Notes for Guidance - Taxes Consolidation Act 1997

Finance Act 2023 edition

Part 45
Charging and Assessing of Non-Residents

December 2023

Revenue
Cáin agus Custaim na hÉireann
Irish Tax and Customs

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PART 45
CHARGING AND ASSESSING OF NON-RESIDENTS

CHAPTER 1
Income tax and corporation tax

Overview

This Chapter provides for the charging and assessing to tax of non-residents (***sections 1034*** to ***1041***). It also makes provision in relation to the application of personal allowances, etc to non-residents (***section 1032***) and entitlement to tax credits in respect of distributions (***section 1033***).

1032 Restrictions on certain reliefs

Summary

With some exceptions personal allowances, etc are not available to non-residents. In the case of these exceptions the ratio of the individual's Irish sourced income to total income determines the amount of allowances available against Irish tax. In the case of an EU resident or a UK resident if this ratio exceeds 75%, the full amount of the allowances are available.

Details

In general, non-resident individuals are not entitled to any of the normal personal allowances, deductions and reliefs (as set out in the table to section 458). ***(1)***

In certain circumstances a portion of the allowances, etc is available. The portion is determined by the ratio of Irish sourced income to total income of the individual. The circumstances are where the individual is — ***(2)***

- an Irish citizen,
- non-resident for health reasons (this includes the ill health of family members),
- an EU citizen or a UK citizen or exempt under section 10 of the Aliens Act, 1935, or
- a British citizen before 5 April 1935, etc.

In the case of an EU resident or a UK resident all personal allowances, reliefs, etc are available if the Irish sourced income is 75% or more of the total income of the individual. ***(3)***

1033 Entitlement to tax credit in respect of distributions

This section was repealed as respects distributions made on or after 6 April, 1999.

1034 Assessment

A non-resident person is assessable and chargeable to income tax in the name of any representative of any kind located in the State. The extent of any liability is the same as if the person were actually resident here.

In the case of a partnership, the precedent partner is deemed to be the agent of the non-resident partner. If there is no precedent partner, any other representative is deemed to be the agent of the non-resident partner.

Special provisions contained in ***section 1041*** apply in the case of rents payable to non-residents.

1035 Profits from agencies, etc

Where a non-resident person earns profits or gains in the State from any agency, partnership, etc that person is assessable and chargeable to income tax in the name of that agent, factor, etc.

1035A Relieving provisions to *section 1035*

Summary

The purpose of this section is to remove a potential liability to Irish tax that might arise to a non-resident who avails of the services of an investment/asset manager who is resident the State. Under ***section 1035***, where a non-resident person earns profits or gains in the State from any agent, partnership, etc. in the State, that person is assessable to income tax under ***section 1035*** in the name of that agent, factor, etc. However, ***section 1035A*** removes such liability in the case of a non-resident who avails of the services of an independent authorised agent who is an investment or asset manager resident in the State.

Details

(1) Definitions for the purposes of ***section 1035A*** are "authorised agent"; "authorised member firm"; "competent authority"; "financial trade"; "investment business firm"; "relevant Directives"; "relevant UCITS"; "AIF"; "AIFM"; "branch or agency"; "EEA state"; "relevant AIFM Directives" and "investment business services".

An authorised agent is essentially a person authorised under:

1. the Investment Intermediaries Act 1995,
2. Regulation 8 of the European Union (Markets in Financial Instruments) Regulations 2017 (S.I. No. 375 of 2017) or,
3. an authorisation which corresponds to 1 or 2 above which has been given by a competent authority in a Member State for the purpose of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 and which provides an investment service through a branch or agency in Ireland pursuant to the European Union (Markets in Financial Instruments) Regulations 2017.

An authorised agent can also be a credit institution within the EU.

The definition of "authorised agent" was expanded with effect from 3 April 2010 to ensure that a management company envisaged by Directive 2009/65/EC (UCITS IV) can benefit from the relief, under this section, from the charge to tax under ***section 1035***. The definition covers a management company of a type envisaged by the UCITS IV Directive as follows:

- a company authorised under Irish regulations implementing UCITS IV, and
- a company that carries on a trade that consists of or includes the management of "relevant UCITS" (which is separately defined – see below), whether they are in the form of unit trusts, common contractual funds or investment companies.

The definition of "authorised agent" was further expanded with effect from 1 January 2016 to include Alternative Investment Fund Managers (AIFMs) which are:

- Irish authorised AIFMs, or
- an Irish branch or agency of an AIFM authorised under the laws of an EEA state.

For an authorised agent to be independent in relation to a non-resident person carrying on a financial trade in the State through the agent, the agent — ***(2)(a)& (b)***

- must act in the ordinary course of the agent's business and in an independent capacity; in other words, the commercial relationship between the agent and the non-resident person must be as it would be between persons doing business at arm's length;
- must have a limited economic involvement in the trade of the non-resident; and
- must not otherwise act for the non-resident person.

The limit to the economic involvement that the agent can have in the trade of the non-resident requires that the aggregate amount of the profits or gains of the financial trade of the non-resident to which the agent and resident connected persons of the agent can have beneficial entitlement is limited to 20%. This limit can be breached if the Revenue Commissioners, or an officer nominated by them for that purpose, are satisfied that the breach is of a temporary nature only. Fees paid to the agent for services rendered to the non-resident, whether or not such fees are based on the profitability of the non-resident's trade, are not to be taken into account for this purpose. ***(2)(c), (4) & (5)***

A non-resident person carrying on a financial trade in the State solely through an authorised agent who satisfies the independence conditions is not liable to income tax in respect of that trade. This exemption, by virtue of ***section 1040***, also extends to corporation tax. ***(3)***

1036 Control over residents

Where a non-resident, being neither an Irish citizen nor an Irish company or a branch of such a person conducts business with an Irish resident person and the inspector is of the view that because of the close connection between the two, the profits of the Irish resident person are artificially reduced, the non-resident person is assessable and chargeable in the name of the Irish resident as if that person were an agent, etc of the non-resident person.

1037 Charge on percentage of turnover

Summary

This section enables an inspector or, on appeal, the Appeal Commissioners, to direct that an assessment be raised on a non-resident person based on a percentage of turnover done with a resident person. This may be done where in the opinion of the inspector the true amount of the profits of the non-resident person cannot be ascertained.

Details

Where it appears to an inspector or on appeal the Appeal Commissioner that the profits or gains of a non resident cannot be easily determined, the assessment can be raised on a percentage of the turnover of the business with the resident person and chargeable in that person's name. The resident person has obligations to deliver statements, etc to ensure that the assessment can be raised. ***(1)***

The level of this percentage is determined by the inspector, but this determination can be appealed to the Appeal Commissioners. ***(2)***

Where either the resident or non-resident person disagrees with the determination of the inspector or the Appeal Commissioners it is open to that person to require that the issue be referred to a referee or board of referees, appointed by the Minister for Finance, whose decision is final. ***(3)***

1038 Merchanting profit

Where a non-resident is assessable and chargeable in respect of profits or gains in the name of an Irish resident agent arising from the sale of goods manufactured outside the State, the resident person may apply to —

- the inspector, or
- on appeal, to the Appeal Commissioners,

to have the assessment amended.

This amendment is to reflect the fact that in normal circumstances the true profits of the non-resident would have had to be reduced to take account of a margin paid to a merchant or retailer if such an agent had acted on their behalf. The amount of this margin must be agreed by the inspector or on appeal with the Appeal Commissioners.

1039 Restrictions on chargeability

This section ensures that a non-resident is not chargeable to Irish tax in respect of profits earned through a general commission agent. In addition, in determining whether a non-resident is chargeable to income tax in the name of an Irish resident agent, no account is taken of transactions with other non-residents.

1040 Application of *sections 1034* to *1039* for purposes of corporation tax

The provisions of ***sections 1034*** to ***1039*** in respect of income tax chargeable on a non-resident person apply to corporation tax chargeable on a non-resident company.

1041 Rents payable to non-residents

This section applies to rental income and other lease income received by a non-resident in respect of property located in the State.

A person making payments directly to a non-resident landlord i.e., the tenant, is obliged to deduct tax at the standard rate in accordance with ***section 238*** from any gross payments and to provide certain information to Revenue. In effect, such payments are treated as annual payments and are subject to withholding tax at source at the standard rate in accordance with ***section 238.*** ***(1)***

The information that must be provided to Revenue includes— ***(1A)***

- the name and address of the non-resident person,
- the address of the property, including the Eircode,
- the unique identification number assigned to the property for the purposes of the Finance (Local Property Tax) Act 2012,
- the date the payment is made to the non-resident person,
- the gross amount of the payment, and
- the amount withheld from the payment and remitted to the Revenue Commissioners in accordance with section 238.

"Collection agents", (resident persons acting on behalf of the non-Irish resident person) are relieved of the obligation of being chargeable and assessable for the income of a non-resident landlord, if the collection agent deducts withholding tax from rental payments and remits that tax together with certain information relating to the payments. Where the collection agent does so, the tenant is not obliged to deduct and remit tax to Revenue. ***(1B)***

The information the collection agent must provide to Revenue includes— ***(1C)***

- the name, address and tax reference number of the non-resident landlord,
- the address of the property, including the Eircode,
- the unique identification number assigned to the property for the purposes of the Finance (Local Property Tax) Act 2012,
- the date the payment is made to the non-resident person,
- the gross amount of the payment, and
- the amount withheld from the payment and remitted to the Revenue Commissioners in accordance with section 238.

Expenses incurred by the non-resident in earning the above income can reduce the final tax liability. Relief in respect of excess tax paid, can be obtained by way of repayment or otherwise. ***(2)***

CHAPTER 2
Capital gains tax

Overview

This Chapter provides for a modification of the general rules relating to the timing of assessment to and charging of capital gains tax where the person chargeable is not resident or ordinarily resident in the State. The Chapter also provides for the application for capital gains tax purposes of certain income tax provisions in such circumstances.

1042 Charging and assessment of persons not resident or ordinarily resident: modification of general rules

This section provides that capital gains tax payable on a chargeable gain accruing to a person who is not resident or ordinarily resident in the State at the time of the disposal may be assessed and charged before the end of the year of assessment in which that gain accrues. It further provides that the tax so assessed and charged is payable 3 months from the date of disposal or 2 months after the making of an assessment, whichever is the later. ***(1)***

In a case in which an assessment is made in the year of assessment under this section, any allowable losses which accrued to the person up to the date of assessment may be deducted in computing the amount of capital gains tax payable. If losses occur in the year of assessment but after the date of assessment, ***section 31*** will apply in the normal way so as to permit review of the full year of assessment after the end of that year and allow a repayment of any tax overpaid. ***(2)***

1043 Application of *sections 1034* and *1035* for purposes of capital gains tax

By virtue of the application, with any necessary modifications, of ***sections 1034*** and ***1035*** for the purposes of capital gains tax, a non-resident person may be assessed and charged to capital gains tax in the name of any trustee, guardian, agent, receiver or

manager in the same manner as if the non-resident was a resident person, notwithstanding the fact that the trustee, guardian, etc may not be in receipt of the gains liable to tax. Similarly, a non-resident person is assessable and chargeable to capital gains tax in respect of chargeable gains arising, directly or indirectly, through or from any factorship, agency, receivership, branch or management and is assessable and chargeable in the name of the factor, agent, receiver, branch or manager.