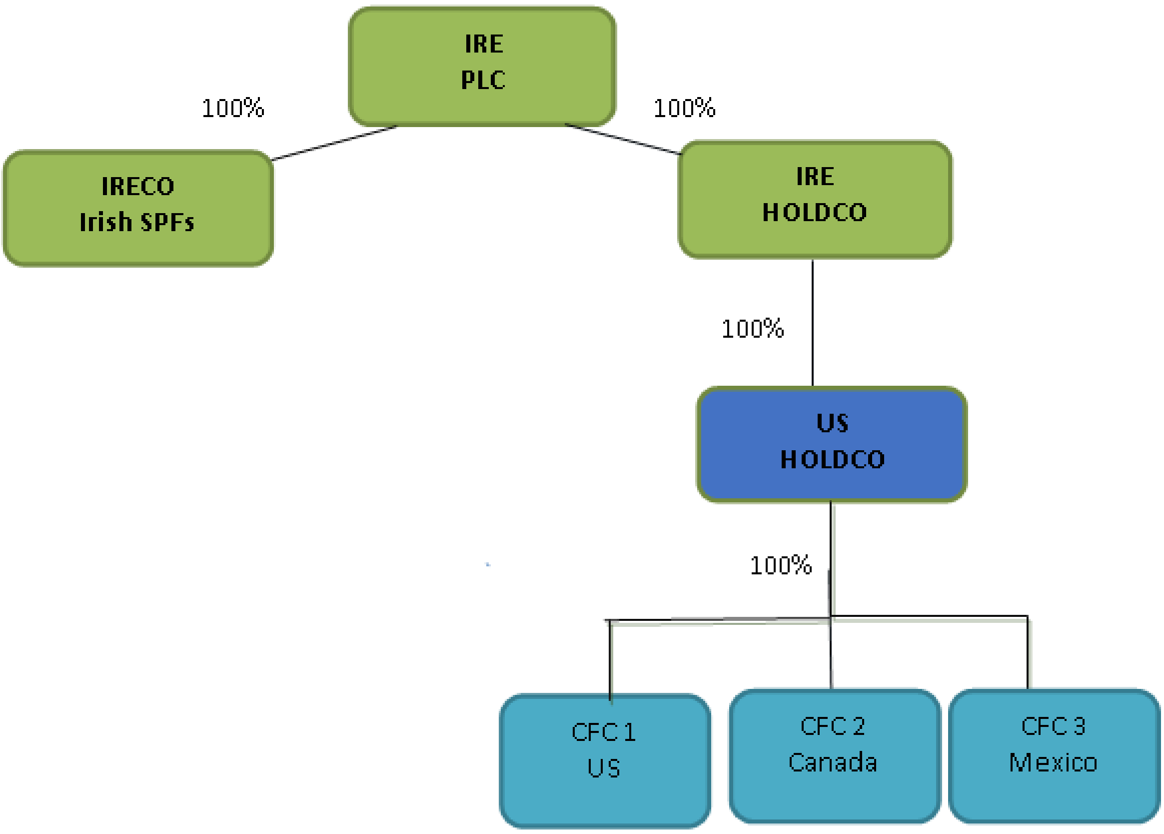


Figure 21: Genuine arrangements & essential purpose tests - see Example 12 for explanations

Facts

A decision was made by an Irish resident parent to extend its market presence in both the US and the Americas. The Irish parent decided to establish US HOLDCO as the holding company for its US and business in the Americas. US HOLDCO and its subsidiaries are considered CFCs from an Irish tax perspective. The Irish parent must consider whether undistributed income of its CFCs should be included as taxable income in Ireland under the CFC charge.

CFC 2 owns intangible assets ('IP') and carries on an IP trade in Canada. CFC 2 also performs intra-group financing activities e.g. the advance and administration of loans to group entities in Canada and foreign territories. IRECO provides financing support activities to CFC 2. These financing support activities are remunerated on an arm's length basis in line with Ireland's transfer pricing regime. It is assumed for the purposes of this example that the income of CFC 2 is not subject to the CFC charge in Ireland due to the application the transfer pricing exclusion.

No other relevant activities are performed by Irish tax resident companies in relation to the CFCs.

US HOLDCO receives dividends from its subsidiaries and the dividends received are reflected in US HOLDCO's accounting profits for the period. The dividend income may or may not be subject to a higher effective tax rate as compared to dividends received in Ireland after claiming underlying double tax credit relief. In addition, subject to group financing requirements, these dividends may or may not be repatriated to IRE HOLDO.

Genuine arrangements test

US HOLDCO controls the decision to invest in the US, in the region and its subsidiaries. As a result of its holding company business, US HOLDCO may receive dividends from its subsidiaries. On receipt of dividends, US HOLDCO can decide whether these dividends are repatriated to IRE HOLDCO or whether the funds should be re-invested as part of its holding company business. The decision making of US HOLDCO is done in the US (and not in Ireland) and an Irish company does not provide any support services to US HOLDCO. The arrangements are considered to meet the requirements of the genuine arrangements test.

As outlined in example 10, if the Irish company's support arrangements with US HOLDCO arise in the course of a trade taxable under Case I, Irish transfer pricing principles should require the Irish company to reflect this pricing adjustment in its taxable Case I income.

Essential purpose test

The US was determined by the Irish parent company as the appropriate holding company jurisdiction to expand its market presence into the US and the Americas. US HOLDCO holds its US and non-US subsidiaries (i.e. its assets) for the purposes of its holding company business and not to secure a tax advantage. Therefore, the essential purpose of the group holding company arrangements, and the dividends received by US HOLDCO as a result of these arrangements, are not to secure a tax advantage and the essential purpose test is satisfied.

4.8 CFC charge already applied

A CFC charge will not apply where the undistributed income has previously been subject to a CFC charge.

4.9 Rate of tax

The rate of tax to be applied to the CFC charge is the rate that would have applied had the undistributed income referable to the Irish SPFs been earned by the chargeable company.

If the Irish SPFs are in the nature of a trade, then the standard rate of tax applicable to trading income, of 12.5%, should apply. If the CFC undistributed income is attributable to relevant Irish activities that would be considered in the nature of passive income than the passive income tax rate of 25% applies.

4.10 Ring-fencing of CFC charge

The CFC charge is ring-fenced so that the corporation tax chargeable may not be reduced by any relief, deduction or set-off except for creditable tax arising under section 835S.

4.11 Creditable tax [section 835S]

4.11.1 Overview

The corporation tax chargeable is reduced by any creditable tax. The rules provide for a credit to be allowed against the corporation tax arising in respect of a CFC charge for any double tax arising on the chargeable income.

4.11.2 'relevant tax'

The meaning of 'relevant tax' includes tax paid by the CFC arising in its jurisdiction of residence or any other jurisdiction, except the State, which corresponds to corporation tax.

Creditable tax includes:

- the amount of foreign tax[15] paid or borne by the CFC, which can include Irish tax, arising on the CFC's chargeable income,
- any amount of relevant tax paid on a foreign company charge (except for a CFC charge arising in the State) arising on the CFC's chargeable income, and
- any foreign qualified domestic top-up tax ('foreign QDTT') payable or borne by the CFC for that accounting period.

A 'qualified domestic top-up tax' or 'QDTT' is a tax that arises under the Pillar Two rules and is defined in section 835I as having the meaning given to it in section 111A(1). A foreign QDTT is also defined in section 835I and means a QDTT that arises under the laws of a territory other than the State. In order to be creditable under the CFC rules, the foreign QDTT must be payable or borne by the CFC in question.

Section 835S(5) excludes the following from being a creditable tax:

(a) a qualified IIR (within the meaning of section 111A(1)), or
(b) a qualified UTPR (within the meaning of section 111A(1)).

[15] There are rules for calculating the amount of foreign tax. These are outlined at section 10 of this manual. Broadly, it is the amount of foreign tax calculated under Irish tax principles i.e. the tax arising on the Irish measure of income. For example, if a stream of income would not give rise to a corporation tax charge under Irish tax principles it will be excluded when calculating the amount of foreign tax. Please see section 10 for further information.

For further information on the meaning of a QDTT, a qualified IIR, a qualified UTPR and the Pillar Two rules please see the Pillar Two guidance in the Revenue Part 04A-01-02 Tax and Duty Manual regarding Global Minimum Level of Taxation for Multinational Enterprise Groups and Large-Scale Domestic Groups in the Union.

The meaning of 'foreign company charge' is a charge arising under the laws of a jurisdiction other than the State that is similar to a CFC charge i.e. essentially a CFC charge that arises outside the State. This could include a CFC charge that arises under different models of CFC regimes. For example, where income becomes taxable on a parent company because it is income of a particular character or a particular category arising to the CFC under a CFC regime other than Ireland's CFC regime.

4.11.3

The amount of foreign tax 'paid or borne' can be taken to mean but is not limited to taxes paid directly or by deduction, administered by the CFC itself or withheld on behalf of the CFC e.g. withholding taxes, taxes referable to the CFC but paid by a consolidated group taxpayer and Irish tax on the income of the CFC.

The foreign QDTT 'payable or borne' can be taken to mean foreign QDTT payable or borne directly by the CFC itself or payable or borne by another group company, on behalf of the CFC, in respect of the aggregate profits of that CFC and one or more other entities that, under the Pillar Two rules, are taken together as a single taxable entity. In that case, the amount of foreign QDTT should be apportioned to the CFC on a just and reasonable basis.

The word 'payable' applies in the case of a foreign QDTT because the payment deadline for the QDTT may fall later than the date the Irish corporation tax is due and so there would be an amount of QDTT due but not yet paid. Any amount of foreign QDTT that has not been paid within 4 years from the end of the fiscal year (which takes its meaning from section 111(A)(1) of the TCA - please see Revenue's Pillar Two guidance for further information) in which it became due is excluded from being creditable.

Any amount of foreign tax or QDTT that has been or falls to be repaid to the CFC or any other person shall be excluded.

4.11.4 Relief limited

The credit allowed is ringfenced and limited to the amount of the CFC charge.

5 Low profit margin exemption [section 835U]

Finance Act 2020 inserted section 835YA into Part 35B TCA 1997 and provides that the low profit margin exemption will not apply in certain circumstances – see section 11 of this manual for further details.

5.1 Overview

This exemption excludes from the scope of the CFC rules a CFC whose accounting profits are less than 10% of its relevant operating costs for the relevant period.

5.2 Relevant operating costs

The term 'relevant operating costs' means the operating costs as construed in accordance with international accounting standards or generally accepted accounting practice. They are the operating costs incurred by a CFC for an accounting period but may not include:

- the cost of goods purchased by the CFC and sold outside the country where the CFC is resident for tax purposes, and
- payments to associated enterprises.

Essentially, for costs of goods sold to qualify as 'relevant operating costs' the goods purchased must be sold in the CFC's jurisdiction and they must not be sold to or bought from associated companies.

5.3 Accounting profits [section 835I]

'accounting profit' in relation to a CFC, means the amount of profit, before taxation, shown in the profit and loss account. Capital gains/losses or dividends/other distributions which would not be within the charge to tax in determining the CFC's corresponding chargeable profits in the State are excluded.

'profit and loss account' in relation to a CFC means the profit and loss account, income statement or equivalent as prepared in accordance with international accounting standards or in accordance with generally accepted accounting practice, but where:

- accounts are not prepared in accordance with international accounting standards or generally accepted accounting practice, or
- no accounts are prepared for the accounting period in question

that expression means the profit and loss account which would be prepared in accordance with generally accepted accounting practice.

5.4 Anti-avoidance

Section 835U(3) contains an anti-avoidance measure which is designed to ensure that the exemption cannot apply where the CFC enters into arrangements and it is reasonable to consider that the main purpose of which is to ensure that the exemption would apply.

5.5 Examples

5.5.1 Facts

An Irish resident company owns 100% of the shares in a non-resident subsidiary which warehouses and manages distribution activities in its jurisdiction of residence.

The subsidiary is a controlled foreign company (CFC) of an Irish controlling company. The CFC prepares its financial statements under local GAAP, which is broadly aligned with IFRS Accounting Standards. The CFC functional currency is pounds (£).

The subsidiary purchases goods from group companies and sells these to third parties resident in its jurisdiction.

Profit and loss account:		£
Sales revenues		4,000,000
Less cost of sales		
Cost of goods sold	(3,500,000)	
Depreciation on warehouse plant and machinery	(50,000)	
Depreciation on warehouse	(50,000)	
		(3,600,000)
Gross profit		400,000
Sales and administrative expenses		
Salaries and employee costs	(180,000)	
Client entertainment	(20,000)	
Other S,G&A costs	(50,000)	
		(250,000)
		150,000
Other income/expenses		
Profit on sale of warehouse	250,000	
Legal costs related to sale of warehouse	(20,000)	
		230,000
Net profit/Profit before tax		380,000

5.5.2 Low Profit Margin Exemption

5.5.2.1 Accounting profit

The accounting profits are £150,000 (£380,000 less capital gain of £230,000) as the profit on the sale of the warehouse cannot be included on the basis that it is a capital gain. (The definition of ‘accounting profit’ means the profit, before tax, shown in the profit and loss accounting excluding capital gains or losses or dividends/distributions.)

5.5.2.2 Relevant operating costs

For costs of goods sold to qualify as ‘relevant operating costs’ the goods purchased must be sold in the CFC’s jurisdiction and they must not be sold to or bought from associated companies.

The total operating costs reflected in the accounts for the period are £3,850,000 (comprising costs of goods sold and other sales and general administration costs). Of these costs, £3,500,000 represent the costs of goods purchased from a group member. In this example, these costs are excluded from the relevant operating costs because the payment for the goods was made to group members.

If, however, the goods were purchased from third parties, this expense would qualify as 'relevant operating costs' because the goods are sold in the CFC's jurisdiction of residence. Where all the operating costs of £3,850,000 are relevant costs, the CFC is eligible for the low profit margin exemption because its accounting profit for the period of £150,000 is less than 10% of relevant operating costs of £3,850,000.

6 Low accounting profit exemption [section 835V]

Finance Act 2020 inserted section 835YA into Part 35B TCA 1997 and provides that the low accounting profit exemption will not apply in certain circumstances – see section 11 of this manual for further details.

6.1 Overview

This exemption excludes from the scope of the CFC rules:

- a CFC with accounting profits of less than €750,000 where any non-trading income stream amounts to less than €75,000; or,
- a CFC with accounting profits of less than €75,000.

'Non-trading income', under section 835I, means the amount of a CFC's income which would be included in the CFC's corresponding chargeable profits if the assumptions set out at 10.3 applied to the company excluding income that would be treated as trading income were the assumptions applied.

6.2 Accounting profit

The definition of 'accounting profit' under section 835I excludes chargeable gains or losses or dividends/distributions that are exempt from the charge to tax in determining the CFC's corresponding chargeable profits in the State.

6.3 Accounting period

Where the accounting period is less than 12 months, the amounts specified should be proportionately reduced.

6.4 Anti-avoidance

As an anti-avoidance measure, the exemption shall not apply where the CFC enters into arrangements and it is reasonable to consider that the main purpose of which is to ensure that the low accounting profit exemption applies.

6.5 Examples

6.5.1 Example 1

As with the low profit margin exemption, accounting profits for the purposes of the low accounting profit exemption exclude chargeable gains. The below example demonstrates how this can affect the exemption.

A CFC of an Irish controlling company holds intangible assets which are under development and which are not yet available for use in the business of the group. The company does not have any income reflected in its accounting profits available for distribution for the period.

The low accounting profit margin would apply for two reasons:

a) The CFC has accounting profits of less than €750,000. There is no other stream of income so the non-trading income stream amounts to less than €75,000.
b) The exemption also applies because the CFC has accounting profits of less than €75,000.

If, however, there were unrealised gains or realised capital gains reflected in the accounting profits of the period, the company may still be eligible for the low accounting profit exemption. This is because accounting profits for the purpose of the exemption do not include capital gains (realised or unrealised).

6.5.2 Example 2

An Irish group seeks to expand its operations in Latin America. It establishes an intermediary holding company in another EU Member State where there are longstanding commercial links with countries in Latin America. In this example, there is an assumption that the necessary circumstances are in place such that a CFC charge applies.

In a period where the EU holding company reflects only capital gains in its financial statements, the company should be eligible for the low accounting profit exemption because accounting profits for the purposes of this test exclude capital gains.

The EU holding company may receive dividend income from its subsidiaries. The dividend income may or may not be subject to a higher effective tax rate as compared to dividends received in Ireland after claiming underlying double tax credit relief. On the basis that such income would be considered to be non-trading income, if the dividend income included in accounting profits for the period did not exceed €75,000, the company could be eligible for the low accounting profit exemption.

7 Exempt period exemption [section 835W]

7.1 Overview

The purpose of this exemption is to provide controlling companies with a 'grace period' for newly acquired CFCs during which the controlling company can organise or reorganise its business so that a CFC charge does not arise. To avoid the CFC charge, the controlling company must re-structure the affairs of its subsidiary during the grace period of 12 months so that it is not considered to be a CFC in the subsequent period. If this condition is not satisfied, the exemption is lost and the CFC charge becomes payable in the subsequent period. Subject to certain exceptions, newly formed CFCs are excluded from the exemption.

7.2 Beginning of 'exempt' period

The exempt period begins when the Irish parent would be subject to the CFC rules for the first time in relation to that CFC. It ends 12 months later.

For an Irish parent to be subject to the CFC rules for the first time, its accounting period must commence after 1 January 2019. It must have a CFC (a subsidiary resident in another jurisdiction that meets the 'control' test requirements) and the CFC's accounting period must end in the accounting period of the controlling company.

The CFC will be exempt from any CFC charge arising, where the CFC's accounting period ends during the exempt period and the CFC satisfies the subsequent period condition.

7.3 Subsequent period condition

The subsequent period condition is satisfied where:

- the company ceases to be considered a CFC in accordance with Chapter 1, Part 35B TCA [16], or,
- the CFC charge does not apply in the first accounting period that follows immediately after the exempt period[17].

7.4 Accounting period of CFC begins during an exempt period but does not end during it

The CFC's undistributed income should be apportioned on a just and reasonable basis where the accounting period of a CFC begins but does not end during an exempt period. The portion that arises during the exempt period, and would otherwise be subject to the CFC charge, is exempt from the charge.

7.5 Preclusion of exemption

The exempt period exemption will not be available for a CFC where:

- the CFC was not carrying on a business before the beginning of the exempt period, or,
- the controlling company was subject to the CFC provisions in relation to the CFC on 1 January 2019.

[16] This may occur where the controlling company ceases to be a controlling company during the exempt period because, for example, it is wound up or dissolved or the conditions for 'control' are no longer in place etc.
[17] If, for example, the controlling company reorganised its affairs to ensure that a CFC charge will not arise.

Newly formed companies are effectively prevented from accessing the exemption to prevent groups claiming the exemption for all new subsidiaries.

An exception to this exclusion provides that the controlling company will not be prevented from availing of the exempt period exemption where newly formed CFCs (CFCs incorporated or formed immediately before the exempt period begins), are formed for the purpose of controlling a company or companies, and the company or companies controlled by the CFC would qualify for the exempt period exemption.

This exception to the exclusion is intended to cover acquisition vehicles that are set up prior to acquiring other companies from a third party.

7.6 Anti-avoidance

This anti-avoidance measure is designed to ensure that the exemption cannot apply where the CFC enters into arrangements and it is reasonable to consider that the main purpose of the arrangements is to secure a tax advantage or the exempt period exemption.

7.7 Examples

7.7.1 Example 1

An Irish parent, Company A with a 31 December 2019 year end sets up a subsidiary, Company B on 1 August 2019. Company B meets the control and residence requirements and is a CFC. It acquires its first source of income on 1 September 2019 and prepares its first financial accounts for the 17-month period, ended 31 December 2020.

This 17-month financial accounting period is two accounting periods for the purposes of the CFC rules. The first accounting period of the CFC begins when it first becomes a CFC upon its formation on 1 August 2019 and is deemed to end 12 months later on 31 July 2020 (in accordance with section 27).

A second account period then begins and this ends 5 months later at the date that the CFC draws up its financial accounts to the financial period accounting date of 31 December 2019.

The first period of the Irish parent, within the scope of the CFC rule, is the 12-month period ended 31 December 2019. Both the 12 months accounting period and the 5 months accounting periods are within the scope of the CFC rules as both periods end in the accounting period of the Irish controlling company.

Availability of exemption period

The first 12-month accounting period of the CFC is not eligible for the exempt period because, notwithstanding that the CFC first became a CFC in the period, the CFC was not engaged in a business prior to its formation which was the date on which it first became a CFC.

7.7.2 Example 2

Irish plc has a 31 December financial year end. It acquires an Irish company and its non-Irish resident subsidiaries from a third party on 1 June 2019. The acquired group has a financial year end to 30 June. The acquired group members will not prepare 2019 accounts to 30 June but instead will prepare 18-month financial accounts post acquisition to 31 December 2019 in line with the new Irish parent's financial accounting date. The acquired CFCs were already CFCs within the scope of the Irish CFC rules as they were already subsidiaries of an Irish parent.

The 18-month financial accounting period of the CFCs is 2 accounting periods for the purposes of the CFC rules – a 12-month (as provided by section 27) and a 6-month period (as also provided by section 27).

The first accounting period in the scope of the CFC rules for the acquired group members began on 1 July 2018 and ends on 30 June 2019 with the second period commencing on 1 July 2019 and ending on 31 December 2019.

Both accounting periods end within the 31 December 2019 accounting period of the new Irish parent and are potentially within the scope of the CFC charge on the new Irish controlling company.

Exempt period exemption

The exempt period provisions may apply to exempt the profits of the acquired CFCs from the CFC rules as the CFCs were carrying on a business prior to the acquisition. The exempt period commences on 1 June 2019, the acquisition date, and ends 12 months later.

Therefore, if all the necessary circumstances were in place to give rise to a CFC charge of, say, €10,000 in respect of one of the CFCs and the exempt period applies, the charge will be deferred. It will be exempt entirely provided that the profits of the CFCs are not subject to the CFC charge in the subsequent period. This begins 12 months after the acquired companies first become CFCs of the replacement Irish controlling company.

Where the controlling company has not reorganised its affairs to ensure that the subsidiary is not considered a CFC, the €10,000 charge arising in respect of the exempt period will become payable along with any CFC charge arising in the subsequent period at the time the charge in respect of the subsequent period is due for payment.

7.7.3 Example 3

Irish plc has a 31 December financial year end. It establishes and controls a non-resident subsidiary in order to acquire an Irish company and its non-Irish resident subsidiaries from a third party on 1 June 2019.

The newly incorporated subsidiary has a 31 December financial year end. The acquired group has a financial year end to 30 June. The acquired group members will not prepare 2019 accounts to 30 June but instead will prepare 18-month financial accounts post acquisition to 31 December 2019 in line with the new Irish parent's financial accounting date. The acquired CFCs were already CFCs within the scope of the Irish CFC rules as they were already subsidiaries of an Irish parent. The 18-month financial accounting period of the CFCs is 2 accounting periods for the purposes of the CFC rules – as 12 months (as required by section 27) and a 6-month period (as also required by section 27).

Exempt period exemption

The grace period may apply because although the non-resident subsidiary is newly incorporated, it has been incorporated for the purpose of acquiring a third-party Irish company and its CFCs.

8 Relief for certain distributions [section 835X]

8.1 Overview

If a CFC makes a distribution and it is a distribution that has been made from chargeable income (i.e. previously undistributed income that has already been subject to a CFC charge), then an amount equal to the CFC charge originally suffered shall be allowed as a credit against any tax arising in respect of the distribution.

8.2 Distribution partly out of chargeable income

Where a distribution is made by a CFC partly out of chargeable income and partly out of other income then the distribution is treated as two separate distributions and any available credit is apportioned respectively.

8.3 Example

IreCo has a CFC. IreCo made a corporation tax payment relating to a CFC charge that arose in a previous accounting period in respect of the CFC's undistributed income.

Three years later the CFC makes a distribution to IreCo. The distribution is comprised of the chargeable income arising from the period (40%) in respect of which the CFC charge arose and undistributed income from a later period (60%). It is assumed for the purposes of this example that the CFC charge was subject to corporation tax at 25% and that the distribution is also subject to corporation tax at a rate of 25% on receipt.

The distribution is treated as two separate distributions. IreCo can set the corporation tax on the CFC charge against the corporation tax on 40% of the distribution that is attributable to the past CFC charge.

Let's assume that there is no creditable tax paid on the profits of the CFC that have been distributed so that there is no foreign tax credit relief available to the Irish parent on receipt of the distribution from the CFC. The 25% corporation tax paid in the past on the CFC charge should offset the 25% corporation tax payable on the deemed separate amount of 40% of the distribution received in the current period. The remaining 60% of the distribution income received from its CFC is subject to corporation tax at 25% in the usual manner.

9 Relief on certain disposals of shares or securities in a CFC [section 835Y]

9.1 Overview

This relief applies where a controlling company or a company connected with the controlling company (referred to as a ‘disposing company’), disposes of shares in a CFC or a company connected with the CFC (the ‘disposed company’), and the disposing company has previously been subject to a CFC charge in relation to that CFC by reference to its participation in it.

This provision reflects the fact that profits available for distribution can affect the share value. Therefore, the legislation provides that, as those profits have already been subject to a CFC charge in the hands of the shareholders, in calculating the amount of the chargeable gain, the amount of the CFC charge will be allowable as a deduction against the consideration for the disposal. An amount to be allowed as a deduction can only be allowed once.

Example

Take an example of a company disposing of the entirety of its holding of 1,000 ordinary shares in a company which comprises all the shares of the company being sold. It is assumed that the:

- sales consideration for disposal of 1,000 ordinary shares is €1,000,000;
- amount of a past CFC charge is €200,000; and
- base cost for capital tax purposes of the shares being sold is €600,000.

Relief is given for the CFC charge related to the CFC by deducting the amount of the prior charge from the disposal consideration. This reduces the amount of the chargeable gain on disposal of the shares as follows:

Sales consideration		1,000,000
Deduct CFC charge		(200,000)
Deduct base cost of shares		(600,000)
Chargeable gain		**200,000**

9.2 One disposing company

The term "chargeable gain" has the meaning given to it in section 545, TCA. There are instances, involving one disposing company, where the disposing company and the chargeable company[18], may or may not be, the same entity e.g.:

- where the disposing company is the only chargeable company in relation to the CFC,
- where the disposing company is not the chargeable company in relation to the CFC and the chargeable company does not have any interest in the CFC, or
- where the disposing company is a chargeable company in relation to the CFC and there is another chargeable company in relation to the CFC, but it does not have an interest in the CFC.

Example 1 (Figure 22)

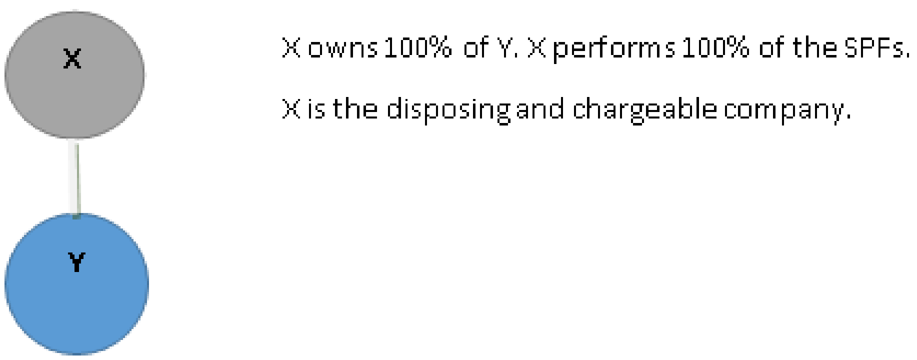


Figure 22: Disposing company is also chargeable company - Example 1

[18] A 'chargeable company' is defined under section 835I as a controlling company, or a company connected with the controlling company, which performs, either itself or through a branch or agency, relevant Irish activities on behalf of a controlled foreign company group.

Example 2

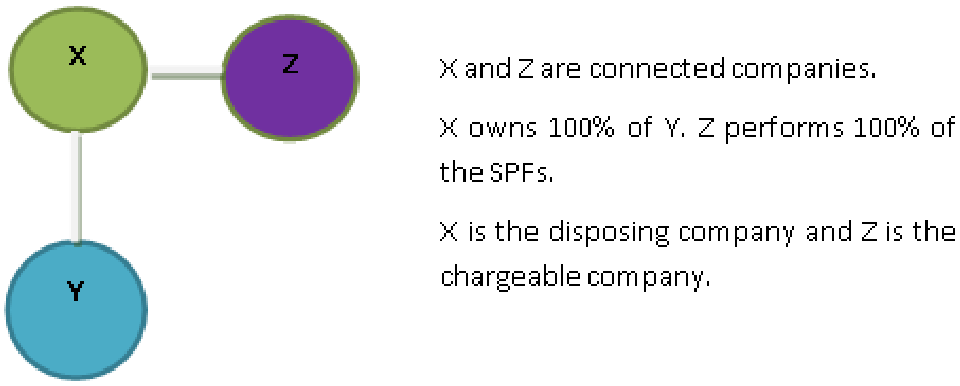


Figure 23: Formula may be applied in this scenario - see Example 2 for explanation

Example 3

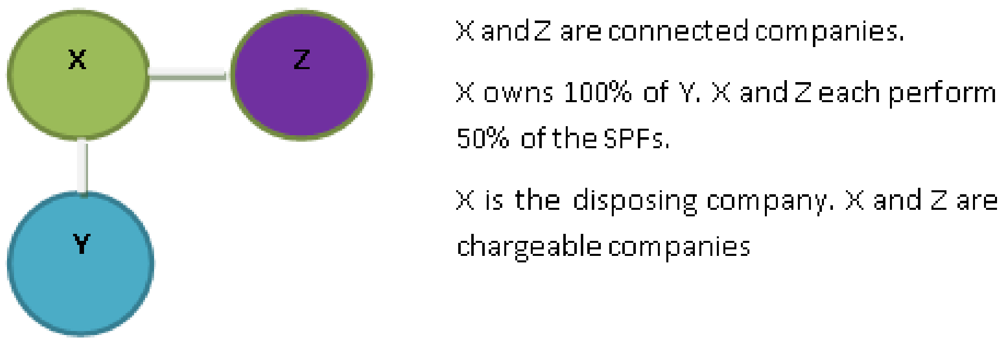


Figure 24: Formula may be applied in this scenario - see Example 3 for explanation

9.3 Formula

Where any of the scenarios outlined above applies, a formula may be applied in order to calculate a proportionate CFC charge amount that will be allowable as a deduction against the consideration when computing the chargeable gain that may arise to a disposing company on the disposal of shares or securities in the CFC.

The CFC charge amount is apportioned by reference to the CFC charge and the proportion of the shareholding being disposed of. The formula for calculating the amount allowable as a deduction against the consideration for the disposal is as follows:

A x (B/C) where –

- A is equal to the CFC charge relating to the CFC,
- B is equal to the number of shares/securities in the CFC being disposed of by the disposing company, and
- C is equal to the total number of shares/securities held by the disposing company in the CFC immediately before the disposal.

This formula has been applied below to sets of circumstances corresponding to examples 2 and 3.

Example 2 (Figure 23)

For Example 2, let's assume that X owns the entirety of the 1,000 ordinary shares in Y. The CFC charge, relating to Y, that was assessed upon Z is €200,000. Applying the formula of A x (B/C) means that X can deduct €200,000 from the measure of the chargeable gain on disposal of the shares in Y. This is calculated as follows: €200,000 x (1,000 shares being sold/1,000 entirety of the shares in Y).

Example 3 (Figure 24)

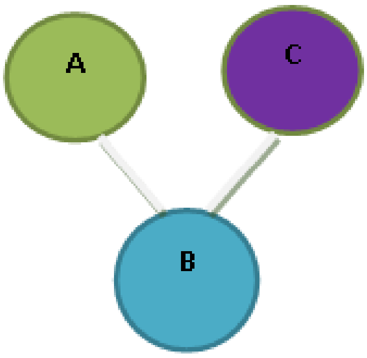
For Example 3, let's assume that a CFC charge of €100,000 was assessed on each of X and Z based on their respective performance 50:50 of the SPFs so that the total CFC charge referable to Y was €200,000. X is now selling the entirety of the shares in Y.

X's chargeable gain on the disposal of the Y shares is reduced by the total combined amount of the CFC charge of €200,000 which is attributable to Y and which was assessed on X and Z as chargeable companies. This is calculated based on the formula as follows:

A x (B/C) which is (€100,000 + €100,000) x (1,000 Y shares being sold/1,000 total Y shares).

9.4 More than one disposing company

Example 4



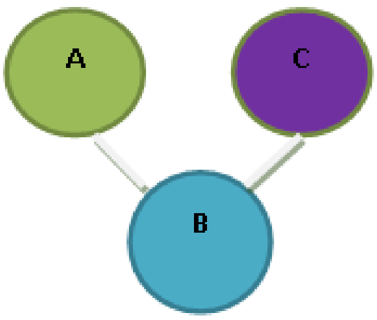
A owns 90% of B. C owns 10% of B. A and C each perform 50% of the SPFs.

A is both a disposing and a chargeable company.

C is also a disposing and a chargeable company.

Figure 25: Formula where more than one disposing company - see Example 4 for explanation

Example 5



A owns 90% of B. C owns 10% of B. C performs 100% of the SPFs.

A is a disposing company.

C is a disposing company and the chargeable company.

Figure 26: Formula where more than one disposing company - see Example 5 for explanation

Where more than one company is a disposing company as above, an amount calculated in accordance with the following formula shall be allowed as a deduction against the consideration for the disposal –

D x (E/F) where

- D is equal to the CFC charge relating to the CFC,
- E is equal to the number of share/securities in the CFC being disposed of by the disposing company, and

- F is equal to the total number of share/securities in the CFC.

Example 4 (Figure 25)

Taking the circumstances set out at example 4, let's assume that B's share capital comprises 1,000 ordinary shares in issue. 900 shares are held by A and 100 are held by C. Let us also assume that both A and C were assessed to a CFC charge referable to SPFs performed relating to B of €100,000 each, being a combined CFC charge relating to B of €200,000.

B is sold for €1,000,000. The base cost in the shares is €600,000 (split 90%/10% between A and C). A receives 90% of the sales consideration (€900,000) and C receives 10% of the sales consideration (€100,000).

The formula works to adjust the chargeable gain realised by A and C on the sale of B as follows:

Disposal by A: apply the formula above: D x (E/F)

€200,000, as the combined CFC charge related to B x 900/1,000 = €180,000

Sales consideration, 900 shares		900,000
Deduct CFC charge		(180,000)
Deduct base cost of shares		(540,000)
Chargeable gain		180,000

Disposal by C: apply the formula above: D x (E/F)

€200,000, being the combined CFC charge related to B x 100/1,000 = €20,000

Sales consideration, 100 shares		100,000
Deduct CFC charge		(20,000)
Deduct base cost of shares		(60,000)
Chargeable gain		20,000

Example 5 (Figure 26)

Taking the above structure at example 5, let's assume that B's share capital comprises 1,000 ordinary shares in issue. 900 shares are held by A and 100 are held by B. Let's also assume that C was assessed to tax on a CFC charge referable to SPFs performed which related to B of €200,000.

B is sold for €1,000,000. The base cost of the shares is €600,000 (to be split 90% and 10% between A and B respectively). A receives 90% of the sales consideration (€900,000) and C receives 10% of the sales consideration (€100,000).

The formula works to adjust the chargeable gain realised by A and B on the sale of C as follows:

Disposal by A: apply the formula above: D x (E/F)

€200,000 (i.e. the CFC charge relating to B which was assessable on C) x 900/1,000 = €180,000

Sales consideration for 900 shares		900,000
Deduct CFC charge		(180,000)
Deduct base cost of shares		(540,000)
Chargeable gain		**180,000**

Disposal by C: apply the formula above: D x (E/F)

€200,000 (i.e. the CFC charge related to B) x 100/1,000 = €20,000

Sales consideration for 100 shares		100,000
Deduct CFC charge		(20,000)
Deduct base cost of shares		(60,000)
Chargeable gain		**20,000**

9.5 Double deductions

To avoid a double deduction being taken, where before any disposal is made, relief has already been granted in accordance with section 835X before that disposal, any relief available in accordance with this section shall be proportionately reduced by an equivalent amount.

The CFC charge referred to as ‘A’ and ‘D’ in the formulae shall be proportionately reduced by any CFC charge amount that relates to a distribution, made by the CFC, where that distribution formed part of the chargeable income that was originally subject to a CFC charge and where relief under section 835X was available.

9.6 FIFO - ‘first in, first out’

The ‘first in, first out’ principle applies so that shares/or securities bought earlier shall be deemed to have been disposed of before shares acquired at a later time.

10 The Effective Tax Rate test [section 835T]

Finance Act 2020 inserted section 835YA into Part 35B TCA 1997 and provides that the effective tax rate ('ETR') test will not apply in certain circumstances – see section 11 of this manual for further details.

10.1 Overview

The ETR test operates to determine whether profits have been diverted to a low-tax or no-tax jurisdiction. A comparison is required of the tax, which includes foreign qualified domestic top-up tax ('foreign QDTT'), that is paid, payable or borne by the CFC in the CFC's foreign jurisdiction of residence and the tax, which also includes QDTT (QDTT takes its meaning from section 111A(1) TCA and is explained in Revenue's Pillar Two guidance), it would have paid in Ireland had the CFC been resident in Ireland.

Profits may come within the scope of the CFC charge where the corporate tax, including any tax on chargeable gains, together with any foreign QDTT, paid by the CFC is less than half the tax that would have been paid had the income been taxed on the basis that the CFC was resident in the State[19] and located in the State for the purposes of the QDTT.

The ETR test is a highly complex undertaking as it requires a re-calculation of the profits of the foreign company under Irish rules (the 'corresponding chargeable profits in the State') and identification of any foreign QDTT payable or borne by the CFC, and a calculation of a hypothetical Irish tax liability that would have been payable on those hypothetical profits had the CFC been Irish resident and located in Ireland (the 'corresponding corporation tax in the State' and the 'corresponding qualified domestic top-up tax' ('corresponding QDTT')).

In recognition of the significant administrative burden imposed by this test, this provision, which originally formed part of the definition of a CFC under the ATAD, has been repositioned as an exemption of last resort. This will allow companies to consider all the other elements giving rise to a CFC charge, and the other potential exemptions that may be available, before undertaking the ETR test.

[19] Profits and gains are included when determining the ETR. The CFC charge however will only arise on undistributed income which derives from the accounting profits and the accounting profits exclude chargeable gains.

10.2 Amount of foreign tax and foreign QDTT

10.2.1 Overview

10.2.1.1 Amount of foreign tax

There are rules for determining the ‘amount of foreign tax’ which is paid or borne by a CFC in its jurisdiction of residence for the purposes of calculating the ETR test. This is done to ensure that the amount of foreign tax paid by the CFC is compared with the corresponding corporation tax in the State on a ‘like with like’ basis. The rules are set out under section 835N. Adjustments to the treatment of income and expenditure will be required when computing the amount of foreign tax where inconsistencies arise between how they are treated in the foreign jurisdiction in calculating the foreign chargeable profits and how they would have been treated in the State.

This could arise, for example, where a stream of income that is taken into account in the CFC jurisdiction would not normally be taken into account in the State or where an amount of expenditure that is typically allowed in calculating chargeable profits in the State is not allowed in the jurisdiction of the CFC.

To avoid a distorted comparison, Irish tax rules are to be followed in calculating the amount of foreign tax so that when this amount is compared against the corresponding chargeable corporation tax both sums will have been calculated on a similar basis i.e. in accordance with Irish tax principles.

10.2.1.2 Foreign QDTT

Any foreign QDTT payable or borne by the CFC, which is a QDTT arising under the laws of a territory other than the State, in respect of the accounting period may also be taken into account. The word ‘payable’ covers foreign QDTT that is due but has not yet been paid because the payment deadlines may fall after the Irish corporation tax deadline.

10.2.1.3 Foreign tax and foreign QDTT repaid

Any foreign tax and foreign QDTT that has been repaid or will be repaid to the CFC (or any other person where such a claim is made) should not be taken into account in calculating the amount of foreign tax and foreign QDTT paid or borne by the CFC in its jurisdiction of residence.

Any foreign QDTT that may be payable but is not ultimately paid or borne by the CFC should not be taken into account.

10.2.2 Foreign chargeable profits

For the purposes of calculating the amount of foreign tax, the foreign chargeable profits, as defined under section 835I, include:

- the CFC's profits as determined for tax purposes under the laws of the CFC's jurisdiction of residence; or
- where the laws do not require profits to be determined for tax purposes, the profits of the CFC as calculated in accordance with the generally accepted account practice applicable in the CFC's jurisdiction of residence.

(The 'amount of foreign tax' is clarified at 10.2.5 and does not include foreign QDTT which is identified separately and aggregated with the amount of foreign tax for the purposes of the ETR test.)

10.2.3 Differing treatment of income

Income that is taken into account in calculating the CFC's foreign chargeable profits but would not be taken into account in determining the corresponding chargeable profits for Irish tax purposes should be excluded when determining the amount of foreign tax paid or borne by the CFC for an accounting period. Excluding the income in determining the foreign tax paid ensures that the amounts of foreign tax and Irish tax being compared arise on an equivalent basis.

10.2.4 Differing treatment of expenditure

Likewise, expenditure of the CFC that is not normally taken into account in calculating its foreign chargeable profits, should be taken into account where it would be taken into account in calculating the corresponding chargeable profits in the State. Including the expenditure as a deduction when calculating the amount of foreign tax where a deduction would typically be taken in calculating the Irish tax ensures, as far as possible, that the amounts of foreign and Irish tax being compared are calculated on an equivalent basis.

10.2.5 'Amount of foreign tax'

The definition of 'amount of foreign tax', set out under section 835I, means the aggregate of any foreign tax paid or borne by a CFC in respect of its profits for the accounting period.

In this context, 'foreign' tax -

- includes tax paid or borne by the CFC in the State. This instance could arise, for example, where a CFC has Irish sourced rental income that is subject to tax in Ireland; and
- means tax that pertains to the relevant accounting period. Tax paid for the relevant accounting period of the CFC can include payments made on account before the accounting period of the CFC commences, tax paid during the accounting period and tax payments made after the period e.g. final tax payments.

It does not include any foreign QDTT which is identified separately and aggregated with the amount of foreign tax (please see 10.2.7 below) for the purposes of the ETR test.

10.2.6 CFC tax paid by group member

Where a CFC is a member of a group of companies that is treated as a single accountable person in its jurisdiction, another group company may be established as the group remitter. Tax may be paid by this group remitter on profits which include chargeable profits of the CFC.

The CFC rules provide that where an amount of foreign tax, that is the tax paid or borne by the CFC in respect of its profits, is actually paid by another company on the aggregate profits of the CFC and one or more other companies, for example in a group situation, the amount of tax, paid by the group tax remitter on the aggregate profits, shall be apportioned between the consolidated companies on a just and reasonable basis in order to calculate the amount of foreign tax, relevant to the CFC.

10.2.7 Foreign QDTT

The foreign QDTT that is payable or borne by the CFC that may be taken into account in determining the amount of tax paid or borne by the CFC includes cases where the foreign QDTT is payable by another party on behalf of the CFC in accordance with the Pillar Two rules. Please see Revenue's TDM on Pillar Two for guidance.

Where the foreign QDTT is payable by another entity on behalf of the CFC and other entities, the amount of foreign QDTT that may be taken into account should be apportioned to the CFC on a just and reasonable basis in order to calculate the foreign QDTT attributable to the CFC.

The term 'payable' is used in the context of QDTT because the payment deadline in respect of an accounting period will fall later than the Irish corporation tax deadline.

10.3 Corresponding chargeable profits in the State [section 835O]

10.3.1 Context

Under the ETR test, a chargeable company will be exempt from a CFC charge where the tax the CFC pays in its jurisdiction is greater than the difference between it and the tax it would have paid in the State. This section of the manual sets out the rules relevant to determining the corresponding chargeable profits in the State i.e. the hypothetical Irish chargeable profits were the CFC's profits or gains chargeable to corporation tax or capital gains tax in the State. The simple example below explains the context in which the corresponding chargeable profits in the State are calculated.

10.3.2 Example

IreCo Ltd has a CFC. All relevant conditions are met and a CFC charge has arisen to IreCo Ltd.

The CFC would have paid €55,000 tax in its jurisdiction of residence. For the purposes of calculating the corresponding chargeable profits we assume that the CFC was resident in the State. The corresponding corporation tax in the State is calculated and amounts to, say, €100,000. The difference between the two amounts is €45,000. As the €55,000 tax that the CFC paid in its jurisdiction is higher than the difference of €45,000, the ETR exemption applies and no CFC charge will arise to IreCo Ltd.

If, however, the tax paid by the CFC was €45,000 in its jurisdiction of residence and €100,000 in the State then as the difference would be €55,000, the test would not be met and the exemption could not apply. A CFC charge would, therefore, potentially arise to IreCo Ltd.

10.3.3 Calculating the corresponding chargeable profits in the State

As can be seen in the above example, before the taxpayer can calculate the corresponding corporate tax in the State (which is separate to corresponding QDTT, please see 10.5), the corresponding chargeable profits in the State, upon which the tax is charged, must align as closely as possible with the chargeable profits and gains arising in the CFC's jurisdiction of residence.

There are assumptions that must be made and rules that apply in determining the corresponding chargeable profits in the State of a CFC. The assumptions set out below allow for Irish tax principles to be applied as fully as possible when determining the corresponding chargeable profits.

10.3.4 Profits and gains

The 'corresponding chargeable profits in the State' means the profits or gains of a CFC that would be the CFC's profits or gains for corporation or capital gains tax purposes for an accounting period if the assumptions outlined below applied to that company.

Chargeable gains can be included so that, in determining the effective tax rate, 'like' is compared with 'like' as far as possible. If the tax paid by the CFC on its profits included gains then the equivalent should be included when determining the corresponding chargeable profits in the State.

10.3.5 Assumptions

To calculate the corresponding chargeable profits in the State, assumptions should be made as follows:

- that the CFC is resident in the State during the accounting period,
- that the company has been resident in the State since its first accounting period,

- that the CFC will continue to be resident in the State in subsequent accounting periods (unless it ceases to be regarded as a CFC),
- that, if the company was resident in the State when it wasn't a CFC, that there is a break in residence between that accounting period where it was resident in the State and was not a CFC, and its first accounting period as a CFC,
- that the company is within the charge to corporation tax,
- that the accounting periods of the company are accounting periods for corporation tax purposes,
- that there is no change in the place or places at which the company carries on its activities,
- that the company is not a close company,
- that the company has made any necessary election or claim for the maximum amount of any relevant allowance, credit, deduction, relief or repayment allowable where necessary,
- that the company is not a member of a group or consortium,
- that the company is not entitled to double tax relief under the laws of its territory of residence.

The 'first accounting period' of the CFC means the accounting period in which the CFC was first regarded as a CFC.

Corporation tax arising on the profits of a trade of the CFC, carried on in the State through a branch or agency, is excluded[20]. This is excluded as it is already within the charge to Irish tax.

10.3.6 Notes on the assumptions

10.3.6.1 The assumptions that the CFC is resident in the State, that the residence is continuous and that the CFC will continue to be resident in the State in subsequent accounting periods ensures that the company is deemed to be within the charge to tax in Ireland.

A consequence of the assumption of continuous residence is that the carrying-forward of any applicable

[20] It is worth noting that a non-resident company performing relevant Irish activities (Irish SPFs) through a branch in Ireland is potentially a chargeable company and falls within the scope of the CFC charge. Please see 4.1 and 4.4.4 for further details.

losses or reliefs is safeguarded. It provides for continuity of treatment for reliefs and the making of claims/elections within the required time etc.

10.3.6.2 The assumptions that the company is within the charge to Irish corporation tax and that accounting periods are accounting periods for corporation tax are self-explanatory – these assumptions enable the corresponding chargeable profits to be calculated and ensure the corresponding corporation tax may be determined.

10.3.6.3 Group relief and related provision are excluded for the purpose of computing the foreign company's chargeable profits. However, aside from this, the full range of allowances and reliefs should be available under normal rules.

10.3.6.4 The assumption that there is no change in the place or places at which the company carries on its activities means that, in computing an Irish tax measure of the company's profits, the foreign company will be treated as continuing to undertake its trading or business activities outside the State i.e. it is treated as a Case III trade. The principles applicable to the measurement of profits from a foreign trade should be applied in measuring the corresponding Irish income.

Another consequence of this assumption is that for the purpose of loss relief, section 396(4) applies, meaning that relief for losses by way of carry-back and same period set-off against other income will not be available. Therefore, relief for losses is only available by way of carry-forward for set-off against future profits of the same trade.

It is worth noting here that under section 835P the 25% rate which applies to Case III trades is disapplied when calculating the tax arising on income from the trade or business activity carried out in the CFC's country of residence. That particular activity will be taxed as if it were carried out in the State and will be taxed at the tax rate appropriate to the activity i.e. trading income rate or passive income rate.

For example, where a CFC is resident in X country and carries on a trading activity there, income from the trade carried on in X will be taxed at the standard rate of 12.5%. Where a CFC is resident in X country and carries on a trading activity in Y country, income from the trade carried out in Y will be treated as a Case III trade in calculating the corresponding chargeable profits. This is dealt with further at 10.4.

10.3.6.5 It is assumed that that the company is not a close company. Therefore, for example, the cost of benefits provided by the foreign company to a participator will not be treated as a distribution etc.

10.3.6.6 There is an assumption that allows the company to assume it has made any claims or elections that would have been available under the TCA for the maximum amount available under the applicable law and within any applicable time limit.

10.3.6.7 There is an assumption that no double tax relief applies as this would distort the tax figure the CFC had paid or borne. (Credit for double tax relief is permitted in respect of the CFC charge arising and is dealt with elsewhere in the manual at 4.11)

In computing the corresponding chargeable profits, the computation should adopt the same fact pattern that was adopted in computing the foreign chargeable profits. For example, where capital allowances, in respect of an asset, have been claimed in total in previous years, there would be no requirement to claim capital allowances on the asset in calculating the corresponding chargeable profits. However, where capital allowances are being claimed in respect of an asset, the capital allowances should be claimed in the hypothetical Irish computation.

Please see section 10.6.5 for examples.

10.4 Corresponding corporation tax in the State [section 835P]

10.4.1 Overview

This section sets out the rules regarding the applicable tax rates to the corresponding chargeable profits in the State. In general, the treatment is such that whatever rate would have applied had the CFC been resident in the State will apply to the income calculated in accordance with the corresponding chargeable profits rules.

The corresponding corporation tax in the State is the sum of:

- the corporation tax that would be charged at the trading rate on profits that would be considered to fall under Schedule D, Case I or II;
- the corporation tax that would be charged at the passive income tax rate on profits that would be considered to fall under Schedule D, Case III, IV or V; and,
- the capital gains tax rate which would be charged on that part of the corresponding chargeable profits in the State that comprise chargeable gains.

The assumption outlined at 10.3.5 and 10.3.6, in calculating the corresponding chargeable profits, that there is no change in the place or places at which the company carries on its activities is dis-applied in determining what Case under Schedule D would apply.

An assumption is to be made that the activities carried on by the CFC in its territory of residence were carried on in the State as otherwise the income would always be taxable as a foreign trade under Case III.

10.5 Corresponding qualified domestic top-up tax

The 'corresponding qualified domestic top-up tax' means an amount of QDTT, which takes its meaning from section 111(A)(1) TCA, that would be payable or borne by the CFC if the CFC was located in the State, and calculated in accordance with section 111D where section 111AAO did not apply. Please see Revenue's Pillar Two TDM 04A-01-02 for guidance.

10.6 Effective Tax Rate [section 835T]

10.6.1 Overview

As outlined at the beginning of this section, there is an exemption from the CFC charge where the tax paid by the CFC in its own jurisdiction is not less than half the corresponding corporation tax in the State i.e. the tax that would have been paid on the profits in the State had the CFC been resident here.

The CFC charge shall not apply to an accounting period of a CFC where the foreign tax paid by the CFC is equal to or greater than the difference between the corresponding Irish tax and the foreign tax.

10.6.2 Amount of foreign tax and foreign QDTT

As outlined previously (at 10.2), the amount of foreign tax means the amount of tax paid or borne by a CFC in respect of its profits for the accounting period and is determined in accordance with the requirements outlined earlier in this manual at 10.2. The amount of foreign tax can include any Irish tax paid on the profits of the CFC e.g. a CFC with Irish sourced rental income.

As outlined in more detail at 10.2, in certain circumstances, foreign QDTT may also be taken into account and can include cases where the foreign QDTT is paid by another party on behalf of the CFC.

10.6.3 Corresponding chargeable profits, corresponding corporation tax in the State and corresponding QDTT

The corresponding corporation tax in the State that arises on the corresponding chargeable profits in the State have been outlined earlier in the manual also at 10.4 and 10.3 respectively. If the tax paid by the CFC is less than the difference between the aggregate of the foreign tax and foreign QDTT and the aggregate of the corresponding corporation tax and corresponding QDTT (10.5), then the effective tax rate exemption does not apply.

10.6.4 Notes

10.6.4.1 As outlined at 10.3 the definition of the CFC's corresponding chargeable profits in the State includes capital gains where the chargeable profits upon which the CFC paid tax in its own jurisdiction included capital gains.

10.6.4.2 Foreign tax paid is tax that is paid or borne for the relevant accounting period of the CFC and can include tax not actually paid in accounting period, for example, payments on account, or taxes not physically paid but suffered by the CFC, for example, withholding taxes.

10.6.4.3 Taxpayers should adopt the accounting functional currency of the CFC when taking the pre-tax accounting profits of the CFC as the starting point for the measure of the taxable income of the CFC.

When computing chargeable gains under Irish principles, the measure of the chargeable gain realised by the CFC must be computed in euros, comparing the euro equivalent cost of the asset with the euro equivalent consideration on disposal of the asset.

10.6.4.4 When computing the Irish measure of income of the CFC, the taxpayer does not assume that the activities of the CFC are carried on in Ireland. This is to ensure that foreign trades of the CFC are afforded equivalent treatment as a Case III trade and that relief for losses under section 396(4) by way of carry-back and same period set-off against other income will not be available.

10.6.4.5 However, to ensure equivalent treatment, in applying the corresponding Irish corporation tax rate to CFC profits which have arisen from activities in the nature of a trade carried on in the jurisdiction of the CFC, the taxpayer can assume that the trade is carried on in Ireland and apply a 12.5% rate of tax to the Irish taxable measure of the profits.

10.6.5 Examples

Example 1

The basic example at 10.3.2 is repeated here to demonstrate in simple terms how the ETR test works.

IreCo Ltd has a CFC. All the necessary circumstances are in place and a CFC charge has arisen to IreCo Ltd. The CFC would have paid €55,000 in its jurisdiction of residence. For the purposes of calculating the corresponding chargeable profits we assume that the CFC was resident in the State.

The corresponding corporation tax and corresponding QDTT in the State is calculated and amounts to, say, €100,000. The difference between the two amounts is €45,000. As the €55,000 that the CFC paid in its jurisdiction is greater than the difference of €45,000, the ETR exemption applies and no CFC charge will arise to IreCo Ltd.

If, however, the tax paid by the CFC was €45,000 in its jurisdiction and €100,000 in the State then as the difference would be €55,0000, the test would not be met and the exemption could not apply. A CFC charge would continue to arise to IreCo Ltd.

Example 2

Background

An Irish resident company owns a wholly owned non-resident subsidiary which warehouses and manages distribution activities in its jurisdiction of residence.

The subsidiary is a CFC of an Irish controlling company. The CFC prepares its financial statements under local GAAP, which is broadly aligned with IFRS Accounting Standards. The CFC functional currency is pounds (£).

The CFC owns a warehouse which it uses to take delivery, store and despatch goods in the course of its business. The warehouse building does not qualify for industrial building allowances.

During the accounting period, the CFC relocated to a new warehouse location. It sold its old warehouse during the accounting period and realised a capital gain on the sale which was reflected in its profits for the accounting period. It is assumed in this example that the warehouse was purchased for £550,000 on 1 September 2000 and sold for £800,000 during the accounting period.

The CFC incurred expenditure on a new replacement warehouse of £1,000,000 which is depreciated for accounting purposes over the 20 years accounting life of the warehouse.

The company invested £400,000 in warehousing equipment 4 years ago. The company depreciates the equipment over 8 years for accounting purposes. Based on the writing down rate applicable to the plant and machinery, the company claims wear and tear allowances at a rate of 12.5% on this expenditure in computing the Irish corresponding measure of its profits.

Amount of foreign tax

In the example, the amount of foreign tax paid by the CFC on its profits includes tax paid on chargeable gains. It also includes an amount of preliminary tax paid before the commencement of the accounting period, a payment on account made during the period and a 'top-up' payment made after the end of the accounting period.

Corresponding chargeable profits in the State

The corresponding chargeable profits of the CFC are recomputed under Irish tax principles and based on the assumptions set out in 10.3 to establish whether the CFC meets the ETR test.

- The profits from the warehousing and distribution activities are considered to be profits arising in the course of the conduct of a trade.
- The principles applicable to the measurement of profits from a foreign trade have been applied in measuring the corresponding Irish income.
- The starting point for measuring the tax adjusted profits of the trade is the pre-tax accounting profits of the company in the functional currency of the company. All the adjustments to the measure of the trading profits of the company have been computed in functional

currency terms including the calculation of wear and tear allowances on the warehousing equipment.

- For ease of comparison, the effective tax rate related to the trading income of the company has been computed in pounds and compared with the Irish equivalent amount measured in pounds, using the appropriate Irish tax rate.
- Regard would be had as to whether all the allowances and reliefs would have been available had the CFC been resident in the State.

The ETR is calculated based on the following profit and loss account figures:

	£	£
Sales revenues		4,000,000
Less cost of sales		
Cost of goods sold	(3,500,000)	
Depreciation on warehouse plant and machinery	(50,000)	
Depreciation on warehouse	(50,000)	
		(3,600,000)
Gross profit		400,000
Sales and administrative expenses		
Salaries and employee costs	(200,000)	
Client entertainment	(20,000)	
Other S,G&A costs	(50,000)	
		(250,000)
		130,000
Other income/expenses		
Profit on sale of warehouse	250,000	
Legal costs related to sale of warehouse	(20,000)	
		230,000
Net profit/Profit before tax		360,000

Computation of corresponding tax in the State

Notes:

- In calculating the Irish measure of the capital gain on the disposal of the warehouse under Irish capital gains tax principles, the corresponding chargeable gain must be calculated in euro. This involves comparing the foreign currency cost of the asset and proceeds from the asset, converted into euro using the rate of exchange on the respective acquisition and disposal dates.

- It is assumed that the local capital gains tax on the gain from the sale of the warehouse was paid on the last date of the accounting period. To allow a comparison of the combined foreign tax paid on the CFC's income and capital gain with the Irish tax on the corresponding chargeable profits, the corresponding corporation tax in the State on the capital gain has been converted back to the functional currency of the CFC using the spot rate of exchange that applied on the date of payment of the foreign tax.

		£
Profit before tax		360,000
Add back		
Depreciation on warehouse building and equipment	100,000	
Client entertainment	20,000	
		120,000
Less		
Capital allowances on warehouse equipment		(50,000)
Profit on sale of warehouse, net of costs		(230,000)
Adjusted taxable income from warehousing trade		200,000
Corporation tax on adjusted profit at 12.5%	25,000	
Corporation tax on chargeable gain at 12.5%*	16,800	
Corresponding corporation tax in the State		41,800
Foreign tax paid		
Preliminary tax paid prior to start of period	12,000	
Payment on account during accounting period	10,000	
Top up payment paid post year end	40,000	
		62,000

	£		FX rate	€
***Gain on chargeable asset**				
Proceeds	800,000		0.87	920,000
Legal costs related to sale	(20,000)		0.87	(23,000)
Base cost	(550,000)		0.65	(846,000)
	230,000			
Euro measure of chargeable gain				51,000
Regressed gain on chargeable asset		51,000 x 33%		153,000

		12.5%	
Corporation tax on chargeable gain at 12.5%			19,125
Convert to £ at date of payment	16,600	0.87	

Effective Tax Rate test

The effective tax rate exemption applies if the tax paid by the CFC on its profits (which for this test includes capital gains) is at least half of the tax that would have been paid by the CFC if it were an Irish resident company. The foreign tax paid is £62,000. The corresponding corporation tax is £41,800 + £16,600 which amounts to £58,400. As the foreign tax paid is greater than the corresponding corporation tax in the State, the effective tax rate exemption applies and a CFC charge shall not apply.

Example 3

Background

This example demonstrates that the amount of foreign tax paid by the CFC can include Irish tax borne on the CFC's profits and tax deducted at source.

A non-resident, property rental company holds investment properties in the resident jurisdiction and in Ireland. The company is a CFC of a family-owned Irish controlling company. Under local accounting standards, the property investments are held at their market value (with valuation movements reflected in a revaluation reserve in equity). No depreciation on the property is recognised in the income statement.

The CFC has incurred interest expense on loans to acquire the foreign investment properties on which interest is paid on a quarterly basis with no accrued interest at year end. The Irish property investment was funded from the CFC's equity resources.

The Irish rental property is managed by an Irish estate agent. After the deduction of management costs, the net rent is paid to the company. The estate agent collects and applies Irish income tax at 20% on the net rents paid to the CFC. In its resident jurisdiction, the CFC pays corporate income tax on its profits after claiming credit relief for Irish income tax borne by the CFC on the Irish rental profits.

The effective tax rate is calculated as follows:	**Krone**	**Krone**
Rental income		
Rent, net of estate agent expense on Irish property	2,000,000	
Rent on non-Irish properties	1,800,000	
		3,800,000
Interest expense		
Interest expense related to non-Irish properties		(1,200,000)
Profits chargeable to corporation tax		2,600,000
Corresponding corporation tax at 25%		650,000
Foreign tax paid		
Foreign corporate income tax paid relating to the period after credit relief for Irish income tax	360,000	
Irish income tax paid on Irish rental income at 20%	240,000	
		600,000

Amount of foreign tax

A non-resident company is charged to Irish income tax on Irish rental profits. The income tax deducted by the Irish rental agent and borne by the CFC is taken into account in comparing the amount of foreign tax paid on its chargeable profits with the corresponding Irish corporation tax.

Corresponding chargeable profits in the State

One of the assumptions made in computing the company's corresponding chargeable profits is that is it not a close company. Accordingly, no close company surcharge applies to the net estate income of the company.

Corresponding corporation tax in the State

In calculating the corresponding chargeable profits in the State, it is assumed that the company is resident in the State. The property rental income is therefore chargeable to corporation tax at the 25% rate.

Effective Tax Rate

As the foreign tax paid (Kr 600,000) is greater than half of the tax that would have been paid by the CFC if it were an Irish resident company (Kr 650,000), the effective tax rate exemption applies and a CFC charge shall not apply.

11 Non-cooperative jurisdictions [section 835YA]

11.1 Modified application of sections 835T, 835U and 835V

Finance Act 2020 inserted a new section 835YA into Part 35B which took effect in respect of accounting periods of CFCs beginning on or after 1 January 2021.

Section 835YA provides for Irish defensive measures by modifying the CFC rules in terms of their application to jurisdictions listed in Annex I of the EU Code of Conduct list of non-cooperative jurisdictions for tax purposes (the list[21]). Defensive measures, applied to jurisdictions that are on the list, are intended to encourage these jurisdictions to take measures to ensure their removal from the list. Section 835YA achieves this through the disapplication of certain exemptions from a CFC charge where the relevant CFC is resident in a listed territory for an accounting period.

It disapplies section 835T (the Effective Tax Rate ('ETR') exemption), section 835U (the Low Profit Margin exemption) and section 835V (the Low Accounting Profit exemption) so that an Irish resident company with a CFC resident in a listed territory may not avail of the aforementioned exemptions.

This should strengthen the application of the Irish CFC rules to Irish resident companies with a CFC resident in a listed territory by imposing stricter conditions which may potentially give rise to a CFC charge which would not otherwise exist.

11.2 What is the EU list of non-cooperative jurisdictions?

The EU list of non-cooperative jurisdictions for tax purposes is a common list, as agreed by all Member States, of non-EU jurisdictions that do not live up to tax good governance standards. The list is part of the EU's work to tackle external risks of tax abuse and bring about positive behavioural change in third countries. The list is devised and agreed by all Member States by applying established criteria, based on international standards, to an assessment of the tax systems of selected third countries. The criteria considered for including a jurisdiction on the list are based on recognised international tax standards and the focus is on:

[21] This list is reviewed periodically and updated as necessary. Please see 11.2 and 11.3 for further details.

- transparency
- fair taxation
- the implementation of the OECD Base Erosion and Profit Shifting (BEPS) minimum standards.

Members States committed to implement defensive measures on a legislative basis targeting listed jurisdictions. The list has two elements:

- Annex I is a list of non-cooperative jurisdictions for tax purposes; and
- Annex II is a list of jurisdictions who have given a commitment to address the issues with their tax system.

The list is an evolving process; where countries make changes, they will be removed from the list. Similarly, where countries have avoided being listed by making commitments, they are included on Annex II of the list and will be added to Annex I of the list should they fail to meet these commitments within the agreed timeframe.

11.3 Jurisdictions placed on the list

11.3.1 2020 List[22]

The list is reviewed periodically and may be updated at these reviews. The list, published in October 2020, applies to CFCs resident in non-cooperative jurisdictions with accounting periods beginning during the period from 1 January 2021 – 31 December 2021. That list comprises 12 jurisdictions -

> American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu, Anguilla, Barbados and Seychelles.

11.3.2 2021 List[23]

During 2021, three jurisdictions were removed from the 2020 list – Anguilla, Barbados and Seychelles. The list, as updated in October 2021, has effect for CFCs resident in non-cooperative jurisdictions, with accounting periods beginning during the period from 1 January 2022 – 31 December 2022 and comprises 9 jurisdictions, namely -

[22] OJ No. C331, 7.10.2020, p. 3
[23] OJ No. C413I, 12.10.2021, p.1

American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu.

11.3.3 2022 List[24]

During 2022, three jurisdictions were added to the list – Anguilla, the Bahamas and Turks and Caicos Islands. No jurisdictions were removed. The list, as updated in October 2022, takes effect for CFCs resident in non-cooperative jurisdictions, with accounting periods beginning during the period from 1 January 2023 to 31 December 2023 and comprises 12 jurisdictions, namely -

American Samoa, Anguilla, Fiji, Guam, Palau, Panama, Samoa, The Bahamas, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands and Vanuatu.

11.3.4 2023 List[25]

The list, as updated in October 2023, reflects the addition of four jurisdictions – Antigua and Barbuda, Belize, Russia and Seychelles. This list takes effect for CFCs resident in non-cooperative jurisdictions, with accounting periods beginning during the period from 1 January 2024 to 31 December 2024 and comprises 16 jurisdictions, namely -

American Samoa, Anguilla, Antigua and Barbuda, Belize, Fiji, Guam, Palau, Panama, Russia, Samoa, Seychelles, the Bahamas, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands and Vanuatu.

11.3.5 2024 List[26]

The list, as updated in October 2024, reflects the removal of five jurisdictions from the list during 2024 – Antigua and Barbuda, Belize, the Bahamas, Seychelles and Turks and Caicos Islands. This list takes effect for CFCs resident in non-cooperative jurisdictions, with accounting periods beginning on or after 1 January 2025 and comprises 11 jurisdictions, namely -

[24] OJ No. C391, 12.10.2022, p.2
[25] OJ C, 2023/437, 23.10.2023
[26] OJ C, 2024/6322 18.10.2024

American Samoa, Anguilla, Fiji, Guam, Palau, Panama, Russia, Samoa, Trinidad and Tobago, US Virgin Islands and Vanuatu.

11.4 Jurisdiction on the list only for part of an accounting period

Whether defensive measures apply to a jurisdiction for a following calendar year depends on whether the jurisdiction is on the list during the previous year.

For example, defensive measures will continue to apply to CFCs, with accounting periods beginning during the period 1 January 2021 – 31 December 2021, that are resident in any of the three jurisdictions removed from the list in 2021. However, the defensive measures cease to apply to CFCs resident in the jurisdictions that were removed from the 2021 list in respect of accounting periods beginning during the period from 1 January 2022 - 31 December 2022.

Equally, defensive measures will only apply to CFCs, resident in jurisdictions that were added to the list in 2022, for accounting periods commencing on or after 1 January 2023. The defensive measures will not apply, for accounting periods commencing during the period 1 January 2022 – 31 December 2022, to the CFCs resident in those jurisdictions added to the 2022 list.

Anguilla, for example, was on the 2020 list, removed from the 2021 list and then added again to the 2022 list. Defensive measures apply for CFCs resident in Anguilla, in respect of accounting periods beginning during the period 1 January 2021 to 31 December 2021 and accounting periods beginning from 1 January 2023. Defensive measures will not apply in respect of accounting periods beginning during the period from 1 January 2022 to 31 December 2022.

11.5 Reporting Requirements

A reporting requirement was added to the Form CT1 for accounting periods ending in 2019 and onwards. Companies must disclose, on their Form CT1, transactions that occurred with persons in a jurisdiction on the list. This is for transactions involving:

- interest
- royalties
- dividends

Please see Revenue's Tax and Duty Manual "Completion of Corporation Tax Returns Form CT1 2021 - Part 38-02-01F" for further detail.