Notes for Guidance - Taxes Consolidation Act 1997

Finance Act 2023 edition

Part 35B
Controlled Foreign Companies

December 2023

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Part 35B Controlled Foreign Companies

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PART 35B
CONTROLLED FOREIGN COMPANIES

Overview

Section 27 inserts a new Part; ***Part 35B***, into the Taxes Consolidation Act 1997 (TCA). The new Part implements the Articles 7 and 8 of the EU Anti-Tax Avoidance Directive (ATAD) provisions on controlled foreign companies.

The Controlled Foreign Company ('CFC') rules, required to be introduced by the ATAD, 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 Ireland, for taxation, where the controlling company or the connected company have been carrying out 'significant people functions' ('SPFs') in Ireland. The rules require an analysis as to the extent to which the CFC would hold the assets or bear the risks that it does were it not for the controlling company undertaking the SPFs 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 share capital, voting power or distributions.

A number of exemptions are provided 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. A one-year grace period is also allowed in respect of newly-acquired CFCs where certain conditions apply. 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 Ireland's Transfer Pricing regime under ***Part 35A***.

In order 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 Ireland, arising in its jurisdiction or any other jurisdiction (including Ireland) on the chargeable income.

The rules take effect from 1 January 2019.

CHAPTER 1
Interpretation

Overview

Chapter 1 provides the interpretation section and sets out the meaning of concepts used in this Part.

Section 835I Interpretation

Summary

This section is the interpretation section for the Part. Most of the definitions are self-explanatory and others are defined by reference to the 2010 Report on the Attribution of Profits to Permanent Establishments of the Organisation for Economic Co-operation and Development dated 22 July 2010.

Details

(1)

"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.

"amount of foreign qualified domestic top-up tax payable or borne by a controlled foreign company" means:

- an amount of foreign qualified domestic top-up tax that is payable or borne by the CFC, or
- where an amount of foreign qualified domestic top-up tax is payable or borne by another entity on behalf of the CFC under the laws of the territory in which the CFC is located, for the purposes of the qualified domestic top-up tax ('QDTT') laws of the territory, in respect of the aggregate profits of that CFC and one or more other entities, taken together as a single taxable entity, the amount of foreign QDTT that is apportioned to the CFC on a just and reasonable basis.

"amount of foreign tax" means the aggregate of any tax paid or borne (for example, withholding taxes) by a CFC in respect of its profits for the accounting period and can include tax paid or borne in the State.

"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.

This definition has broad applicability and 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. Arrangements entered into in accordance with ***section 826*** of the TCA "Agreements for relief from double taxation" are excluded.

"chargeable company" means a controlling company, or a company connected with the controlling company, which performs relevant Irish activities either itself or through a branch or agency, on behalf of a CFC group.

"chargeable income" means the CFC's undistributed income of a CFC which is subject to a CFC charge.

"company" means any body corporate or unincorporated association.

"connected" is construed in accordance with ***section 10*** of the TCA.

"controlled foreign company" means a company which is not resident in the State and is controlled by a company/companies resident in the State.

"controlled foreign company charge" is a charge imposed under ***section 835R(2)*** of this Part.

"controlled foreign company group" means all the CFCs of a controlling company.

"controlling company" is a company resident in the State that controls a CFC.

"corresponding chargeable profits in the State" means the profits or gains of a CFC which would be its equivalent profits or gains for Irish corporation or capital gains tax purposes, provided certain assumptions set out in ***section 835O*** were applied, for the accounting period.

"corresponding corporation tax in the State" means the corporation tax and capital gains tax that would be chargeable, in the State, on the CFC's corresponding chargeable profits in accordance with ***section 835P*** by applying the assumptions set out in ***section 835O***.

"corresponding qualified domestic top-up tax" means an amount of QDTT that would be payable or borne by the CFC, if the CFC was located in the State, in accordance with section 111D, and section 111AAO did not apply.

"creditable tax" has the meaning given to it by ***section 835S***.

"EEA Agreement" means the Agreement on the EEA signed on 2 May 1992 and 17 March 1993.

"fiscal year" has the meaning given to it in section 111A(1).

"foreign chargeable profits" means the profits of a CFC, determined for tax purposes under the laws of the CFC's territory of residence or where the laws of the CFC's territory of residence do not require profits to be determined for tax purposes, the CFC's profits determined in accordance with the generally accepted accounting practice that applies in the territory where the CFC is resident.

"foreign company charge" means a charge similar to the CFC charge but that arises under the laws of a territory other than the State.

"foreign qualified domestic top-up tax" means a QDTT arising under the laws of a territory, other than the State.

"key entrepreneurial risk-taking function" is to be construed in a manner that is consistent with the use of that term in the OECD Report.

"non-trading income" means the income of a CFC, other than trading income, included in the CFC's corresponding chargeable profits in the State.

"OECD Report" means the 2010 Report on the Attribution of Profits to Permanent Establishments of the Organisation for Economic Co-operation and Development dated 22 July 2010.

"profit and loss account" means the profit and loss account, income statement or other equivalent, prepared in accordance with international accounting standards or with generally accepted accounting practice. If the accounts are not prepared in accordance with these standards or no accounts are prepared, it is the accounts that would be prepared in accordance with generally accepted accounting practice.

"qualified domestic top-up tax" has the meaning given to it in section 111A(1).

"relevant assets and risks" means the assets which a CFC has or has had, and the risks which a CFC bears or has borne, where those assets or risks would not have been employed or undertaken but for the SPFs performed in the State.

"relevant function" means an SPF or a key entrepreneurial risk-taking function.

"relevant Irish activities" means relevant functions performed in the State on behalf of a CFC group. Such functions must be relevant to the legal and beneficial ownership of the assets in the CFC group or the assumption and management of the risks of the CFC group.

"relevant Member State" means a state, other than the State, which is a Member of the European Union or a state which is a contracting party to the EEA Agreement.

"significant people function" ('SPF') is to be construed in a manner consistent with the use of that term in the OECD Report.

"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. This includes 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.

"undistributed income" has the meaning given to it by ***section 835Q***.

(2)

A company shall be treated as an "associated company" of another company where

- one of them directly or indirectly is entitled to acquire not less than 25 per cent of the share capital or issued share capital, or voting power of the other company,
- one of them is beneficially entitled to not less than 25 per cent of any profits available for distribution to equity holders of the other company, or
- in respect of those companies, a third person directly or indirectly is entitled to acquire not less than 25 per cent of the share capital or issued share capital, or voting power or is beneficially entitled to not less than 25 per cent of any profits available for distribution to equity holders of each company.

Section 835J Meaning of control

Summary

A company that is not resident in the State will be considered a CFC where it is 'controlled' by a company or companies resident in the State. This section defines "control" for the purposes of ***Part 35B***.

Details

A person controls a company if the person is able to control or to acquire control, either directly or indirectly, of the company's affairs. A person is regarded as having control of a company if the person has or is entitled to acquire — ***(1)***

- the majority of the issued share capital or voting power,
- such part of that capital as would entitle the person on a total distribution of income to more than 50 per cent of such distribution, or
- such rights as would entitle the person on a winding up or otherwise to more than 50 per cent of the distributable assets,
- or any part of the share capital and as a result be able to control the composition of the board of directors.

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. ***(2)***

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. ***(3)***

The rights and powers of a person and of the person's associates are to be regarded as belonging to that person. The position is similar in relation to the rights and powers of any 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 this provision can be applied in such a way as to enable control of the company to be exercised by persons resident in the State, it is to be so applied. ***(4)***

The terms 'participator', 'associate', 'director' and 'loan creditor' are given the same meaning as they have in ***Part 13***. ***(5)***

Section 835K Accounting periods

Summary

This section sets out the rules for determining the accounting period of a CFC.

Details

A CFC's accounting period begins on the date it becomes a CFC, and where it continues to be a CFC, a new accounting period begins immediately after the end of the previous accounting period. ***(1)***

Relevant subsections of ***section 27*** of the TCA apply in determining accounting periods.

A CFC's accounting period ends when the company ceases to be a CFC, when the CFC becomes or ceases to be resident in a territory and when the company ceases to have any sources of income. ***(2)***

Subject to ***subsections (1)*** and ***(2)*** of this section, ***subsections (3), (5)*** and ***(7)*** of ***section 27*** of the TCA, which broadly provide for when an accounting period shall be deemed to have ended, apply in determining accounting periods. ***(3)***

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. ***(4)***

Revenue shall issue a notice in writing to the controlling company of any determination made in accordance with ***subsection (4)***. ***(5)***

A controlling company can appeal any determination made by Revenue under ***subsection (5)*** within 30 days of the notice issuing. ***(6)***

Section 835L Application of Part to a controlled foreign company

Section 835L applies the provisions of this Part to a company for an accounting period where it is considered to be a CFC for that accounting period.

Section 835M Determination of residence

Summary

This section sets out the rules for determining the residence of the CFC.

Details

A CFC is regarded as resident in the territory where it is subject to tax by reason of domicile, residence or place of management for an accounting period. ***(1)***

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, ***(2)***

(a) where the company's place of effective management is;

(b) if the company's place of effective management is in two territories, where more than 50% of the company's assets are situated, or

(c) where neither (a) nor (b) applies where more than 50% of the company's assets are situated.

Where neither ***subsection (1)*** nor ***(2)*** applies, a company shall be regarded as being resident where it is incorporated or formed. ***(3)***

The amount of the company's assets is determined by reference to the market value of the assets immediately before the end of the accounting period. ***(4)***

Market value should be construed in accordance with ***section 548***. ***(5)***

If a company is considered resident somewhere under the terms of a double tax treaty, in accordance with ***section 826(1)***, then that takes precedence over any other subsection in ***section 835M***. ***(6)***

Section 835N Adjustment to amount of foreign tax

Summary

Section 835N sets out the 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 Effective Tax Rate ('ETR') test. In relation to the ETR test, adjustments to the hypothetical Irish tax computation, when computing the corresponding Irish tax, will be required where inconsistencies arise between the treatment of income and expenditure in the State and the CFC's jurisdiction of residence. 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.

Details

Where an amount of foreign tax, that is the tax paid or borne by the CFC in respect of its profits, is paid by another company on the aggregate profits of the CFC and one or more other companies the amount of tax paid by the company 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. ***(1)***

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. ***(2) & (3)***

Expenditure of the CFC that is not normally taken into account in calculating its foreign chargeable profits but would be taken into account in calculating the corresponding chargeable profits in the State should be taken into account when calculating the amount of foreign tax paid or borne by the CFC for the accounting period. Including the expenditure as a deduction when calculating the 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 the same basis. ***(4) & (5)***

Section 835O Corresponding chargeable profits in the State

Summary

This section is relevant in determining whether the ETR exemption applies under ***section 835T***. It sets out the assumptions that must be made and the rules that apply in determining the corresponding chargeable profits in the State of a CFC.

Details

This section provides for the assumptions that should be made when determining the corresponding chargeable profits in the State of a CFC, as follows: ***(1)***

- 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.

References to the first accounting period of the CFC mean the accounting period in which the CFC was first regarded as a CFC. ***(2)***

Corporation tax arising on the profits of a trade of the CFC, carried on in the State through a branch or agency, is excluded. ***(3)***

Section 835P Corresponding corporation tax in the State

Summary

This section sets out the rules regarding the applicable tax rates to the corresponding chargeable profits in the State.

Details

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 at ***section 835O(1)(d)*** 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 be taxable as a foreign trade.

CHAPTER 2
Controlled foreign company charge

Overview

Chapter 2 provides for the CFC charge. The charge arises on the portion of the CFC's undistributed income that is attributable to the Irish SPFs, where those SPFs are instrumental in generating the income and the arrangements involving the SPFs are non-genuine and have been put in place for the essential purpose of avoiding tax.

Section 835Q Undistributed Income

Summary

This section sets out the rules for determining the undistributed income of the CFC.

Details

In determining the CFC's amount of undistributed income, the available distributable profits for the accounting period are reduced by any relevant distributions made in respect of the accounting period. ***(1)***

In determining the amount of distributable profits, any local laws in the CFC's territory of jurisdiction that prohibit the making of a distribution or any other such restriction should be ignored. The amount of distributable profits available is limited to the profits attributable to SPF activities, ['relevant Irish activities'] undertaken by the controlling company or a connected company. This subsection ensures that a CFC charge can only arise on income with an Irish nexus. ***(2)***

A relevant distribution is defined with a formula: A x (B/C). ***(3)***

A is equal to the distribution made in respect of the accounting period.

B is equal to the amount of distributable profits for the accounting period.

C is equal to the amount of the CFC's accounting profits for the accounting period.

The distribution amount is apportioned by reference to the distributable profits available divided by the CFC's accounting profit.

Undistributed income cannot be reduced by income that has been distributed but has not suffered tax in the EU. For an amount to be considered distributed, it must be distributed to a person resident in a Member State that imposes tax on distributions received from outside that Member State or to a person resident in the State. The distribution must be paid or payable during the accounting period or within 9 months after the end of the accounting period. The distribution must have been subject to tax in a Member State. ***(4)***

The reference to 'tax' in ***paragraph (c)*** of ***subsection (4)*** means a tax that must have been paid in the EU and must not be repayable. ***(5)***

Subsection (6) ensures that the distribution is considered to be made from distributable profits of that accounting period with any excess coming from the most recently accumulated distributable profits. ***(6)***

Section 835R Controlled foreign company charge

Summary

This section sets out the charging provisions and provides that a CFC charge will arise on the undistributed income of a CFC where that CFC has non-genuine arrangements that have been put in place for the essential purpose of securing a tax advantage.

To identify whether an arrangement is non-genuine, an analysis is required of the extent to which the CFC would own the assets or assume the risks that it does were it not for the controlling company in the State undertaking the SPFs relevant to those assets and risks and it would be reasonable to consider that the SPFs are instrumental in generating the income.

The charge arises on the amount of undistributed income that can be attributed to the Irish SPFs carried on the State by a chargeable company in relation to the CFC. Irish SPFs are referred to as "relevant Irish activities" and the arm's length principle is applied in assigning a value to the undistributed income attributable to the Irish SPFs.

The undistributed income amount cannot exceed a proportion of undistributed income that corresponds to the controlling company's shareholding. The section is worded so as to ensure a CFC charge can still arise in instances where a CFC group has transferred the SPF activity out from the controlling company to another connected company and which would mean, that in the absence of this provision, the CFC charge could be avoided.

Where it is reasonable to consider that the arrangements that have given rise to the undistributed income would have been entered into by companies dealing with each other at arm's length then that undistributed income shall be excluded from any further charge. Undistributed income that has previously been assessed to an Irish CFC charge shall be excluded also.

The rate of tax to be applied to the CFC charge is the rate that would have applied had the income been earned in the chargeable company. Apart from creditable tax, calculated in

accordance with ***section 835Q***, no other relief, deduction or set-off shall be allowed against a CFC charge.

An asset or risk 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 or borne the risk at all. This exclusion applies only as far as all the assets or risks excluded, when taken together, increase the CFC's profits by only a negligible amount.

A charge will not arise where it is reasonable to consider that the essential purpose of the arrangement was not to secure a tax advantage or if the CFC does not have any non-genuine arrangements (i.e. there are no Irish SPFs) in place.

Details

'Participation' means: ***(1)***

- 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.

Subject to other subsections of ***section 835R***, where a CFC group has undistributed income and the CFC group carries on Irish SPFs through a chargeable company, the CFC charge shall arise on the chargeable company in the accounting period of the chargeable company within which the accounting period of the CFC ends. ***(2)***

The CFC charge will arise on the undistributed income of the CFC group to the extent that it can be attributed to Irish SPFs. ***(3)***

The arm's length principle is applied in assigning a value to the undistributed income attributable to Irish SPFs. The undistributed income is limited to an amount proportionate to the controlling and chargeable companies' shareholdings in the CFC through a formula as follows: ***(4)***

UI x AP, where,

UI represents the undistributed income of the CFC, 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.

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: ***(5)***

- the arrangements would have been entered into by parties dealing with each other at arm's length; or
- the essential purpose of the arrangements is not to secure a tax advantage; or
- the arrangements are subject to the transfer pricing provisions under ***section 835C***.

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

The rate of tax to be applied to the CFC charge is the rate that would have applied had the income been earned in the chargeable company. ***(6)***

The corporation tax chargeable is reduced by any creditable tax that arises under ***section 835S***. ***(7)***

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***. ***(8)***

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. ***(9)***

The charging section will not apply where, ***(10)***

- it is reasonable to consider that the CFC did not at any time hold assets or bear risks under an arrangement, the essential purpose of which was to secure a tax advantage, or,
- where the CFC does not have any non-genuine arrangements (i.e. there are no Irish SPFs) in place.

Whether an arrangement should be considered non-genuine requires an analysis to the extent to which, ***(11)***

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

Section 835S Creditable Tax

Summary

This section provides 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.

Details

'relevant tax' means tax paid by the CFC arising in its jurisdiction of residence or any other jurisdiction, except the State, which corresponds to corporation tax. ***(1)***

'creditable tax' in respect of an accounting period is the total of: ***(2)***

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

Any amount of foreign tax, relevant tax or foreign QDTT that falls to be repaid to the CFC or any other person and any amount of foreign QDTT that is not paid within 4 years from the end of the fiscal year in which it becomes due shall be excluded. ***(3)***

The credit allowed is ringfenced and limited to the amount of the CFC charge. ***(4)***

Any amount arising in respect of a qualified IIR (within the meaning of section 111A(1)), or a qualified UTPR (within the meaning of section 111A(1)) is excluded from the meaning of 'creditable tax'. ***(5)***

CHAPTER 3
Exemptions

Overview

Chapter 3 provides for the exemptions to the CFC charge arising under ***Chapter 2***.

Section 835T Effective tax rate exemption

Summary

Section 835T provides for an exemption from the CFC charge where the tax paid by the CFC in its own jurisdiction is not less than half the aggregate of the corresponding corporation tax and corresponding QDTT in the State.

Details

The CFC charge shall not apply to an accounting period of a CFC where the aggregate of the foreign tax and the foreign QDTT paid, payable or borne by the CFC is equal to or greater than the difference between the aggregate of the corresponding Irish corporation tax and corresponding QDTT and the aggregate of the foreign tax and foreign QDTT. ***(1) & (2)***

The amount of foreign tax which is paid by a CFC shall be determined in accordance with the requirements set out under ***section 835N*** (Adjustments to amount of foreign tax). ***(3)***

Any amount of foreign tax or foreign QDTT that falls to be repaid to the CFC or any other person upon the making of a claim and any amount of foreign QDTT, where payable is not paid, shall be excluded. ***(4)***

Section 835U Low profit margin exemption

Summary

This section excludes from the scope of the CFC rules an entity whose accounting profits are less than 10% of its operating costs for the relevant period. The operating costs may not include the cost of goods sold outside the country where the entity is resident for tax

purposes and payments to associated enterprises. The section contains an anti-avoidance measure and is designed to ensure that the exemption cannot apply where the CFC enters into arrangements, the main purpose of which is to ensure that the exemption would apply.

Details

The term 'relevant operating costs' means the operating costs as construed in accordance with international accounting standards or generally accepted accounting practice and they are the operating costs incurred by a CFC for an accounting period, excluding: ***(1)***

- the costs of goods purchased by the CFC other than the goods sold by the CFC in its territory of residence, and
- payments to associated companies.

The CFC charge in accordance with ***section 835R*** shall not apply where the accounting profits of the CFC are less than 10% of its relevant operating costs. ***(2)***

This anti-avoidance measure provides that the exemption shall not apply where arrangements are entered into, the main purpose of which is to ensure that the low profit margin exemption applies. ***(3)***

Section 835V Low accounting profit exemption

Summary

This section 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.

Details

(1)

A CFC with:

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

is exempt from a CFC charge.

Where the accounting period is less than 12 months, the amounts specified should be proportionately reduced. ***(2)***

As an anti-avoidance measure, the exemption shall not apply where the CFC enters into arrangements, the main purpose of which is to ensure that the low accounting profit exemption applies. Similarly, the amounts specified should be proportionately reduced where the accounting period is less than 12 months. ***(3) & (4)***

Section 835W Exempt period exemption

Summary

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. In order 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.

Details

"exempt period" and "subsequent period condition" have the meanings given to them by ***subsection*** ***(3)*** and ***(4)*** respectively. ***(1)***

The CFC charge shall not apply where the CFC's accounting period ends during the exempt period and the CFC satisfies the subsequent period condition. ***(2)***

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. ***(3)***

The subsequent period condition is satisfied where: ***(4)***

- the company ceases to be considered a CFC in accordance with ***Chapter 1***, or
- the CFC charge does not apply

in the first accounting period that follows immediately after the exempt period.

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. ***(5)***

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. 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. ***(6) & (7)***

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

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. ***(8)***

Section 835X Relief for certain distributions

Summary

This section provides that if a distribution is subsequently made out of chargeable income (i.e. previously undistributed income that has been subject to a CFC charge), then an amount equal to the tax on the charge shall be allowed as a credit against any tax arising in respect of the distribution.

Details

If a distribution is subsequently made out of chargeable income (i.e. previously undistributed income that has been subject to a CFC charge), then an amount equal to the tax on the charge shall be allowed as a credit against any tax arising in respect of the distribution. ***(1)***

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. ***(2)***

Section 835Y Relief on certain disposals of shares or securities in a controlled foreign company

Summary

This section applies where a controlling company or a company connected with the controlling company, disposes of shares in a CFC or a connected company, and the controlling company has previously been subject to a CFC charge in relation to that CFC. This provision reflects the fact that profits available for distribution can affect the share value. Therefore, the section calculates an amount that will be allowable as a deduction against the chargeable gain before calculating the tax due. An amount to be allowed as a deduction can only be allowed once.

Details

"chargeable gain" has the meaning given to it in ***section 545***. ***(1)***

This section applies where a controlling company or a company connected with the controlling company (referred to as a 'disposing company'), disposes of shares or securities in a CFC or a company connected with the CFC (referred to as a 'disposed company') and the disposing company has previously been subject to a CFC charge in relation to that CFC by reference to its interest in it. ***(2)***

Subsection (3) sets out three instances where the section applies, involving the disposing company and chargeable company, where they are and are not the same entity as follows: ***(3)***

- 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.

Depending on the circumstances of the disposing company and the chargeable company one of two formulae may be applied in order to calculate a proportionate CFC charge amount, by reference to the CFC charge and the proportion of the shareholding being disposed of, that will be allowable as a deduction against the consideration in computing the chargeable gain that may arise to a disposing company on the disposal of shares or securities in the CFC. ***(4)***

Where a scenario under ***subsection (3)*** applies an amount calculated in accordance with the following formula shall be allowed as a deduction against the consideration for the disposal –

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,

Or

where none of the scenarios under ***subsection (3)*** apply, 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.

In order to avoid a double deduction being taken, where relief has already been granted in accordance with ***section 835X*** before the disposal, any relief available in accordance with this section shall be proportionately reduced by an equivalent amount. ***(5)***

The section provides that 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 subject to the CFC charge and where relief under ***section 835X*** was available, the balance would be available under ***subsection (4).***

The reference to the CFC charge in ***paragraphs (a)*** and ***(b)*** of ***subsection (4)*** shall reflect an amount of CFC charge as reduced by the amount that corresponds to the chargeable income represented by the distribution relating to the CFC.

In order to prevent a double deduction being taken, where an amount equivalent to all, or part, of a CFC charge has been taken as a deduction under ***subsection (4)*** then no further deduction shall be given. ***(6)***

Where the amount taken as a deduction under ***subsection (4)*** is equal in amount to the CFC charge, no further deduction shall be given in respect of the CFC charge, or where the

amount taken as a deduction under ***subsection (4)*** represents part of the CFC charge, no further deduction shall be given in respect of that part of the CFC charge.

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. ***(7)***

Section (2) of ***section 27*** of the Finance Act 2018 is the commencement section and provides that a "controlling company" has the same meaning as it has in ***Chapter 1*** of this Part, and "accounting period" has the same meaning as it has in ***section 27*** of the Principal Act.

The section applies in respect of an accounting period of a controlling company commencing on or after 1 January 2019.

Section 835YA Non-cooperative jurisdictions: modified application of sections 835T, 835U and 835V

Summary

This section provides that the exemptions from a CFC charge provided for in ***section 835T*** (the Effective tax rate exemption), ***section 835U*** (the Low profit margin exemption) and ***section 835V*** (the Low accounting profit exemption) will not apply for an accounting period of a CFC where that CFC is resident in a jurisdiction included on the EU list of non-cooperative jurisdictions for tax purposes.

Details

Subsection (1)(a) provides that, for the purposes of this section, a 'listed territory' in respect of the period 1 January 2021 to 31 December 2021 means a territory included in Annex 1 of the "EU list of non-cooperative jurisdictions for tax purposes – Report by the Code of Conduct (business taxation) suggesting amendments to the Annexes to the Council conclusions of 18 February 2020" as published in the Official Journal No. C331 on 7 October 2020. ***(1)*** ***(1)(a), (b), (c) & (d)***

Subsection 1(b) provides that for accounting periods beginning during the period from 1 January 2022 to 31 December 2022, a 'listed territory' means a territory listed in Annex 1 of the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes as published in the Official Journal No. C413I on 12 October 2021.

Subsection 1(c) provides that for accounting periods beginning during the period from 1 January 2023 to 31 December 2023, a 'listed territory' means a territory listed in Annex 1 of the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes as published in the Official Journal No. C391 on 12 October 2022.

Subsection 1(d) provides that for accounting periods beginning on or after 1 January 2024, a 'listed territory' means a territory listed in Annex 1 of the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes as published in the Official Journal C, 2023/437 on 23 October 2023.

Subsection (2) provides that where a CFC is resident for an accounting period in a territory referred to in ***subsection (1)*** of this section that the exemptions from a CFC charge provided for in ***section 835T*** (the Effective tax rate exemption), ***section 835U*** (the Low profit margin exemption) and ***section 835V*** (the Low accounting profit exemption) will not apply in respect of that accounting period of the CFC. ***(2)***

Section (2) of ***section 20*** of the Finance Bill 2020 is the commencement section and provides that section 835YA shall apply in respect of an accounting period of a CFC beginning on or after 1 January 2021.