7 March 2025

Section 831B Taxes Consolidation Act (TCA) 1997
Feedback on the Participation Exemption for Certain Foreign Distributions

We refer to the email from the Department of Finance of 14 February requesting feedback on three aspects of section 831B TCA 1997, as introduced by Finance Act 2024. We outline below our response to the questions raised by the Department.

1. The geographic scope of the participation exemption

1.1 Extending the geographic scope of the participation exemption to MNEs in scope of Pillar Two

Confining the geographic scope of the participation exemption to distributions received from companies resident in the EU/EEA and jurisdictions with which Ireland has a Double Tax Agreement (DTA) is too restrictive and is out of step with the approach adopted by many of Ireland's competitors for foreign direct investment (FDI). It is important that the geographic scope of the participation exemption is extended if it is to achieve its intended objective of simplifying the Irish corporation tax code and enhancing Ireland's attractiveness as a place to do business in an increasingly competitive environment for FDI.

We strongly urge that the scope of the participation exemption be amended to include dividends paid by a company that is a constituent entity of the same Pillar Two group as the Irish recipient, regardless of the location of the payor company. The profits of global subsidiaries of Irish companies in scope of the Pillar Two Global Anti-Base Erosion Rules (GloBE) Rules will be subject to a 15% minimum effective

tax rate, in either the local jurisdiction or via another group company. Therefore, it would be reasonable for distributions received by an Irish company from subsidiaries in a group, which is in scope of the Pillar Two Rules, to qualify for the participation exemption irrespective of where the subsidiary is resident for tax purposes.

We note that a factor to be considered in relation to Pillar Two is that for a jurisdiction's rules to meet a qualifying standard, they must not provide any benefits that are related to the rules (i.e., the no related benefit requirement). In the absence of any further guidance from the OECD, we do not believe that extending the scope of the participation exemption to subsidiaries in a Pillar Two group could be considered a related benefit. However, to alleviate any concerns that policymakers may have regarding the no benefits requirement, one approach could be to amend the definition of 'relevant subsidiary' and the definition of 'relevant distribution' in the manner outlined below.

A new sub-part (b) could be inserted in the definition of 'relevant subsidiary' to include a company that is, on the date on which it makes the 'relevant distribution', a constituent entity of a MNE group and is subject to a foreign supplemental tax within the meaning of section 817U TCA 1997, or would have been so subject, if Part 4A TCA 1997 did not apply. Policymakers may wish to consider including further protections to address circumstances where the parent and subsidiary are not members of the same Pillar Two group and to exclude distributions received from jurisdictions included in Annex 1 of the Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes (i.e. a listed territory). Appropriate amendments would also be required to subsection 2, subsection 5, and the existing sub-parts (b) and (c) of the definition of 'relevant subsidiary' to take account of the fact that the definition of 'relevant territory' is currently confined to EU/EEA and DTA jurisdictions.

We do not believe that this approach would create any difficulty with the Pillar Two no related benefit requirement as qualification for the participation would not be

contingent on the Irish Pillar Two Rules applying. This is because if the Irish Pillar Two Rules did not apply, then in that event, the relevant subsidiary would have been subject to another foreign supplemental tax within the meaning of section 817U TCA 1997.

In addition to amending the definition of relevant subsidiary to include a new sub-part (b), we believe that the existing sub-parts (b) and (c) of the definition would be better placed elsewhere in section 831B and should be considered in the context of distributions and the source of such distributions. We have addressed this point in more detail in paragraph 3.1.4 of this submission.

The definition of 'relevant distribution' could also be amended so as to include a new sub-part (VI) which would apply in circumstances where the proposed new sub-part (b) of the definition of 'relevant subsidiary' applies, and sub-part (a) of the definition of 'relevant subsidiary' does not apply. The new sub-part (VI) could exclude from the meaning of 'relevant distribution' any distribution which is not an 'excluded dividend' within the meaning of section 111P TCA 1997 and where it is not reasonable to consider the distribution was paid directly or indirectly out of income, profits or gains that have been subject to supplemental tax within the meaning of section 817U TCA 1997.

Under this approach, the onus would be on the Irish parent company receiving the distribution to demonstrate the profits out of which the distribution is paid have been subject to a foreign supplemental tax. Where the profits of a subsidiary are in scope of Pillar Two but qualify for a Pillar Two safe harbour, it would be important that such profits would be considered to be subject to a foreign supplemental tax.

1.2 Extending the geographic scope to companies with an annual turnover below the Pillar Two threshold

A relevant subsidiary which is resident in a non-EU/EEA, non-DTA jurisdiction and is outside the scope of Pillar Two, may be paying a similar level of tax on its profits as a subsidiary that is resident in an EU/EEA/DTA country and/or is within the scope of Pillar Two. It would seem inequitable that a distribution received from such a subsidiary would not come within the scope of the participation exemption. Consequently, we consider it would be appropriate for the participation exemption to be extended to include a subsidiary which is resident in a territory, other than a listed territory, that generally applies corporation tax to the profits of companies. Such an amendment would align with the Department's objective of ensuring that the participation exemption is an effective regime for both small and large sized companies.

To achieve this, one possible approach which could be considered is to amend the definition of 'relevant subsidiary' so that if a subsidiary is resident in a non-EU/EEA, non-DTA jurisdiction and is outside the scope of Pillar Two, it may still be considered a relevant subsidiary if it is resident in a territory that generally applies corporation tax to the profits of companies. In this context, policymakers may also wish to consider including within the definition of 'relevant subsidiary', subsidiaries that are resident in territories that do not generally apply corporation tax to the profits of companies but apply a withholding tax on distributions.

1.3 Impact of the 5-year relevant period where a new DTA is concluded

Currently, where Ireland concludes a DTA with a jurisdiction for the first time, and a distribution is subsequently made from a subsidiary which has been resident in that jurisdiction for the previous 5 years, a question arises as to whether the subsidiary was resident in a 'relevant territory' throughout the relevant period.

Confirmation would be welcome, by way of legislative amendment if necessary, that it is possible to take account of the period during which a subsidiary was resident in the DTA jurisdiction prior to signing the relevant DTA with Ireland.

2. Dividends paid into Ireland from companies that have merged/relocated out of Ireland

2.1 Issues arising from the exclusion of Ireland from the definition of ‘relevant territory’

The Department notes that some stakeholders raised an issue relating to dividends paid into Ireland from companies that have merged/relocated out of Ireland. Due to the requirement that the company paying a dividend must have been resident in a relevant territory for 5 years prior to the payment, and the definition of ‘relevant territory’ in section 831B(1) TCA 1997 does not include Ireland, the participation exemption will not apply in such circumstances.

The exclusion of Ireland from the definition of ‘relevant territory’ means that any transfers of a business, part of a business, or the assets of a business from an Irish company to a subsidiary or its involvement in a cross-border merger with the subsidiary can result in the conditions for a relevant subsidiary not being met. However, similar transfers between other EU Member States do not have the same result. We believe there is no clear policy rationale for this distinction.

We have set out below an example which demonstrates the difficulties which can arise from the exclusion of Ireland from the definition of ‘relevant territory’.

Example: Rationalisation of business post-merger

IreCo is the Irish parent company of an international group which acquires a foreign group. IreCo has an Irish resident subsidiary which is carrying on a

business. A German resident subsidiary of the foreign group is carrying on a similar business in Germany. Post acquisition, the group decides to rationalise its operations. As part of this rationalisation the Irish subsidiary is merged into the German subsidiary. Following the merger, the German subsidiary carries on its pre-existing business in Germany and also the business which was previously carried on by the Irish subsidiary through an Irish branch. In these circumstances, the German subsidiary is effectively disqualified from being a relevant subsidiary for the 5-year reference period with the result any distribution during that period from the German subsidiary to IreCo will not qualify for the participation exemption.

We consider that the legislation, as currently drafted, could be viewed as contrary to the freedom of establishment under the Treaty on the Functioning of the European Union (TFEU). Article 49 TFEU prohibits restrictions on the freedom of establishment of 'nationals' of a Member State in the territory of another Member State. This freedom of establishment applies to both individuals and to legal persons such as companies. In addition, Article 55 TFEU states that *"Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54*".

We strongly urge that the definition of 'relevant subsidiary' in section 831B(1) TCA 1997 is amended, with effect from 1 January 2025, to address the fact that the definition of 'relevant territory' excludes the State.

2.2 Amounts ineligible for exemption as franked investment income but eligible for the participation exemption

The Department has requested examples of distributions which may not be distributable under Irish company law and therefore would not be eligible for exemption as franked investment income under section 129 TCA 1997, but would be

eligible for the participation exemption because a foreign law permits such a distribution. It is difficult to envisage scenarios where such a distribution might occur.

We would observe that the question of whether a foreign law permits a distribution is one of company law. From a tax perspective, we note that irrespective of the company law requirements in the foreign jurisdiction regarding distributions, in order to be considered a 'relevant distribution' for the purpose of the Irish participation exemption, the distribution must constitute income in the hands of the recipient for the purposes of corporation tax.

3. Other areas of concern/ potential unintended consequences

3.1 Other areas of concern regarding section 831B TCA 1997

We have outlined below a number of areas where there is a lack of certainty regarding the legislative provisions underpinning the participation exemption. It may be the case that clarification on some issues which we have identified below can be provided in Revenue guidance. However, if Revenue consider these matters cannot be clarified in guidance, it would be important that clarification is provided by way of a legislative amendment.

3.1.1 Qualification criteria for a 'relevant distribution'

For a distribution to be considered a 'relevant distribution' as defined in section 831B(1) TCA 1997, it must be made in respect of the subsidiary's share capital:

> *"(i) out of the profits (within the meaning of section 21B(1)(a)) of the relevant subsidiary, or*
> *(ii) out of the assets of the relevant subsidiary where the cost of the distribution, or that part of the distribution, as the case may be, falls on the relevant subsidiary"*

Section 831B(5)(b) further provides that section 831B(3) applies only *"if the relevant distribution is made by the relevant subsidiary in respect of the relevant subsidiary's share capital out of the assets of the relevant subsidiary, where any gain on the disposal of that share capital by the parent company on the date on which the relevant distribution is made would not be a chargeable gain in accordance with section 626B."*

Application of the section 626B test

In circumstances where the distribution is made *"out of the assets of the relevant subsidiary"*, section 831B(5)(b) provides that the exemption applies only if any gain on the disposal of the shares on which the distribution is made would not be a chargeable gain under the provisions of section 626B TCA 97, if the parent company were to dispose of those shares on the date of the distribution.

We understand that this condition in section 831B(5)(b) is not intended to apply where the distribution is made out of the profits of the relevant subsidiary under subpart (i) of the definition. Revenue's TCA Notes for Guidance on section 831B TCA 1997 are framed in this manner, stating that:

> *"[t]his requirement does not apply to distributions to the extent that they are made out of profits of the relevant subsidiary."*

However, section 831B(5)(b) does not specifically exclude distributions made out of profits. Any distribution, including a distribution which is declared and paid out of the profits of a company, could be said to be made out of the assets of the company with the cost similarly falling on the company in respect of such a distribution. Therefore, if such an interpretation of section 831B(5)(b) is taken, the requirement that the shares, if sold, would qualify for exemption under section 626B would potentially apply to any distribution made including distributions made out of profits.

We have asked that Revenue’s new Tax and Duty Manual (TDM) on the participation exemption for foreign dividends includes the same confirmation as has been provided in the Notes for Guidance. However, we would also consider it important that legislative clarification on this point is provided in Finance Bill 2025, with effect from 1 January 2025, to remove any uncertainty. This could be achieved by making a minor amendment providing that, for the purposes of section 831B, a distribution made out of the assets of the relevant company shall not include a distribution made out of the profits of the ‘relevant company’. Such an amendment would provide clarity and certainty to taxpayers of the requirements they need to meet in order to qualify for the participation exemption in respect of the two different types of distribution envisaged by section 831B(1) TCA 1997.

Distribution out of the assets of the relevant subsidiary

Similarly, the requirement that the “*cost of the distribution… falls on the relevant subsidiary*” in sub-part (ii) is unclear, as arguably the cost of all distributions fall on a company if it is made out of its assets. We have asked that Revenue’s new TDM on the participation exemption for foreign dividends clarifies what is meant by this phrase. Our understanding is that it is not intended to represent an additional test. If clarification cannot be provided in guidance, it is important that legislative clarification on this point is provided to remove any uncertainty going forward.

Exclusion of dividends paid/ distributions made by an offshore fund

Sub-part (V) of the definition of ‘relevant distribution’ provides for the exclusion of *“any dividend paid or other distribution made by an offshore fund as construed in accordance with section 743”.* Section 743 TCA 1997 (Chapter 2 of Part 27) provides that an offshore fund can include any company resident outside of the State in which any person has an interest which is a ‘material interest’.

(a) 'Non-equivalent' offshore funds located in the EU/EEA/OECD treaty territory

Section 747B(2A) TCA 1997 provides that income and gains relating to a 'non-equivalent' offshore fund located in an 'offshore state' (being the EU, the EEA or any OECD country with which Ireland has a double tax treaty) fall outside the scope of Chapter 4 of Part 27. These are essentially funds which are not similar in all material respects to an Irish regulated fund.

Section 747AA TCA 1997 further provides that *"without prejudice to 'offshore fund' having the meaning assigned to it by section 743 for the purposes of Chapter 4, where that Chapter does not apply to an offshore fund by virtue of subsection (2A) of section 747B, then Chapter 2 and section 747A shall not apply in respect of that offshore fund*". In essence, these funds are outside of the offshore funds regime.

We have sought confirmation in Revenue guidance that an offshore fund for the purposes of sub-part (V) of the definition of 'relevant distribution' does not include any 'non-equivalent' offshore fund, which is located in an 'offshore state', as defined in section 747B(1) and is excluded from the offshore funds regime by virtue of section 747B(2A) and section 747AA. It would be important that this confirmation is also provided in legislation as the current wording in sub-part (V) references *"an offshore fund as construed in accordance with section 743"*.

(b) Meaning of 'offshore fund'

The definition of 'offshore fund' in section 743(1) comprises two components:

1. The offshore concern must be a non-resident company, a unit trust scheme with non-resident trustees or an arrangement governed by foreign law which creates rights in the nature of co-ownership;

2. *"and any reference in this Chapter to an offshore fund shall be construed as a reference to any such company, unit trust scheme or arrangements in which any person has an interest which is a material interest."* [emphasis added]

We interpret point 2. above to mean that a person ('any person') must have a 'material interest' in the non-resident company/ unit trust scheme/ arrangement in order for that offshore concern to be an 'offshore fund' (i.e. a material interest must be present before a non-resident company/ unit trust scheme/ arrangement can be an 'offshore fund' for the purposes of paragraph (V) of the definition of 'relevant distribution').

This interpretation aligns with the following statement in Revenue's Notes for Guidance on Part 27 TCA 1997 (provided in the context of section 743(2)):

"The legislation defines offshore funds by reference to the structure of investors' rights. Without a "material interest", an investor cannot be charged to tax by reference to the offshore fund provisions; ***further, without at least one material interest existing, an overseas concern cannot be an offshore fund at all****. …"* [emphasis added]

Notwithstanding the above, Revenue's guidance in Paragraph 3.1, Example 2 and Decision Tree 1 of TDM Part 27-02-01[1] could be interpreted to mean that the definition of an 'offshore fund' in section 743(1) is such that any non-resident company/ unit trust scheme/ arrangement is an offshore fund in the first instance, **irrespective** of whether any person has an interest in it which amounts to a 'material interest'.

1 Revenue Commissioners, Tax and Duty Manual, Part 27-02-01, last reviewed July 2023.

We have requested that:

- Revenue updates its comments on the meaning of an 'offshore fund' in TDM Part 27-02-01 to reflect the interpretation contained in the Notes for Guidance on Part 27 TCA 1997 (i.e. *"without at least one material interest existing, an overseas concern cannot be an offshore fund at all"*).

- Revenue's guidance on the participation exemption confirms that a 'material interest' must be present before a non-resident company/ unit trust scheme/ arrangement can be an 'offshore fund' for the purposes of paragraph (V) of the definition of 'relevant distribution.'

If it is not possible for Revenue to provide the clarification sought in guidance, then it would be important that legislative clarification is provided that a 'material interest' must be present before a non-resident company/ unit trust scheme/ arrangement can be an 'offshore fund' for the purposes of paragraph (V) of the definition of 'relevant distribution.'

Deductible Dividends

Sub-part (I) of the definition of 'relevant distribution' provides that the participation exemption does not apply to deductible dividends. However, there are circumstances where a dividend may be deductible under the terms of an anti-avoidance provision but not deductible generally against income tax.

Some jurisdictions may wish to discourage the retention of certain classes of profits in companies because the non-payment of dividends may result in the deferral of income tax for the shareholders. One approach to encourage the making of regular dividends is to impose an additional tax (a surcharge) on profits which are not distributed within a specified timeframe. Ireland has such a rule in its domestic legislation whereby close companies may be subject to a surcharge on their

undistributed estate and investment income or a surcharge on their service company income where the profits from these activities is not distributed within a specified timeframe.

Section 440 TCA 1997, which provides for a surcharge on estate and investment income, states:

> "*Where for an accounting period of a close company the [distributable estate and investment income] exceeds the distributions of the company for the accounting period, there shall be charged on the company an additional duty of corporation tax (in this section referred to as a "surcharge") amounting to 20 per cent of the excess*."

On a plain reading of the above, it could be concluded that legislation framed in this manner does not provide for a deduction for distributions made as the surcharge (which is a form of corporation tax) is imposed on such amount of the relevant profits that exceeds the distributions made. Under this interpretation, any rule denying the application of the participation exemption where a tax deduction has been taken for the dividend concerned would not apply where a similar surcharge is framed in the above manner (although it would be preferable to make this clear in the legislation).

That said, while the Irish legislation does not make specific reference to the taking of a tax deduction for dividends in determining the amount subject to a close company surcharge, it is quite possible that the tax laws in another jurisdiction could implement a similar policy initiative but frame it as entailing a tax deduction for the making of the dividend rather than imposing the surcharge on the excess of profits over distributions. Indeed, this is the case for the US personal holding company rules.

For US federal corporate income tax purposes, in general, a corporation will be considered a personal holding company if:

(a) at least 60% of the corporation's adjusted ordinary gross income for the tax year is from certain dividends, interest, rent, royalties, and annuities; and

(b) at any time during the last half of the tax year, 5 or fewer individuals directly or indirectly own more than 50% in value of the corporation's outstanding stock.

Under the US personal holding company rules, in addition to paying “ordinary” US federal corporate income tax, a personal holding company is subject to an additional tax (called a personal holding company tax) on its undistributed personal holding company income (as defined) equal to 20% of that undistributed personal holding company income.

The relevant legislation provides that a personal holding company’s ‘undistributed personal holding company income’ is its taxable income (subject to various adjustments) ‘minus’ the dividends paid during the taxable year (and certain other dividends).

As a result, the framing of the personal holding company tax surcharge is such that a tax deduction is taken for relevant distributions. While the formulation of the surchargeable amount is different, the policy objective underpinning this additional tax is essentially the same as that under the Irish close company rules.

Importantly, in the case of an Irish company subject to the Irish close company rules and a US company subject to the US personal holding company rules, a company is subject to ‘ordinary’ corporation tax and federal corporate income tax respectively. In neither case can a tax deduction be taken against the profits of the company concerned for the purposes of computing those taxes.

We recommend that the legislation is amended to provide that a distribution will still be a relevant distribution where it is taken into account (by means of deduction, reduction, or otherwise) in computing a tax that corresponds to a close company surcharge in the State so long as it is not deducted for the purposes of a tax in a foreign territory which corresponds to corporation tax in the State (other than a surcharge levied under Part 13).

3.1.2 Qualification criteria for a parent company

A parent company must hold a 'qualifying participation' in the relevant subsidiary. A 'qualifying participation' is defined in section 831B(2) as directly or indirectly owning at least 5% of the ordinary share capital of the relevant subsidiary by virtue of which the three tests set out in section 831B(2)(a) are met.

In our view, consideration should be given to permitting shares in the subsidiary held by other group members to be taken into account in establishing whether the tests set out in section 831B(2)(a) are met. This approach would align with the definition of parent company contained in section 626B(1)(b)(ii).

In addition, consideration should be given to extending the period of ownership of the shares where, for example, shares which were previously held by another company are transferred to the parent company in a no-gain/ no-loss transfer in the manner provided for in paragraph 1, Schedule 25A TCA 1997. This approach would also be in line with the approach adopted in section 626B.

3.1.3 Alternative forms of equity interests akin to ordinary share capital

By virtue of the meaning of 'qualifying participation' in section 831B(2), the parent company is required to directly or indirectly own 'ordinary share capital' in the relevant subsidiary. We have sought confirmation from Revenue in guidance that this ordinary share capital requirement, when applied in the context of a body

corporate formed under foreign law, would be met where that body corporate has ownership interests that are analogous to 'ordinary share capital' (as defined in section 2 TCA 1997). For example, a US Limited Liability Company (LLC) may issue transferrable LLC interests analogous to ordinary share capital (typically denoted as 'membership interests').

We understand that Revenue has previously confirmed that the holding of a membership interest in a US LLC would be treated as the holding of ordinary share capital for the purpose of the application of a number of provisions including section 626B TCA 1997.

It is important that the participation exemption provides for distributions derived from equivalent or similar interests to equity, such as member interests in US LLCs. Therefore, if the clarification sought cannot be provided by Revenue, it is important that a legislative amendment is made to extend the ownership provisions in section 831B(2) to include alternative forms of equity such as US LLCs. Notably, under the Companies Act 2014,[2] rights or incidents of membership (including the right to receive a distribution) of a company limited by guarantee (CLG) are recognised as analogous to that of a shareholding.

3.1.4 Qualification criteria for a 'relevant subsidiary'

As currently drafted, the definition of 'relevant subsidiary' in section 831B(1) includes a requirement in sub-part (b) that the company did not at any time during the reference period, acquire *"(i) another business or part of another business, or (ii) the whole or greater part of the assets used for the purposes of another business"* previously carried on by another company that was not resident in a 'relevant territory'. Similarly, sub-part (c) of the definition contains a requirement that the subsidiary was not formed through a merger where any party to that merger was another company that was not resident in a 'relevant territory' from the start of the

[2] Section 1173 Companies Act 2017

reference period.

In our view, some of the perceived ‘mischief’ being addressed in sub-part (b) and (c) of the definition of ‘relevant subsidiary’ might better be placed elsewhere in section 831B so that the requirements are considered in the context of distributions and the source of such distributions. This would avoid the ‘tainting’ of an otherwise ‘relevant subsidiary’ by matters that have not impacted the distribution, effectively disqualifying the subsidiary entirely for a 5-year period.

We would highlight that the application of this 5-year look back period is extremely onerous and the level of work required in some cases could be so significant that the taxpayers concerned would not wish to claim the participation exemption, which would be a regrettable outcome. For example, the assessment of the conditions contained in sub-parts (b) and (c) require the parent company to have knowledge of the residence status of the other company at the time of the acquisition or merger and also its residence history in the period up to 5 years before the date of the distribution. The parent company may not be in possession of this information, particularly in circumstances where the other company is a third party. It might also not know whether the assets being acquired represent the business or part of the business of the seller or the greater part of the assets used for the purposes of the business of the seller.

Acquisition of loss-making/ immaterial activity

We understand the condition in sub-part (b) aims to ensure that the participation exemption is not claimed in respect of profits that arose in a non-relevant territory. However, the relative scale of the business or assets acquired from another company is not a relevant factor. It may be low in the context of the overall activities of the subsidiary and may not make any material contribution to the profits or assets of the subsidiary. The business acquired may in fact be loss-making. However, even in these cases, the acquisition would appear to result in the subsidiary not being a

‘relevant subsidiary’ for a period of 5 years after the acquisition.

We have sought clarification in Revenue’s new TDM that in circumstances where the business acquired is loss-making or not material in the context of the activities of the subsidiary, it does not need to be taken account of for the purposes of sub-part (b) of the definition of ‘relevant subsidiary’. If it is not possible for Revenue to provide this clarification in its guidance, it would be important that legislative clarification is provided and that it would apply with effect from 1 January 2025.

Similarly, sub-part (c) of the definition contains a requirement that the subsidiary was not formed through a merger where any party to that merger was another company that was not resident in a ‘relevant territory’ from the start of the reference period. This condition takes no account of whether any assets, liabilities or activities were acquired from the other company and, as such, the acquisition may not have contributed to the profits or assets of the subsidiary. Again, any business acquired may be loss-making.

We have sought clarification in Revenue’s new TDM that, in circumstances where no assets or activities were acquired from the other company as part of the merger or where any such assets/ activities acquired make no contribution to the profits or assets of the subsidiary or are not material in the context of the subsidiary’s business, the merger does not need to be taken account of for the purposes of sub-part (c) of the definition of ‘relevant subsidiary’. If it is not possible for Revenue to provide this clarification in guidance, it would be important that legislative clarification is provided.

Business previously carried on by more than one entity during the specified time period

The test to be applied puts the focus on whether there has been an acquisition by the relevant subsidiary of a business or part of a business or the greater part of the

assets of a business, where the business concerned was '**previously**' carried on by another company that was not resident in a relevant territory.

We have sought clarification in Revenue's new TDM as to whether it is necessary to consider the position of the entity that sells the business to the relevant subsidiary in this regard or whether it is necessary to consider the position of all entities that might have 'previously' carried on the business at any time within the 5-year window. If it is the latter, the policy rationale for such an approach should be reviewed as this will require significant work and all the relevant information required to reach a conclusion on the point might not be readily available.

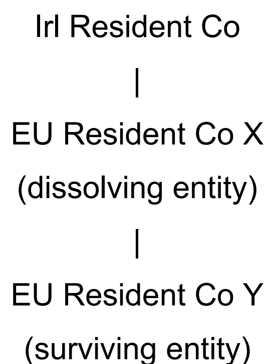
Acquisitions of shares

We have sought clarification in Revenue's new TDM that it can be accepted for the purposes of section 831B, the terms 'business' and 'assets used for the purposes of a business' do not include shareholdings in another company. Such an interpretation would appear appropriate in a section 831B context where neither the transferor nor the transferee entities held or hold the shares as trading assets. If it is not possible for Revenue to provide this clarification in guidance, it would be important that legislative clarification is provided.

'Formed through a merger'

We have sought clarification in Revenue's new TDM regarding the requirement for the 'relevant subsidiary' not to have been *"formed through a merger ... where a* ***party*** *to the merger was another company that was not, by virtue of the law of a relevant territory, resident for the purposes of foreign tax in a relevant territory"*. The following illustrates a potential scenario that is likely to arise in practice.

Merger scenario: EU Resident Co X merges downward into EU Resident Co Y with EU Resident Co Y surviving



The question that arises is whether, for the above purposes, Irl Resident Co would be considered to be a 'party' to such a merger in circumstances where shareholder consent is required for the merger between the two EU resident entities to take place. The requirement in relation to mergers appears to be concerned with and aimed at the merging entities themselves as opposed to the shareholders of any such entities.

We have sought confirmation in Revenue's new TDM that when interpreting 'party' to a merger, it is Revenue's view that the parties in question for this purpose, in the context of section 831B, are limited to the merging entities only. To interpret it otherwise, such that it includes a shareholder in any such entity risks an Irish resident shareholder of two EU subsidiaries which merge, being considered a 'party' to the merger of the two EU subsidiaries with the result that participation exemption may not be available to the Irish parent, due to its status of not being considered resident of a relevant territory. There would not appear to be any clear policy rationale for such an interpretation to be taken. Therefore, if Revenue are unable to provide the clarification sought in guidance, it would be important that legislative clarification is provided.

3.1.5 Application of participation exemption to certain preference shares

Section 831B(3) provides that the participation exemption can be claimed on a relevant distribution in respect of which the parent company would otherwise be chargeable to corporation tax under, inter alia, "*Case IV of Schedule D in accordance with section 138*".

The subsection goes on to provide that *"subject to subsections (5) to (8), and except where otherwise provided by the Corporation Tax Acts, corporation tax shall not be chargeable on the relevant distribution and the relevant distribution shall not be taken into account in computing income for corporation tax."* It would seem illogical to refer to section 138 in section 831B(3) if it is not to apply the participation exemption to it.

We would note that the taxing provision in section 138(3) states the following:

> *"Notwithstanding any provision in the Tax Acts* - [emphasis added]
> *…*
> *(b) the dividend shall be chargeable to corporation tax under Case IV of Schedule D."*

We understand the policy intention is that the underlined text does not prevent the provisions of section 831B(3) applying where the necessary conditions to claim the participation exemption are met. We have sought clarification on this point in Revenue's new TDM, however, it is important that legislative clarification on this point is also provided so as to remove any uncertainty going forward.

3.1.6 Shares held via a partnership

To the extent that shares are held via a partnership, which is akin to an Irish partnership, it is assumed that distributions from those shares to which the corporate

partner is beneficially entitled, via the partnership, will be viewed as taxable dividend income in respect of those shares.

In addition, where a corporate partner would have qualified to claim the participation exemption had it held its proportion of the shareholding directly, it is assumed that a corporate partner will also meet the shareholding requirement for the participation exemption, if the shareholding is held via a partnership.

We have requested that both these points be clarified in Revenue's guidance. If clarification cannot be provided in guidance, it is important that legislative clarification is provided so as to remove any uncertainty going forward.

3.1.7 Jurisdictions without a local concept of tax residence

The definition of a relevant subsidiary in section 831B (1) TCA 1997 requires a subsidiary to be *"resident for the purposes of foreign tax".* This terminology gives rise to considerable uncertainty where subsidiaries are located in jurisdictions without a local concept of tax residence.

For example, both Hong Kong and the US are considered to be relevant jurisdictions by virtue of the fact that they have DTAs in place with Ireland. However, the US and Hong Kong are generally considered as not having the concept of tax residence in their domestic tax legislation. Consequently, it is not clear how subsidiaries located in the US or Hong Kong would satisfy the residency condition to be a relevant subsidiary.

Revenue has several published practices dealing with difficulties presented by a DTA jurisdiction which does not have a concept of corporate tax residence under domestic law. For example, Revenue guidance dealing with the issue in respect of Hong Kong corporations states that a residency condition would be satisfied if the

company paying the interest is a resident of Hong Kong for the purposes of the DTA with Ireland.[3]

To ensure certainty and consistency for taxpayers, we consider that the legislation should be amended to clarify that where a subsidiary is considered to be resident in a relevant jurisdiction under a DTA with Ireland, it should satisfy the residence requirement for the purposes of being considered a relevant subsidiary.

3.2 Exemption for foreign branch profits

The Budget 2025 documents published by the Department of Finance confirmed that, in line with the Roadmap for the Introduction of a Participation Exemption to Irish Corporation Tax, policymakers would consider a possible exemption for foreign branch profits in 2025. As Ireland does not have a branch exemption at present, there can be significant differences in the timing and measure of taxable income for Irish companies between the head office and branches resulting in tax uncertainty and complexity. The introduction of a foreign branch exemption alongside the participation exemption for foreign dividends is important if Ireland is to remain an attractive location for foreign direct investment.

We would welcome clarification from policymakers as to the proposed timeframe for engaging with stakeholders on this important issue and whether it is intended a Feedback Statement outlining draft approaches to the legislation will be published soon.

[3] Revenue Tax and Duty Manuals Part 08-03-06 and Part 35b-01-01.