

## What constitutes a trade?

### Part 02-02-06

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

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## Executive Summary

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

### 1. General

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

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

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

### 2. Guidance on trading issues

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

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

#### 2.1 Trading Presupposes Activity

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

## 2.2 Distinction between Trading and Investment

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

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

The case of **Noddy Subsidiary Rights Company Ltd v CIR 1966 [43 TC 458] (the Noddy case)** is often quoted as an authority in favour of the proposition that the mere ownership of an asset and receipt of royalties can be a trade. However, in that case there was evidence of a high degree of activity associated with trying to promote the brand, seeking out and evaluating licensees and of dealing with third parties.

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

The Noddy case concerned the exploitation by a company of a fictional character from a series of children's books. The company's income was derived from the granting of licences to use the pictorial representation of the character. These licences were granted to manufacturers of goods in return for the payment of royalties.

It was held in this case that it is generally possible for the granting of licences on royalty terms to be in the nature of a trade when the facts and circumstances supported such treatment.

**“...where a person owns an item of property and grants licences under it, those activities may or may not, according to the particular circumstances, amount to a trade... where you have this position, that a person owns an asset of any kind, whether physical or not, and grants licences under it, the activities which he carries on in connection with the grant of those licences may amount to a trade and then Case I of Schedule D applies. On the other hand, at the other end of the scale, the activities may amount to the mere holding of an investment, so that the receipt of income is in the nature of pure income profit...”**

Although the appellant:

- referred to the company’s objects clause (which empowered the company to carry on the business of exploiting and profiting from character) and
- put forward 16 arguments in support of the contention that the activity was trading in nature

no singular circumstance was identified as particularly determinative as to whether or not an activity is within the nature of a trade.

In reaching the conclusion that the activities amounted to a trade in this specific case, the following points were relevant:

- the objects clause in the memorandum of association
- the time spent by the representative in managing the Company’s affairs,
- the fact that the representative:
  - actively sought out customers,
  - exercised, when managing the licences, skill and labour of a continuous and variegated kind.

It was recognised that the company did not have a separate office or staff and this was the only respect in which the activities did not contain the common elements of a trade. However, this circumstance in itself was not enough to prevent the activities from amounting to a trade.

The activities of the company in the Noddy case provide an indication of the level of activities required to constitute the carrying on of a trade. It may be useful to consider the principles outlined in the Noddy case and their application to the facts in other cases being evaluated to determine whether the activities amount to trading or are in the nature of investments. Cases should be examined on their own particular facts and circumstances and consideration should also be given to other case law, and the Badges of Trade.

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

## 2.3 Group Structures

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

## 3. Advance opinions

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

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

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

Procedures set out in the Revenue Technical Service Guidelines, TDM [Part 37-00-00a](#) should be followed and the full details of the facts and circumstances should be set out by practitioners.

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

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

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

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

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

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

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

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

It should be noted that all opinions/confirmations issued by Revenue are subject to a maximum validity period of 5 years, or such shorter period as may have been specified by Revenue when providing the opinion/confirmation. Further information on Revenue Opinions/Confirmations is available in TDM [Part 37-00-41](#) on the Revenue website.

## Appendix A

### **Note on the “Badges of Trade”**

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

#### **1. The subject matter of the sale.**

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

#### **2. The length of period of ownership.**

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

#### **3. The frequency of similar transactions.**

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

#### **4. Supplementary work.**

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

#### **5. The circumstances that were responsible for the realisation.**

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

**6. Motive.**

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

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

## Appendix B

## Classification of Trading Activity

Case No.	Year	Details	Description of Activity	Case 1	Reason
114	Dec 2011	2 employees	Irish company entering into a loan facility agreement with a group company.	No	Not Case 1. The interest is being earned on one inter-group loan. The activities of the company are merely activities undertaken to manage the income flow from the loan facility. Other than the one inter-group loan the company is not engaged in the trade of lending. The interest income earned is correctly taxed under Schedule D, Case III.
115	Dec 2011	100 employees	Existing company that expanded its activities to include the treasury management operations for group companies.	Yes	Case 1 confirmed on the basis that the company has employees that have the relevant skills, expertise, experience and authority to carry out the treasury operation of the group companies.
116	Jan 2012	1 employee	Company established to exploit the Intellectual Property of an individual.	N/A	No opinion given as Intellectual Property is an asset the mere ownership of which yields an income in its own right. The company would have to show that it has undertaken a high degree of activity in exploiting the I.P. This was not a matter that can be agreed in advance.
117	Jan 2012	Existing company	Existing company that has restructured its activities resulting in transfer of all new Irish business to the UK. Servicing of Irish customers will continue to be carried out by Irish Company.	Yes	Case 1 confirmed on the basis that the company was already trading and will continue to trade until the contracts of current Irish customers expire.

<b>118</b>	Dec 2011	12 employees initially	Company established to handle non-US business of a group. Initially the co. will be responsible for growing international business of the group and for all non-US sales of the group.	Yes	Case 1 confirmed on the basis that the key management team of the company will have the skill, expertise and authority to carry on the relevant trading activities of the company.
<b>119</b>	Jan 2012	2 employees initially rising to 14	Company established to provide payroll payment solutions.	No	Not Case 1. The company had no physical presence in Ireland. The income derived by the company would not be considered trading income.
<b>120</b>	Feb 2012	Existing company	Existing company that intends to acquire inter group loans.	N/A	No advance opinion given.
<b>121</b>	Nov 2010	6 employees initially	Company established to provide treasury functions to group companies.	Yes	Case 1 confirmed on the basis that the company will actively enter into and conclude group financing transactions. The Irish directors have the necessary skills, qualifications, experience and authority to perform the day-to-day activities of the company.
<b>122</b>	Mar 2012	Existing company	Existing company that intends to make a loan to another group company.	No	Not Case 1. A single loan to a group company would not constitute a trading activity.
<b>123</b>	May 2012	Existing company	Provision of finance to a leasing company.	Yes	Case 1 confirmed on the basis that the company is involved in activities covered by Section 403(1)(d) TCA 1997.
<b>124</b>	May 2012	New company	Company established to carry out R & D and exploit the resulting IP by way of granting licences to use the IP.	Yes	Case 1 confirmed as co. will exploit IP by all possible means. A general manager, with relevant expertise and skill, has been recruited to seek out potential opportunities for exploitation of the IP product, licensing and development opportunities.

<b>125</b>	May 2012	4 employees	Company established to carry out R & D and exploit the resulting IP by way of granting licences to use the IP.	Yes	Case 1 confirmed. The co. will actively enter into and conclude group financing transactions. The Irish directors have necessary skills, qualifications, experience and authority to perform day-to-day activities of the company.
<b>126</b>	Jun 2012	Not stated	Company established to exploit group Intellectual Property.	Yes	Case 1 confirmed on the basis that the Board will actively manage and exploit the I.P. and the performance of licensees. The Board will also be actively involved in the seeking out of new licensees.
<b>127</b>	Jun 2011	Not stated	Company re-organisation.	N/A	No advance opinion given. Whether the new Irish resident company will be carrying on a trade cannot be determined until after the company re-organisation has taken place.
<b>128</b>	Jul 2012	30 employees initially	Co. established to manage European operations of a group. Initial activities will include sales, administration, marketing, training, & distribution services.	Yes	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry out the management of the European operations of the group.
<b>129</b>	Jul 2012	11 employees initially	Co. established to have responsibility for manufacture and sale of group products and to exploit the IP of both existing and newly generated IP.	Yes	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
<b>130</b>	Nov 2012	1 employee initially	Provision of operational services to third party franchisees.	N/A	No opinion given. The income generating activities of the company are carried out by other group companies.
<b>131</b>	Nov 2012	Not Stated	Group company established to carry out aircraft conversion, leasing and other aircraft management activities and services.	Yes	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.

<b>132</b>	Dec 2012	30 - 50 employees intended within 24 months	Company established to provide management and consultancy services to other group companies.	Yes	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
<b>133</b>	May 2012	1 employee initially rising to 5	Company established to provide treasury functions to group companies.	Yes	Case 1 confirmed as company will actively enter into and conclude group financing transactions. The staff have the necessary skills, qualifications, experience and authority to perform the day-to-day activities of company.
<b>134</b>	Feb 2013	25 employees initially rising to 100	Company established to provide services to other group companies including R&D, vendor management and purchasing support services.	Yes	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
<b>135</b>	Dec 2012	9 employees initially rising to 20 by the end of 2014	Co. established to develop and manage non-U.S. business operations of group, to include product development, customer service, technical service, and administrative and finance services.	Yes	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
<b>136</b>	Dec 2012	23 employees intended by the end of 2013	Company established to develop and license software and provide services and technical support to customers.	Yes	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
<b>137</b>	Dec 2012	1 employee	Activities not disclosed as could lead to identification of the company.	No	The company was not considered to be carrying on a Case 1 trade as there seemed to be no commercial basis for its activities.
<b>138</b>	Jan 2013	25-35 employees initially	Co. established to provide sales, account management and technical support to non-U.S. business operations of group, with a view to Irish co. becoming principal for all non-US transactions of group.	Yes	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.

<b>139</b>	Apr 2013	4-6 employees initially	Company established to carry out the management functions for key geographic areas of a group.	Yes	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
<b>140</b>	May 2013	Existing company	An existing company that intends to acquire and develop a portfolio of Intellectual Property.	Yes	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
<b>141</b>	Jun 2013	4 employees initially	Company established to carry out group finance and treasury operations.	N/A	No opinion given as insufficient information regarding the operations of the company was supplied.
<b>142</b>	Jun 2013	Not stated	Company established to exploit Intellectual Property.	No	Not considered to be carrying on a trade as the company would not exploit the Intellectual Property to such a degree to be considered trading.
<b>143</b>	May 2013	Existing company	An existing company that intends to undertake the treasury functions of a group.	Yes	Case 1 confirmed on the basis that the company has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed treasury operations.
<b>144</b>	Jun 2013	20-24 employees initially	Company established to undertake the European business of a US company.	Yes	Case 1 confirmed on the basis the co. has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
<b>145</b>	May 2013	Existing company	Existing company that intends to exploit Intellectual Property of a group company.	No	Not considered to be carrying on a Case 1 trade as the company would not be exploiting the Intellectual Property to such a degree to be considered trading.
<b>146</b>	Aug 2013	Not stated	Company established to provide financing.	N/A	No opinion given as insufficient information regarding the operations of the company was supplied.
<b>147</b>	May 2013	13 employees, rising to 300 by end of 2016	It is not possible to publish details as to do so would enable the company to be identified.	Yes	It is not possible to publish details of this case as to do so would enable the company to be identified.

<b>148</b>	Sep 2013	6 employees initially	Company established to undertake non U.S business of a company.	Yes	Case 1 confirmed on the basis the co. has a sufficient number of employees with relevant skills, expertise, experience and authority to carry on proposed trading operations.
<b>149</b>	Dec 2013	1 employee initially	Company established to provide treasury functions to group companies.	Yes	Case 1 confirmed as the key management team will have the skill, expertise and authority to carry on the trading activities of the company.
<b>150</b>	Jan 2014	5 employees initially	Company responsible for developing, protecting and exploiting internet media video for group.	Yes	Case 1 confirmed as the key management team will have the skill, expertise and authority to carry on the relevant trading activities of the company.
<b>151</b>	Jan 2014	Not stated	New company established to exploit, manage & develop Intellectual Property of a group company.	Yes	Case 1 confirmed as key management team will actively manage, develop, licence and exploit IP acquired. The board will be responsible for developing the brand enhancement strategy and setting strategic direction.
<b>152</b>	Feb 2014	Not stated	Co. established for the sales and marketing of branded products, and the sourcing of new products and licenses.	Yes	Case 1 confirmed as key management team will have the skill, expertise and authority to carry on the relevant trading activities of the company.
<b>153</b>	Apr 2014	25 employees initially	Co. will develop, manufacture and distribute software developed by itself and by group.	Yes	Case 1 confirmed as the key management team of the company will have the skill, expertise and authority to carry on the relevant trading activities of the company.
<b>154</b>	Apr 2014	Not stated	Co. will provide business development marketing, promotion, and support services to group companies.	Yes	Case 1 confirmed as the key management team of the company will have the skill, expertise and authority to carry on the relevant trading activities of the company.
<b>155</b>	Jul 2014	Not stated	As licensee for all non-US territories, the co. will sell software as a service solution to non-US customers.	Yes	Case 1 confirmed on the basis that the key management team of the company will have the skill, expertise and authority to carry on the relevant trading activities of the company.
<b>156</b>	Jul 2014	Existing company	Co. will act as principal service provider for the EMEA region with right to market and sell solutions in the EMEA region.	Yes	Case 1 confirmed on the basis that the key management team of the company will have the skill, expertise and authority to carry on the relevant trading activities of the company.

<b>157</b>	Jul 2014	3 employees initially	Co. will be responsible for the procurement and inventory management for the group.	Yes	Case 1 confirmed on the basis that the key management team of the company will have the skill, expertise and authority to carry on the relevant trading activities of the company.
<b>158</b>	Jul 2014	5 employees initially	Hosting & technical support services.	No	Insufficient level of activity and it cannot be determined that co. is carrying on a trade the income from which would be subject to tax under Case 1 of Schedule D.
<b>159</b>	Sep 2014	Not stated	Holding of image rights.	No	No staff, no board meetings, no turnover, therefore it does not meet the requirements of the Badges of Trade. The co. will not engage in any activity other than to receive payments.
<b>160</b>	Oct 2014	3 employees initially	Not disclosed as a description could lead to identification of the company.	Yes	Case 1 confirmed on the basis the co. has a sufficient number of employees with the relevant skills, expertise, experience and authority to carry on the proposed trading operations.
<b>161</b>	Dec 2014	3 employees initially	Limited risk distributor of parent company's products. Assisting group companies in the US & UK.	No	Insufficient level of activity, and it cannot be determined that the company is carrying on a trade the income from which would be subject to tax under Case 1 of Schedule D.
<b>162</b>	Feb 2015	Existing company	Expansion of existing company's group treasury function to the provision of intra group loans.	Yes	Case 1 confirmed as the company will actively enter into and conclude the inter group loan transactions. Irish directors have the necessary skills, qualifications, experience and authority to perform the day-to-day activities.
<b>163</b>	Jun 2015	Not stated	A company that will subcontract all activity to a linked company.	N/A	Insufficient level of activity, it cannot be determined that SPV is carrying on a trade the income from which would be subject to tax under Case 1.
<b>164</b>	Nov 2017	Existing company	The company sold tokens as prepayment for the services it would provide.	Yes	The sale of tokens or similar, as prepayment for a service that will be provided later by the company is an element of company's trading profile.
<b>165</b>	Apr 2018	Existing company	A treasury company invested surplus cash into bonds. Question related to treatment of income from, and proceeds on disposal of these bonds.	No	Where a trading company acquires an investment asset, such as a bond which is not integral to its trade, the proceeds on disposal would not be considered as trading.

<b>166</b>	Oct 2019	Existing company	Treasury co. engaged in acquisition & sale of financial instruments acquired with view to making profit on sale, at least one sale takes place per month.	Yes	The frequent acquisition and sale of financial instruments, which have been acquired with a view to making profit, may be seen as a trading activity.
<b>167</b>	Feb 2020	New company	Taxpayer/director intends moving to Ireland to set up a company engaged in buying and selling commodity futures.	Yes	Where the buying and selling of commodity futures is carried out in a manner which satisfies the "badges of trade" criteria it is likely that this could comprise a trade.