Annex 8 - Ireland

IRELAND

CONTENTS

A. INTRODUCTION

1. Company law

Mergers and divisions as envisaged by the Merger Directive ("Directive") are not specifically provided for by Irish domestic law, although some of the procedures described below resemble these transactions. The usual method of restructuring companies is by means of an exchange of shares, known in Ireland as a takeover.

Company law also provides for a restructuring of Irish companies sanctioned by the court (Secs. 201 to 203, Companies Act 1963). Such a restructuring may take the form of a reconstruction or amalgamation. In a reconstruction one company transfers the whole or part of its business to another company in return for the issue to the shareholders of shares by the receiving company. In an amalgamation two or more existing businesses are transferred to an existing or new company in return for the issue to the shareholders of shares by the receiving company. This procedure may also be used to effect a division, whereby a company transfers all its assets and liabilities to two or more existing companies. An alternative procedure is a scheme of arrangement on a voluntary liquidation (Sec. 260, Companies Act 1963). In this case the business of the liquidating company may be transferred to another company in exchange for an issue of shares by the receiving company. The shares are issued to the liquidator of the transferring company who passes them on to the shareholders of the transferring company. Restructuring operations are sometimes also achieved by making a distribution of assets or shares in a subsidiary or by transferring a business or shareholding within a group of companies.

The Third and Sixth Company Law Directives have been implemented through special regulations applicable to public limited companies. The procedure for obtaining the court's sanction for a reconstruction or amalgamation does not apply in such cases, unless the company being wound up opts for its application. The Directive applies to public and private companies, whether limited by shares or by guarantee, bodies registered under the Industrial and Provident Societies Acts and building societies registered under the Building Societies Acts. This list covers most bodies subject to corporation tax in Ireland, but does not include unlimited companies. In an unlimited company, the shareholders have an unlimited liability for the company's debts.

2. Taxation law

Ireland implemented the parts of the Merger Directive relevant to transfers of assets in Secs. 64 to 74, Finance Act ("FA") 1992. Irish legislation already largely conformed with the requirements of the Directive as regards share exchanges, and no further implementation measures were introduced. No attempt has been made to implement the requirements of the Directive for mergers and divisions, except for Sec. 72, FA 1992 which allows the Revenue Commissioners to give relief in cases covered by the Directive other than transfers of assets. This section cannot claim to be an adequate means of implementing the Directive as it places no compulsion on the Commissioners to provide any particular kind of relief or, indeed, to provide any relief at all.

Ireland uses the concept of permanent establishment in its treaties but not in its domestic law. The domestic equivalent is a branch or agency, which is defined as "any factorship, agency, receivership, branch or management". In practice there are few differences between the domestic concept and the corresponding parts of the treaty concept. Ireland has concluded treaties with all the other Member States except Greece.

3. Basic concepts

Two concepts which are basic to Irish taxation are vital to an understanding of the implementation of the Directive in Ireland. One is the fundamental distinction between income and capital gains and the other is the concept of trade.

Income and capital gains are generally kept quite separate for tax purposes. Broadly speaking, they are subject to entirely different rules regarding computation, rates, reliefs and the set-off of losses. The taxation of income looks to the income or loss realized as a result of an activity, such as the carrying on of a business, whereas capital gains taxation is based on the gain or loss realized on the disposal of particular assets. Only assets are capable of producing taxable capital gains or deductible capital losses; the realization of a gain or loss on a capital liability has no tax consequences. The dividing line between receipts which are income and those which are capital gains is one which has spawned hundreds of judicial decisions in other jurisdictions such as the United Kingdom. No attempt has been made to define the concepts in the legislation, except for certain anti-avoidance rules.

Whether a receipt represents income or a capital gain is a question of fact. A particular type of receipt does not have a fixed character as income or a capital gain. For example, a company in the business of manufacturing and selling sewing machines realizes income on the sale of a machine. The sale of an identical machine by a company in the clothing business, which has used the machine to produce clothes, produces a capital gain. In the first case the machine is part of the stock-in-trade of the manufacturer, in the second it is a capital asset. Stock-in-trade is what a business deals in and capital assets are the equipment which enables the business to be carried on.

Expenditure on capital assets is not deductible under the general principles of income taxation. Special legislation allows the deduction from income of capital allowances, a form of depreciation, in respect of certain capital assets. On the sale of such an asset a balancing allowance or balancing charge is deducted from, or added to, income to align the total capital allowances given with the actual drop in value since the acquisition of the asset. If the asset is sold at a price above its acquisition cost, the excess is a capital gain. For example, the clothing manufacturer buys a sewing machine for 100, deducts 25 in capital allowances from its income and sells the machine for 110. On the sale the company must add to its income a balancing charge of 25 and realizes a capital gain of 10. The capital gain may be reduced by an inflation indexation allowance, which is computed by reference to the acquisition cost of 100.

Many provisions of the Irish legislation, including those implementing the Directive, use the concept of trade. Although the precise limits of this concept are far from clear in many respects, the important point in the context of companies is the dividing line between trade and investment. The legislation states that "`trade' includes every trade, manufacture, adventure or concern in the nature of trade". As a definition this statement is clearly inadequate. "Trade" is another concept which has exercised judicial minds in hundreds of cases in other jurisdictions, not all of them entirely consistent with each other. Most of these cases are devoted to determining the limits of the concept in relation to organized activities of buying and selling commodities, but case law also makes clear that trade includes the provision of services.' Actively buying and selling securities probably does constitute trade, whereas the pure holding of securities generally does not. The management of a portfolio of investments is in the grey area where the facts of each case become crucial. In the context of the Directive, the important question is whether "trade", as used in the Irish implementing legislation, is a narrower concept than "business" as used in Art. 2(i) of the Directive. This question in turn depends to a large extent on whether the concept of business used in the Directive includes investment. As the latter question is unanswered it is not yet possible to state whether there is a discrepancy between the Directive and its implementation in Ireland.

4. Definition of residence

Traditionally, a company was regarded as resident where its central management and control was located, i.e. where the highest level policy decisions were made. This was normally the place where the directors held their meetings, although this would not be the case if the directors in fact made their decisions elsewhere or merely "rubber stamped" the decisions of a third party (typically a controlling shareholder). The place of incorporation was rarely a material consideration for those purposes.

With effect from 11 February 1999 (1 October 1999 for companies incorporated before 11 February 1999), it is provided that, in general, a company is resident in Ireland if it is incorporated there, even though the central control and management of the company is exercised outside Ireland (Secs. 23-25 TCA 1997). There is an exception to this rule if an Irish incorporated company or a related company:

(1) carries on a trade in Ireland; and

(2) *either*:

(a) the company is controlled (directly or indirectly) by persons resident in an EU Member State (including Ireland), or in a tax treaty state, under the laws of that state, *and* those persons are not themselves under the control (directly or indirectly) of persons who are not so resident; *or*

(b) the company or a related company is one whose principal class of shares is substantially and regularly traded on a recognized Stock Exchange in an EU Member State (including Ireland) or in a tax treaty state.

A company is "related" to any company within the same 50%+ group; for these purposes, the 50% relationship must satisfy substantial economic ownership conditions.

Notwithstanding the above, with effect from 11 February 1999 (1 October 1999 for companies incorporated before 11 February 1999), a company which is regarded as solely resident in another state for the purposes of a tax treaty will always be regarded as also being non-resident for Irish domestic tax purposes (Sec. 23A TCA 1997).

5. Company migration

A company which is formed under Irish law remains permanently subject to Irish law and is required to have its registered office in Ireland. A company which is formed under non-Irish law cannot be re-registered under Irish law. However, it is possible for some companies that are tax resident in Ireland to cease to be so resident by means of transferring the central management and control of the company to another country.

If an Irish resident company ceases to be resident, the subsequent disposal of the assets it held could escape tax on capital gains (even though the gains had accrued in whole or part during the period of residence). Gains on disposals of certain assets, including Irish assets located in Ireland which are (or were) used in an Irish branch or agency, are, however, subject to tax in Ireland, irrespective of the residence status of the disponer. Since 21 April 1997, an exit charge has been imposed on companies ceasing to be resident in Ireland. This deems the company to have disposed of its capital assets at market value (other than assets used in an continuing Irish branch or agency).

A postponement of the charge is allowed in certain cases (broadly, if the company ceasing to be resident is a 75% subsidiary of an Irish resident company and the charge relates to the deemed disposal of foreign trading assets). This postponement becomes permanent if certain conditions are met over a period of 10 years.

The charge is also not imposed if at least 90% of the issued share capital of the company is held by either:
(1) a company or companies which are not resident in Ireland and which are under the control of person(s) resident in a tax treaty country (and not under the control of person(s) resident in Ireland); or
(2) a person or persons who are directly or indirectly controlled by a company or companies falling within (1).

The Revenue have power to collect any tax due under these provisions from any person who was a controlling director of the company concerned (or of a company which controlled that company) or any company which was a member of the same group within the 12-month period prior to the date of the deemed gain; the person thus assessed has a right to reclaim the tax from the emigrating company (Sec. 432 TCA 1997).

The emigration of the company may result in the breaking of group relationships for payments, loss reliefs and capital gains purposes; in some cases, deferral of capital gains may be recaptured as a result.

If a company ceases to be resident, this brings an accounting period to an end. If the company continues to trade through a branch or agency in Ireland or has other sources of income liable to Irish tax, a new accounting period will immediately commence. The ending of the accounting period will affect the due date for the payment of corporation tax and the computation of certain loss and similar reliefs. If the company was previously a closely-held company, it will cease to be so on emigration.

If a company's trade ceases to be liable to Irish corporation tax as a result of emigration, the trade is treated as permanently discontinued. This generally requires a balancing adjustment to be carried out in respect of depreciable plant based on a deemed disposal at market value (or actual sale price if the asset is sold shortly afterwards). Furthermore, trading stock held at the end of the accounting period must normally be valued at open market value (or actual sale price if subsequently sold to another person carrying on a trade in Ireland which is liable to Irish tax).

6. Conversions

If a company is converted from a private to a public company or from an unlimited company to a limited company or vice versa, there are generally no tax consequences. Special rules apply, however, to the demutualization of life insurance companies and conversions of certain building societies and trustee savings banks into companies.

7. Intra-group transfers

A key concept in the definition of a group is that of the "percentage subsidiary". The reliefs available may depend on whether company qualifies either as a 90%, 75% or 51% subsidiary. Another key concept is that of the "relevant Member State". This is defined as any Member State of the European Community or (from 1 January 2002) an EEA country which has a double tax agreement with Ireland (currently this only covers Norway).

A company is a 90% subsidiary of a second company if at least 90% of its ordinary share capital is owned directly by the second company; a company is a 75% subsidiary of a second company if at least 75% of its ordinary share capital is owned directly *or* indirectly by the second company; a company is a 51% subsidiary of a second company if more than 50% of its ordinary share capital is owned directly *or* indirectly by the second company. Thus, for example, if Company A owns 60% of the ordinary shares in Company B and 80% of the ordinary shares in Company C which in turn owns 20% of the ordinary shares in Company B, a 75% subsidiary relationship is established (i.e. 60% + (80% x 20%) = 76%). Ordinary share capital is defined as all issued share capital except shares which carry only a fixed right to dividends and no other entitlement to profits.

In the case of 90%/75% relationships, the loss and capital gains group reliefs will only be available if the second company is entitled (directly or indirectly) to (a) 90%/75% as the case may be of the profits available for distribution to equity holders (defined to include all ordinary shareholders and certain creditors in respect of non-commercial loans) and (b) 90%/75% as the case may be of the assets available for distribution to equity holders on a winding up (based seemingly on current balance sheet values). Anti-avoidance provisions apply if entitlements to distributions of profits or assets are capped or if such entitlements vary over time. In relation to capital gains groups (see below), the "economic ownership" requirements in relation to the distributions of profits and assets did not apply prior to 11 February 1999 (Secs. 412-419 TCA 1997).

A corporation tax loss relief group consists of a parent company and its 75% subsidiaries. A loss relief consortium exists if five or fewer companies (the consortium) own at least 75% (100% prior to 6 April 2000) of the ordinary share capital (as defined above) of either (a) a trading company or (b) a holding company the business of which consists wholly or mainly of holding trading companies resident in a "relevant Member State" and which are its 90% subsidiaries. The 75% consortium ownership requirement does not incorporate the economic ownership requirements attached to the definition of a 75% subsidiary; these are relevant, however, in determining the availability of loss relief. A consortium relationship will not exist if a company is also the 75% subsidiary of a single company (in which case group loss relief may be available instead) (Sec. 411 TCA 1997).

A capital gains group consists of a principal (i.e. parent) company and all of its 75% subsidiaries and all of the 75% subsidiaries of those subsidiaries (prior to 11 February

1999 all the subsidiaries of a principal company which was a member of a group were also included in that larger group).

A gross payments group consists of a company and its 51% subsidiaries.

In the cases of a corporation tax loss relief group or consortium and of a gross payments group, a 75%/51% subsidiary relationship must generally be calculated by excluding any shares held as trading stock and any shares held in a company not resident in a "relevant Member State" (Sec. 411 TCA 1997). These exclusions do not apply in the case of a capital gains group.

In ascertaining the existence of a loss relief group, loss relief consortium, capital gains group or gross payments group, only companies resident in a "relevant Member State" may be treated as members. Thus, for example, if a US resident company owns 80% of an Irish resident company (S) no group will exist. If the US company is 100% owned by an Irish resident company (H), S will be treated as an 80% indirect subsidiary of H for capital gains group purposes, but not for group loss relief purposes (since the shareholding in the US company must be disregarded). H and S will, therefore, form a capital gains group (the US company will not be a member of the group as it is not resident in a "relevant Member State").

Anti-avoidance provisions may apply if arrangements exist under which companies in a loss relief group or loss relief consortium (but not a capital gains group or gross payments group) are under the control (as widely defined) of different persons or under which a company could cease to be a member of the group or consortium (Sec. 424 TCA 1997).

On the transfer of a business between companies within a group relationship, it may be possible to defer any capital gains arising (albeit subject to recapture in certain circumstances) on the transfer of assets.

Under general principles, the transfer of a trade from one company to another marks the cessation of the trade by the transferor and the commencement of a new trade (or possibly the expansion of an existing trade) by the transferee company. As a result, the losses of the transferor cannot be carried forward for the benefit of the transferee, although the transferor may be able to take advantage of enhanced terminal loss relief. The transfer will also potentially give rise to balancing adjustments in relation to the transfer of depreciable assets, but these may normally be avoided on a transfer between connected persons.

If, however, a minimum 75% interest in the transferor company's trade is directly or indirectly in the same ownership at any time within 2 years following the transfer as it was at any time in the year up to the transfer of the trade, special provisions apply. The trade must have been directly owned by a company at all times; if a company is put into liquidation, it loses ownership of its assets and thereafter is unable to pass on the benefit of its trading losses. Under these provisions, any losses of the trade incurred by the transferor company will normally be carried forward against profits earned by the transferee company from the same activities; furthermore, no balancing adjustments will be made on the transfer of depreciable assets and the transferee company will acquire the assets at their written down value for tax purposes. In applying the ownership requirement, the interests of his relatives may be attributed to a shareholder, facilitating the use of these provisions in the case of family companies. The right to carry forward losses in the transferee company is subject to the general anti-avoidance rules directed at loss buying and for these purposes, the original company and the successor company are treated as a single entity (Sec. 396 TCA 1997).

There are no provisions for the carry-forward of capital losses or non-trading losses of an income nature. The rules regarding the transfer price of stock between connected parties on a cessation of trade are as discussed in the context of incorporation above.

Where trading stock is transferred on a cessation of trade to a connected party, the transfer will be treated, from 6 December 2000, as if made at an arm's length price; this is subject to the right of both parties to the transfer to elect for a price equal to the greater of original cost and the actual transfer price where both of those amounts are lower than the arm's length price.

The cessation of trade will normally bring about the end of an accounting period for the transferor company; this will affect the due date for payment of corporation tax and possibly the computation of loss reliefs, including group loss relief. Conversely, the commencement of business by the transferee company will mark the beginning of an accounting period.

B. MERGERS

1. Tripartite reconstructions

1.1. Company

It is possible to effect a reconstruction under which an existing or newly formed (acquiror) company acquires the business of an existing (second) company in return for the issue of shares to the shareholders of the second company. From 15 February 2001 deferral relief may apply in relation to capital gains where the companies concerned are either resident in Ireland or in another "relevant Member State" and the assets concerned are within the scope of Irish capital taxation. Prior to that date the relief was restricted to resident companies only, in clear contravention of EC law. The second company must receive no consideration other than (possibly) the assumption of trade liabilities by the transferor company; it seems also that the consideration received by shareholders must otherwise consist only of shares. The relief is available in relation to a transfer of development land only if the transfer does not form part of tax avoidance arrangements (Secs. 633 and 635 TCA 1997). There is generally no requirement that the companies should be in a group relationship; these provisions will, therefore, provide deferral relief if the group provisions are inapplicable (Sec. 615 TCA 1997).

If the above conditions are met, no gains accrue on the disposal of capital assets by the second company and the acquiror company is deemed to have acquired those assets for the same acquisition cost and at the same date as the second company. The provisions of Sec. 396 of the TCA 1997 in relation to the transfer of losses and avoidance of adjustments on the transfer of depreciable assets may again be relevant; failing this, an election to avoid any balancing adjustments on the transfer of depreciable assets may be possible if the companies are connected. There are no provisions for the carry-forward of capital losses or non-trading losses of an income nature. In general, the transfer price of stock will be reflected in the value of shares issued by the acquiror company, but, in practice, the Revenue may accept the agreed transfer price, subject to the rules governing transfer pricing on a cessation of trade. The cessation of trade will normally bring about the end of an accounting period for the second company.

1.2. Shareholders

Strictly, the receipt of shares in the acquiror company by the shareholders in the second company may constitute a distribution taxable as a dividend. In practice, the Revenue will not enforce this charge in the case of a commercially motivated reconstruction. Deferral relief may apply for capital gains tax purposes to the holders of shares or debentures in the second company, whereby the receipt of shares and debentures in the acquiror company is not treated as giving rise to a disposal; the shareholders are treated as having acquired the shares in the acquiror company at the same date and the same cost as their shares in the second company. The deferral relief is restricted to the extent that the shareholders receive any consideration other than shares or debentures. The deferral will be granted only if the reconstruction is undertaken for commercial reasons and does not form part of a tax avoidance arrangement (Sec. 587 TCA 1997). The deferral is generally no longer available, except for the issue of debentures to another company in the same group (as defined by Sec. 616 TCA), to the extent that the consideration received by shareholders comprises debentures issued or allotted after 3 December 2002 other than pursuant to a prior binding written agreement or approval by the Revenue Commissioners (Sec. 66 FA 2003).

2. Bipartite reconstructions

2.1. Company

Where an existing or newly formed (acquiror) company acquires the business of a second company in exchange for the issue of shares in the acquiring company to the second company, deferral relief for capital gains applies if a second company which is (broadly) resident in Ireland or any other EU Member State transfers all or part of a trade carried on in Ireland to another such acquiror company *exclusively* in return for shares and/or debentures in the acquiring company (it seems that the assumption of trade liabilities by the acquiring company may be disregarded).

The acquiror company must be liable to Irish corporation tax or capital gains tax in respect of the trade immediately following the transfer. The deferral operates by disregarding the disposal of assets by the second company and treating the acquiring company as acquiring these assets at the same cost and on the same date as the second company. If the second company disposes of the shares and/or debentures received as consideration within 6 years of the transfer, the acquisition cost of the shares, etc. is reduced by the amount of the deferred gain in computing the gain or loss on any future disposal thereof.

The deferral will be granted only if the transfer is undertaken for commercial reasons and does not form part of a tax avoidance arrangement. The deferral will apply automatically, unless the acquiror and second companies jointly elect otherwise, e.g. in a situation where group relief is already available (Sec. 631 TCA 1997, implementing in part the EC Merger Directive).

Otherwise, similar considerations as apply to tripartite reconstructions are generally relevant again at the corporate level. If, however, the conditions for capital gains deferral are met, no balancing adjustments will arise on the transfer of depreciable assets even if a 75% interest in the trade is not maintained under the new ownership structure (Sec. 631(2) TCA 1997).

If an Irish resident company transfers all or part of a trade carried on in another EU Member State, the provisions of the EC Merger Directive may result in a deferral of tax in that other Member State. It is provided that, if there is a charge to Irish tax on any capital gains accruing as a result of the transfer, credit must be given against such tax for the tax which would have been chargeable in the other Member State in the absence of the deferral (Sec. 634 TCA 1997).

2.2. Shareholders

There are normally no potential tax implications at the shareholder level, since the transferor company itself receives all of the consideration.

C. PURCHASE/TAKEOVER OF A COMPANY

1. Companies

The purchase or takeover of a company for either shares or cash does not generally impact on the tax treatment of that company as such. The rules restricting the carry-forward of trading losses and certain "pre-entry" capital losses may, however, be relevant. The company may be eligible for the various group reliefs following the acquisition.

2. Shareholders

The sale of shares or debentures for cash will give rise to a potential charge on any capital gains accruing. Deferral relief will apply if shareholders in the purchased company exchange their shares or debentures for shares and debentures in the purchasing company and the purchasing company thereby acquires control of the purchased company or had made an offer conditional on acquiring such control. The deferral does not apply to the extent that the shareholders receive any consideration other than shares or debentures. The deferral will only be granted if the purchase is undertaken for commercial reasons and does not form part of a tax avoidance arrangement (Sec. 586 TCA 1997). Deferral relief is generally not available for consideration comprising the issue of debentures after 3 December 2002 (see B.1.2. above).

D. TRANSNATIONAL MERGERS

1. Foreign absorbing company, domestic absorbed company

1.1. Transfers between unconnected companies

The Finance Act, 1992 provided for the implementation of the provisions of the EC Council Directive (EEC) 90/434 relating to mergers, divisions, etc. This legislation is now contained in Secs. 630-638 of the TCA.

Irish company law does not provide for mergers and divisions per se. Domestic tax legislation already provides for reliefs from corporation tax in the case of exchanges of shares between companies. Therefore, the legislation deals only with transfers of assets. It applies only to companies situated in the EU Member States as provided for in the Directive (Irish unlimited companies do not fall within the definition).

Secs. 630-638 of the TCA provide that with effect from 1 January 1992, where a trade or a part of a trade carried on in the Republic of Ireland is transferred by a domestic company to a company situated in an EU Member State in exchange only for shares or securities in that foreign company, the domestic company will not be subject to corporation tax on any capital gain arising from the exchange. The foreign company will be regarded as having acquired the assets at the same time and for the same consideration at which they were acquired by the domestic company.

For capital gains tax purposes, the domestic company is deemed to have acquired the shares or securities at market value. If the company disposes of those shares or securities within 6 years of the transfer, that deemed cost will be reduced by any gain which would have arisen to it at the date of transfer of the trade if this relief was not available.

The relief will not apply where, immediately after the transfer, any one of the following situations exists:

- the assets transferred are not used for the purposes of a trade carried on by the foreign company;
- the foreign company would not be chargeable to such corporation tax or capital gains tax in the event of a disposal by it of the assets;
- by virtue of the provisions of the relevant double taxation treaty, the foreign company would not be liable to corporation tax or capital gains tax on gains arising on a disposal;
- the foreign and domestic companies jointly elect that the provisions shall not apply; such election to be made within 9 months of the end of the accounting period of the domestic company.

The legislation specifically provides that application may be made to the Irish authorities for relief from corporate or capital gains tax in any situation not covered by the legislation. This provision is intended to make allowance for any changes in domestic company law to provide for mergers and divisions.

Where the trade or part of the trade being transferred in consideration of securities is carried on by the domestic company in another Member State, Chapter V provides that any Irish corporation tax arising on the disposal shall be reduced by any tax payable on the disposal in the Member State in which the trade is carried on. Any foreign tax which would have been payable but for the application of the Directive or any domestic measure granting a deferral in the Member State will be treated as tax paid for Irish tax purposes.

1.2. Transfers between subsidiary and parent

Prior to the introduction of the Finance Act, 1992, no corporation tax reliefs existed for a domestic company where it transferred assets used for the purposes of its domestic trade to its non-Irish tax resident parent or subsidiary. For corporation tax purposes, the group relief provisions did not apply since the two companies would not form a group for Irish corporation tax purposes.
In implementing the provisions of the EC Council Directive on mergers, etc., this position has been rectified. With effect from 1 January 1992 the group relief provisions available to domestic companies now also apply to transnational disposals.

An anti-avoidance provision has been included to ensure that any disposal is effected for bona fide commercial purposes and does not form part of any scheme or arrangement the main purposes or one of the main purposes of which is the avoidance of tax.

2. Domestic absorbing company, foreign absorbed company

Where the foreign company is not already carrying on a trade or activities in Ireland through a branch or agency, the disposal of assets by it to the Irish company will not give rise to any Irish tax liabilities unless the assets consist of Irish land or minerals or any rights, interests or other assets in relation to mining or minerals or the searching for minerals. In such cases, the foreign company will be liable for capital gains tax on any gain arising from the transfer.

Where the foreign company is located in an EU Member State, the provisions of Secs. 630-638 of the TCA described at D.1.1. may apply.

With the above-mentioned exceptions, the position of a domestic/foreign merger is no different from that of a domestic merger.

3. Taxation of shareholders

3.1. Capital gains

The disposal by shareholders of the transferor company of their shares in that company may give rise to capital gains tax liabilities. The liability will be based on the consideration obtained for the transfer, less the purchase price paid as increased by an indexation factor to take account of inflation since the date of purchase. Where shares were acquired prior to 6 April 1974, the deemed purchase price will be the value of the shares as at 6 April 1974, as increased by the indexation factor applicable. Tax is payable at the rate of 20% on taxable gains.

Where the consideration for the disposal of shares is the issue of shares or debentures in the transferee company and the transferor has or, as a result of the acquisition, will have a controlling interest in the transferee, the provisions of Sec. 586 of the TCA will apply to treat the two companies as the same company and the exchange of shares to be a reorganization of its share capital. The same applies if the offer is, as a result of a general offer to members of the company or of the particular class, made in the first instance on the condition that if it were satisfied the transferee company would have control of the acquired company. The effect of this treatment for the shareholders is that there is no disposal or acquisition for capital gains tax purposes. The ultimate disposal by the shareholders of their shares in the transferee company will be treated as a disposal of the original shares and will carry a purchase cost equivalent to the cost originally incurred on acquiring the shares in the transferee company. It is a fundamental condition of this relief that the exchange of shares be for bona fide commercial reasons and not for tax avoidance purposes.

The provisions of Sec. 586 of the TCA apply also where, in connection with a scheme of reconstruction or amalgamation, another company issues shares or debentures to the shareholders of the transferor company in proportion to their holdings in the company and their existing shares are retained by the shareholders or cancelled. Again, the requirement that the reconstruction or amalgamation be for bona fide commercial reasons is paramount.

Deferral relief is generally not available for consideration comprising the issue of debentures after 3 December 2002 (see B.1.2. above).

3.2. Income distributions

Where the transferring company is deemed to have made a dividend or other distribution, individual shareholders will be subject to income tax on the deemed distribution, receiving credit for dividend withholding tax paid by the company on the distribution. As there cannot be a double charge to tax, the individuals will not suffer capital gains tax on the deemed distribution. Irish tax-resident companies are not liable to corporation tax on distributions received from Irish tax-resident companies (although there is a 20% surcharge on undistributed investment income of closely controlled companies.

E. TRANSNATIONAL DIVISIONS

1. Domestic dividing company, foreign beneficiary companies

The position relating to an Irish dividing company and foreign beneficiary companies is as described above regarding transnational mergers.

2. Foreign dividing company, domestic beneficiary companies

The foreign dividing company transferring its business to an Irish resident company is subject to the same provisions as apply above for a transnational merger involving an Irish absorbing company.

F. TRANSNATIONAL TRANSFERS (CONTRIBUTIONS) OF ASSETS

1. Transferor domestic company

As in the case of a contribution of assets to a domestic company, the domestic company will be subject to potential capital gains tax liabilities and corporation tax liabilities on the consideration received for the disposal. That consideration will be the value of the shares received or the market value of the assets disposed of where the shares cannot be readily valued.

There may also be a disposal for the purposes of capital allowances giving rise to a balancing charge or balancing allowance, as appropriate.

Where the assets disposed of represent a part of a trade, the relieving provisions introduced in Secs. 630-638 of the TCA to implement the EC Mergers Directive and detailed at D.1.1. will apply where the parties to the transfer are located in EU Member States.

2. Transferee domestic company

Where a foreign company contributes assets located outside of Ireland to an Irish resident company in exchange for the issue of shares, the Irish company will be taxable on future profits or income arising from the assets acquired.

Capital allowances may be available on the assets acquired if used for the purposes of a trade carried on by the Irish company.

The foreign company will be subject to capital gains tax arising from the transfer of land situated in Ireland or assets used for the purposes of a trade carried on in Ireland through a branch or agency. The exception to this arises where the foreign company is situated in an EU Member State. In that instance, the provisions of Secs. 64-74 of the TCA implementing the EC Mergers Directive may apply (see D.1.1.).

The Irish company will acquire the assets at market value or at the original cost to the foreign company depending on the application of the aforesaid provisions.

G. TRANSNATIONAL ACQUISITIONS (SALES) OF SHARES

1. Tax consequences for acquiring company

1.1. Domestic company acquiring foreign company

Where an Irish company acquires a foreign company, the Irish company will have no Irish tax liabilities by virtue of the acquisition as is the case in the acquisition of an Irish company.

Capital gains and dividends

The Irish company will, subject to the provisions of the relevant double tax agreement, have a capital gains tax liability arising at the time of disposal of the shares in the foreign company. The cost of the shares, increased by an indexation factor for inflation, will be deducted from the sales proceeds to compute the capital gain, taxable at 20% (or 40% if the shares derive the greater part of their value from Irish development land).

Whereas dividends from another Irish company are exempt from corporation tax in the hands of the receiving company (apart from the corporation tax surcharge in the case of closely controlled companies), dividends from a foreign subsidiary are fully chargeable to corporation tax subject, where appropriate, to credit relief under:
- a relevant double taxation agreement;

- the provisions of Sec. 831 of the TCA which implement the EC Parent-Subsidiary Directive; or
- the provisions of Finance Act, 1998 which grant unilateral tax credit where the foreign subsidiary is resident in a country with which Ireland does not have a double taxation agreement.

Relief for losses

Where the foreign company continues to be tax resident in its own jurisdiction, no relief will be available to the Irish company against profits for any losses suffered by the foreign company since the two companies do not form a group for loss relief purposes.

1.2. Foreign company acquiring domestic company

The foreign company will not suffer any immediate direct Irish tax liabilities on the acquisition of shares in an Irish company.

Capital gains

The foreign company will be subject to tax on any gains arising on the disposal of the shares in the domestic company where those shares derive the substantial part of their value from land or minerals or mineral rights situated in the state. The foreign acquiring company will not be subject to capital gains tax in any other circumstances unless the shares form part of the assets of a branch or agency activity carried on by it.

In general, double tax agreements do not remove the liability to capital gains tax in respect of companies deriving the substantial part of their value from land or minerals situated in Ireland.

2. Tax consequences for company acquired

There should be no tax consequences for the Irish company itself unless the acquisition by the foreign company causes the Irish company to leave a capital gains tax group. Where a group is broken, there may be capital gains tax liabilities arising from the transfer of assets within the old group which crystallize in the hands of the Irish company.

3. Tax consequences for seller

A potential liability to capital gains tax exists in respect of any gain arising on the sale of shares in a foreign company by an Irish company. The liability is computed based on the consideration received for the assets, less the purchase price paid (as increased by an inflation indexation factor). This position arises irrespective of the capacity of the vendor. A sale by a non-resident corporate or individual shareholder will give rise to a capital gains tax liability only where a capital gain has been realized and the shares derive their value or the greater part of their value from land or minerals situated in Ireland. This position is to be contrasted with the liability of an Irish corporate or individual shareholder (including an Irish holding company owned by a foreign shareholder) on the sale of shares in a domestic or non-resident company since a liability to capital gains tax is chargeable on Irish tax-resident persons on worldwide gains.

H. TRANSNATIONAL ACQUISITIONS (SALES) OF ASSETS

1. Tax consequences for acquiring company

1.1. Domestic company acquiring foreign assets

Profits and losses

The profits of the foreign branch will always be subject to tax in Ireland and the taxable profit will be computed in accordance with Irish rules. There is no exemption provided for profits from foreign branches under domestic law. The only treaties that provide for such exemption are those with Cyprus and Switzerland. Ordinarily, Ireland's double tax agreements provide that the profits of the branch be taxable in the country in which the branch is situated with a credit in Ireland for that tax against the Irish tax liability arising on those branch profits.

Losses incurred by a foreign branch may be used by a domestic head office to offset against contemporaneous profits of its worldwide activities or may be carried forward for offset against future profits of the branch provided that the losses arise in respect of a branch trade which is the same as the domestic trade of the head office.

Acquisition of a business

For Irish tax purposes, the acquisition of a business is treated in the same way as the acquisition of assets for use in a business with the exception that if the acquiring company was not previously carrying on a business it will commence a trade at the date of the acquisition.

The acquisition cost will form the base cost of the assets for future disposals and tax depreciation allowances.

Tax depreciation (capital allowances) on the acquisition of capital assets

For Irish tax purposes, capital expenditure is not deductible in arriving at taxable income or profit. However, through the principle of capital allowances, a deduction is available for capital expenditure on most plant and machinery and certain buildings used for trading purposes.

Payments for intangible assets

No tax relief is available in respect of amounts paid for the acquisition of goodwill of a trade.
Capital allowances are available in respect of the acquisition of patent rights provided that those patents are used for trading activities and that any income receivable in respect thereof is liable to tax.

No capital allowances are available in respect of know-how, licence rights or use of trade names acquired on the purchase of a business.

Where a company incurs non-capital expenditure on scientific research or pays a sum to a body approved by the Minister for Finance or to an Irish University for it to undertake scientific research, the expenditure incurred is allowable as an expense.

Where a company carrying on a trade incurs capital expenditure on scientific research in an accounting period, it can claim capital allowances on the expenditure for that year. It is not necessary that the scientific research relates to the trade being carried on. The allowance is 100% of the expenditure incurred.

If an asset ceases to be used for research, the allowances granted, or the value of the asset if less, shall be treated as a trading receipt.

Apportionment of purchase price

There are no specific rules to determine the apportionment of a single price paid for a business acquired amongst the component parts of the business.

Capital gains tax legislation provides that an asset is deemed to be acquired at market value where the consideration for the acquisition cannot be determined or is less or more than the market value of the assets acquired.

Where specific prices are indicated for each asset acquired and some of the prices allocated may be regarded as excessive, it is possible that the provisions of Sec. 811 of the TCA (the general anti-avoidance provisions) would apply to impute market values. Certainly, in the view of some writers, the Inspector of Taxes would not be bound by a price allocated to an asset which, in his view, was clearly excessive.

Carry-over of losses of acquired business

There are only limited circumstances in which losses of a business may be transferred to a transferee company with the business. These circumstances are set out below.

Within the period of 2 years after the date of transfer of the trade, the trade or at least a 75% interest in it must be owned by the same person who held it within 1 year prior to the transfer and the trade must be carried on by a company which is liable to Irish tax in respect of it (Sec. 400 TCA). The ownership requirement may be satisfied either directly or indirectly, i.e. the shareholders in a company are deemed to carry on the trade of the company.

Furthermore, Sec. 401 of the TCA requires that, for the losses to be available, there must not be a major change in the nature or conduct of the trade within a 3-year period either side of the transfer. "A major change in the nature or conduct of a trade" is defined as a major change in the type of property dealt in or services or facilities provided in the trade or a major change in customers, outlets or markets of the trade. That section provides also that where, prior to a change of ownership of the company, the scale of activities had become small or negligible and, before any increase in activity, there is a change of ownership of the company, the relief for losses will be lost.

Subject to the above conditions, the losses of the transferor company in respect of the trade transferred shall be available in full to the transferee against profits of the same trade. Apportionment of losses is required where the transferor is carrying on two or more trades and only one of those trades is transferred.

The ownership conditions required to enable the transferee company to avail itself of the losses are such that it is not normally possible for an unconnected transferee company to meet them.

The conditions could be satisfied where the transferor company first transfers the business to a subsidiary company and then sells the company. However, it is imperative that the new company continues to carry on the same trade and that there is not a major change in the nature or conduct of the acquired trade.

1.2. Foreign company acquiring domestic assets

There is no difference between a foreign, non-resident, company acquiring a business located in Ireland directly and the acquisition of that same business by an Irish company.

2. Tax consequences for seller

Gains incurred by an Irish company on the sale of assets of a business located abroad will be liable to corporation tax in Ireland. Any relief available for foreign taxes suffered on the gain arising will depend on the provisions of the relevant double tax agreement.

Where a foreign company disposes of a business located in Ireland, that company will be liable to tax on any gain arising from the sale of the business where the subject matter of the disposal was used by the foreign company as a branch or agency activity carried on in Ireland.

2.1. Claw-back of capital allowances

The selling company may have a liability to corporation tax arising as a result of a "balancing charge" where assets on which capital allowances have been claimed are sold for sums in excess of their tax written-down value. A balancing charge which is treated for the purposes as trading income cannot exceed the amount of capital allowances given in respect of the asset concerned.

2.2. Capital gains

Irrespective of whether the selling company sells the business as a going concern or sells merely the assets, a potential capital gains tax liability arises to the company. The liability will be computed based on the consideration received for the assets less the purchase price paid, as increased by the relevant inflation indexation factor.

The capital gains tax liability arising on the disposal of capital assets by the selling company may be deferred where that company had been engaged in the previous trading activity for a period of 10 years and it commences to carry on another trade within a period of 2 years from the date of ceasing the previous trade ("roll-over relief"). In the circumstances, where the consideration received on the sale of the assets is invested in full in plant and machinery, buildings or goodwill of the new trade, the capital gains tax liability may be deferred until the sale of the new trade or assets (Sec. 597 TCA). Roll-over relief has generally been abolished for disposals of assets after 3 December 2002 (Sec. 67 FA 2003), except for disposals under prior binding agreements. Roll-over relief remains available for capital gains on assets that have previously been the subject of a roll-over relief claim, i.e. the gains on such assets will continue to be deferred until such time as they are disposed of without further reinvestment in qualifying assets.

2.3. Relief for losses

Where losses are incurred by the selling company on the sale of its capital assets, those capital losses will be available for use against capital gains arising to the company on the disposal of other capital assets in the future or in the accounting period on which the sale is made.

Where losses arise on the disposal of trading stock, those losses will be treated as trading losses and may be used to relieve other income or any capital gains arising on the sale of capital assets in the accounting period in which the losses arise or may be carried back for a period of 3 years from the date of the cessation of the trade and used to set against profits of the trade in that 3-year period. Alternatively, the loss may be used to relieve profits arising in the corresponding preceding accounting period (note that the loss cannot be used to relieve capital gains arising in respect of development land).

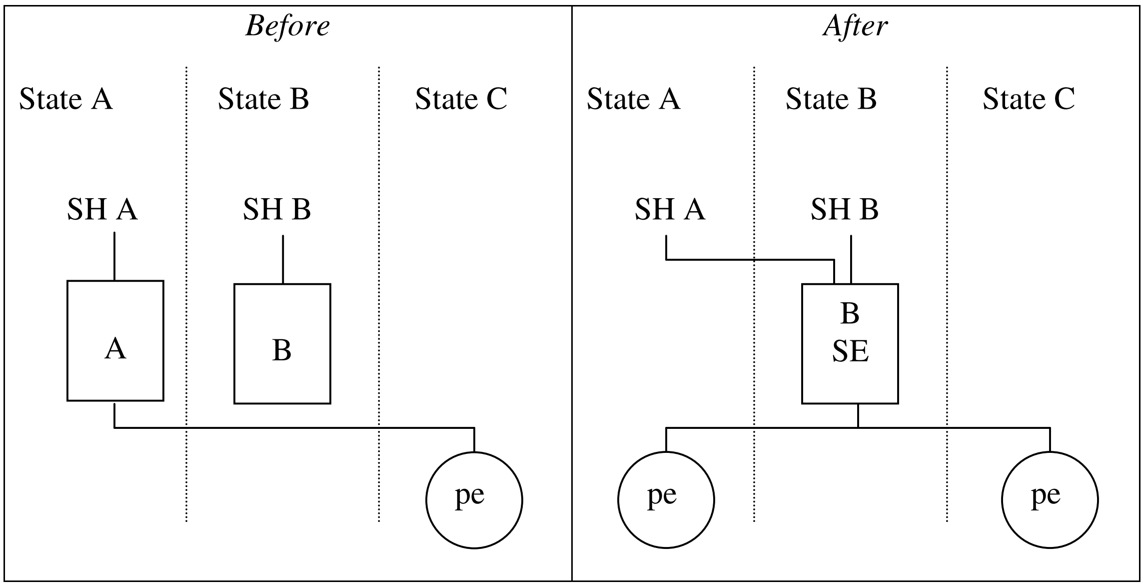
2.4. Sale of a business by an individual owner

There will be no fundamental difference in the tax treatment of the sale as compared with the tax treatment of a corporate vendor.

CASE 1

Merger by acquisition

(Art. 2 par. 1 jo. Art 17 par. 2(a) Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A and B are existing companies
- A and B are public limited-liability companies (see Annex I to Reg. 2157/2001)
- State A, State B, and State C are EU Member States
- A:
  - formed under law of Member State A
  - registered office in Member State A
  - head office in Member State A
  - has a permanent establishment in Member State C
- B:
  - formed under law of Member State B
  - registered office in Member State B
  - head office in Member State B
- B SE:
  - registered office in Member State B
  - head office in Member State B
  - will be covered by the EC Merger Directive

Transactions

- A:

  - transfers all assets and liabilities to B
  - in exchange for shares in B (and cash payment if any, not exceeding 10% of nominal value of shares to be issued) issued to shareholder(s) of A
  - will be wound up without going into liquidation*

** Note: Under Irish law a winding up generally involves a liquidation. This event is therefore interpreted as meaning that A ceases all activities but continues to exist as a dormant company.*

- B / B SE:
  - as the acquiring company, B will take the form of an SE when the merger takes place (Art. 17 Reg. 2157/2001: "In the case of a merger by acquisition, the acquiring company shall take the form of an SE when the merger takes place". Consequently, there are in fact two transactions: 1) the merger and 2) a transformation of a public limited-liability company into an SE. With regard to the transformation, see also Case 9.)
  - will be regarded as public limited-liability company governed by law of Member State B

Questions

1) Assume Member State A is your country

   Tax effects for A in Member State A

   a) Will the merger give rise to any taxation of capital gains (= real value of assets & liabilities transferred minus their value for tax purposes), or is there roll-over relief?

      The merger will qualify as a reconstruction (see A.1) eligible for capital gains rollover (see B.1.1).

   b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State A, be taken over with the same roll-over relief by the permanent establishment of B SE in Member State A?

      Irish tax law does not allow the creation of provisions and reserves that are partially or wholly tax exempt. Specific provisions for identifiable expenditure or events may be allowed as deductions if they qualify as trade expenses, but their deductibility will not be affected by a merger.

   c) Will B's permanent establishment in Member State A be allowed to take over the losses of A that have not been exhausted for tax purposes? If B would be a company resident in Member State A, would it then be allowed to take over these losses?

Trading losses, but not other losses, can be transferred to another company under 75% common control in limited circumstances (see A.7.).

d) Will Member State A renounce any right to tax the permanent establishment in Member State C?

Yes, as regards post-merger transactions.

e) Or will Member State A tax profits or capital gains with respect to the permanent establishment as a result of the merger? If so, will Member State A give relief for any (notional) tax charged on these profits or capital gains by Member State C?

Any taxable profits or capital gains arising as a result of the merger will crystallise in Company A and are therefore liable in principle to Irish tax in the absence of a specific relief.

If A transfers part or all of the p/e in State C to B, Ireland will give credit relief for any State C tax that would have been payable in the absence of either relief under the Merger Directive or C's domestic law (see B.2.1.).

f) Will Member State A reinstate in the taxable profits of A such losses of the permanent establishment as have been set off against the taxable profits of A in Member State A and which have not been recovered at the time of the merger?

Once the losses have been utilised, they cannot be reinstated.

Tax effects for SH A in Member State A

g) Will the issue of shares by B SE to SH A, resident in Member State A, in exchange for shares in A give rise to any taxation of the income, profits or capital gains of that shareholder?

The share exchange will normally qualify as a reorganisation such that no capital gain will arise (see B.1.2.). Reorganisation relief is not available to share dealers.

h) Will the issue of shares by B SE to a shareholder of A, not resident in Member State A, in exchange for shares in A give rise to any taxation of the income, profits or capital gains of that shareholder?

Non-Irish residents are only subject to Irish taxation to the extent that the shares are attributable to an Irish permanent establishment. If the shares are held as a capital asset, reorganisation relief will be available.

i) Will the answers to the questions 1g) and 1h) differ if SH A is:
   i) A corporate shareholder?
   ii) An individual shareholder not owning a substantial interest?
   iii) An individual shareholder owning a substantial interest?

iv) An individual entrepreneur?

No.

2) Assume Member State B is your country

Tax effects for B and B SE in Member State B

a) According to Art. 17 par. 2 Reg. 2157/2001, the acquiring company shall take the form of an SE when the merger takes place. According to Art. 37 par. 2 Reg. 2157/2001 the conversion of a public limited-liability company into an SE shall not result in the winding up of the company or in the creation of a new legal person. However, the Regulation itself does not give guidance with regard to taxation. Will the fact that B takes the form of an SE have corporate income tax consequences in Member State B?

No, assuming that the SE is recognised as a corporate body (which is likely to be the case).

b) What is the value for tax purposes that B SE has to attribute to the assets and liabilities, which are transferred to B SE as part of the merger and that form a permanent establishment in Member States A and C?

B takes over:
- *capital gains assets at their base cost to the transferor company;*
- *capital assets on which capital allowances (tax depreciation) has been claimed at their tax written down value in the transferor company;*
- *trading stock at an arm's length price;*

unless the parties jointly elect otherwise (see B.2.1.).

Tax effects for SH B in Member State B

c) Will the fact that B will take the form of an SE result in tax consequences for SH B?

No.

d) Will the answer to question 2c) above differ if SH B is:
i) A corporate shareholder?
ii) An individual shareholder not owning a substantial interest?
iii) An individual shareholder owning a substantial interest?
iv) An individual entrepreneur?

No.

3) Assume Member State C is your country

Tax effects for A and B SE in Member State C with respect to its permanent establishment in Member State C

a) Will the merger give rise to any taxation in A of capital gains (= real value of assets & liabilities transferred minus their value for tax purposes) or is there roll-over relief?

No (see B.1.1.).

b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State C, be taken over with the same roll-over relief by the permanent establishment of B SE in Member State C?

Not applicable (see Q1.b above).

c) Will B SE's permanent establishment in Member State C be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes?

Yes, subject to certain conditions (see A.7.).

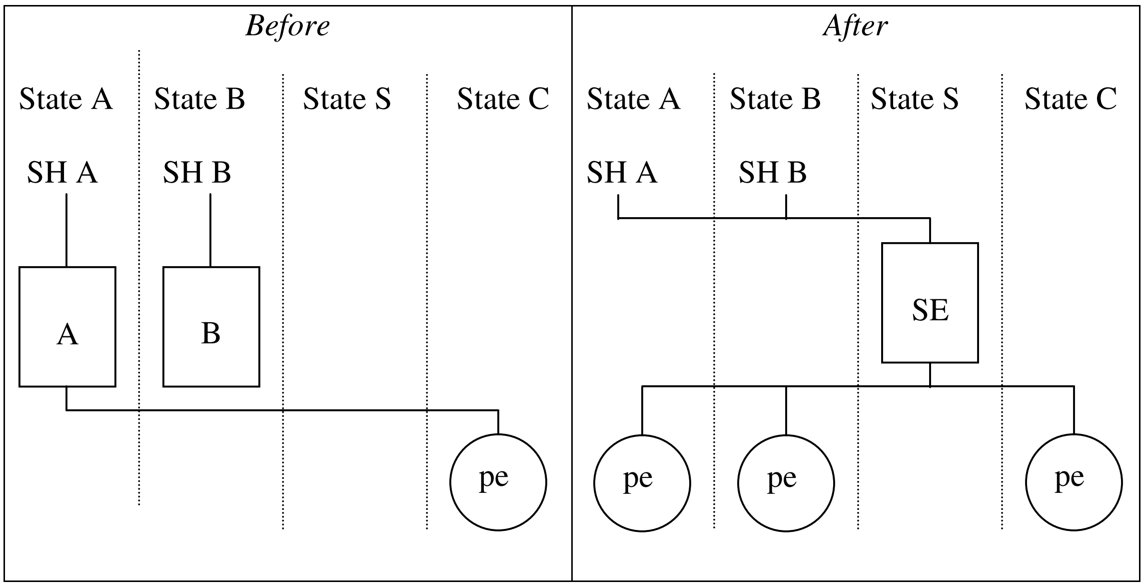
d) If B SE would be a company resident in Member State C, would it then be allowed to take over these losses? See Merger Directive Art. 6.

Yes, subject to certain conditions (see A.7.).

CASE 2

Merger by formation of a new company

(Art. 2 par. 1 jo Art 17. par 2(b) Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A and B are existing companies
- A has a permanent establishment in Member State C
- SE is a new company
- A and B are public limited-liability companies (see Annex I to Reg. 2157/2001)
- State A, State B, State C, and State S are EU Member States
- A:
  - formed under law of Member State A
  - registered office in Member State A
  - head office in Member State A
- B:
  - formed under law of Member State B
  - registered office in Member State B
  - head office in Member State B
- SE:
  - formed under law of Member State S
  - registered office in Member State S
  - head office in Member State S
  - will be covered by the EC Merger Directive

Transactions

- A:
  - transfers all assets and liabilities to SE
  - in exchange for shares of SE (and cash payment if any, not exceeding 10% of nominal value of shares to be issued) issued to shareholder(s) of A
  - will be wound up without going into liquidation*
- B:
  - transfers all assets and liabilities to SE
  - in exchange for shares of SE (and cash payment if any, not exceeding 10% of nominal value of shares to be issued) issued to shareholder(s) of B
  - will be wound up without going into liquidation*
- SE:
  - will be a newly formed SE
  - will be regarded as public limited-liability company governed by the law of Member State S

** See Note to Case 1 above.*

Questions

1) Assume Member State A is your country

   Tax effects for A in Member State A

   a) Will the merger give rise to any taxation of capital gains (= real value of assets & liabilities transferred minus their value for tax purposes), or is there roll-over relief?

      The merger will qualify as a reconstruction (see A.1) eligible for capital gains rollover (see B.1.1).

   b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State A, be taken over with the same roll-over relief by the permanent establishment of SE in Member State A?

      Irish tax law does not allow the creation of provisions and reserves that are partially or wholly tax exempt. Specific provisions for identifiable expenditure or events may be allowed as deductions if they qualify as trade expenses, but their deductibility will not be affected by a merger.

   c) Will SE's permanent establishment in Member State A be allowed to take over the losses of A that have not been exhausted for tax purposes? If SE would be a company resident in Member State A, would it then be allowed to take over these losses?

Trading losses, but not other losses, can be transferred to another company under 75% common control in limited circumstances (see A.7.).

d) Will Member State A renounce any right to tax the permanent establishment in Member State C?

Yes, as regards post-merger transactions.

e) Will Member State A reinstate in the taxable profits of A such losses of the permanent establishment as have been set off against the taxable profits of A in Member State A and which have not been recovered at the time of the merger?

Once the losses have been utilised, they cannot be reinstated

f) Or will Member State A tax profits or capital gains of the permanent establishment resulting from the merger? If so, will it give relief for any (notional) tax charged on these profits or capital gains by Member State C?

Any taxable profits or capital gains arising as a result of the merger will crystallise in Company A and are therefore liable in principle to Irish tax in the absence of a specific relief.

If A transfers part or all of the p/e in State C to B, Ireland will give credit relief for any State C tax that would have been payable in the absence of either relief under the Merger Directive or C's domestic law (see B.2.1.).

<u>Tax effects for SH A in Member State A</u>

g) Will the issue of shares by SE to SH A, resident in Member State A, in exchange for the shares in A give rise to any taxation of the income, profits or capital gains of that shareholder or is there roll-over relief?

The share exchange will normally qualify as a reorganisation such that no capital gain will arise (see B.1.2.). Reorganisation relief is not available to share dealers.

h) Will the issue of shares by SE to a shareholder of A, not resident in Member State A, in exchange for the shares in A give rise to any taxation of the income, profits or capital gains of that shareholder or is there roll-over relief?

Non-Irish residents are only subject to Irish taxation to the extent that the shares are attributable to an Irish permanent establishment. If the shares are held as a capital asset, reorganisation relief will be available.

i) Will the answers to the questions 1g) and 1h) differ if SH A is:
   i) A corporate shareholder?
   ii) An individual shareholder not owning a substantial interest?
   iii) An individual shareholder owning a substantial interest?
   iv) An individual entrepreneur?

   No.

2) Assume Member State S is your country

<u>Tax effects for SE in Member State S</u>

a) What is the value for tax purposes that SE has to attribute to the assets and liabilities, which are transferred to SE as part of the merger and that form a permanent establishment in Member States A, B and C?

   SE takes over:
   - *capital gains assets at their base cost to the transferor company;*
   - *capital assets on which capital allowances (tax depreciation) has been claimed at their tax written down value in the transferor company;*
   - *trading stock at an arm's length price;*

   unless the parties jointly elect otherwise (see B.2.1.).

<u>Tax effects for shareholder(s) of SE in Member State S</u>

b) Is there any provision in the legislation of Member State S that affects the shareholder of SE whether resident in Member State S or not? For example, are there provisions with regard to the valuation of the shares received in SE?

   To the extent that SE shareholders are subject to Irish tax (see Q.1.h above) and the share exchange qualifies as a reorganisation, the base cost of the SE shares issued to them will be their original shares in A and B.

3) Assume Member State C is your country

<u>Tax effects for A and SE in Member State C in respect of its permanent establishment in Member State C</u>

a) Will the merger give rise to any taxation of capital gains (= real value of assets & liabilities transferred minus their value for tax purposes) or is there roll-over relief?

   Rollover relief will generally apply (see B.1.1.).

b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State C, be taken over with the same roll-over relief by the permanent establishment of SE in Member State C?

   Not applicable – see Q.1.b above.

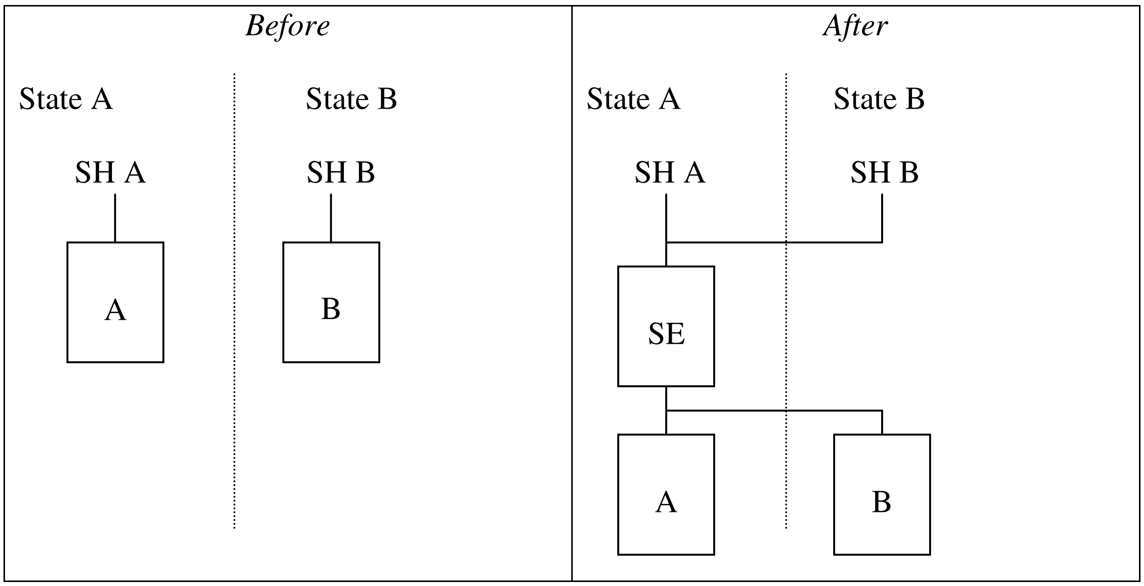
c) Will SE's permanent establishment in Member State C be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes? If SE would be a company resident in Member State C, would it then be allowed to take over these losses?

   Yes, subject to certain conditions (see A.7.).

CASE 3

Formation of a Holding – SE – 1

(Art. 2 par. 2(a) jo. Art. 32, Art. 33 and Art. 34 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A and B are existing companies
- SE is a new company
- A and B are public or private limited-liability companies (see Annex II Reg. 2157/2001)
- State A and State B are EU Member States
- A:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- B:
    - formed under law of Member State B
    - registered office in Member State B
    - head office in Member State B
- SE:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
    - will be covered by the EC Merger Directive

Transactions

- SE:
  - will be regarded as public limited-liability company governed by the law of Member State A
  - acquires holding in A and B
  - such that it obtains more than 50% of the permanent voting rights in A and B
  - in exchange for shares in SE
  - issued to the shareholders of A and B

Questions

1) Assume Member State A is your country

   Tax effects for SE in Member State A

   a) Are there any provisions for the valuation for tax purposes of the shares in A and B acquired by SE? Do the shares have to be valued at the book value of the exchanging shareholder or at a higher value?

      The shares in A and B are valued at the consideration given by SE for their acquisition, i.e. the market value of the shares issued by SE to the A and B shareholders.

   b) Are there any provisions for the valuation for tax purposes of the shares issued to SH A and SH B? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

      Assuming that the share exchange qualifies as a reorganisation, the SE shares are valued at the original base cost of the A and B shares to their respective shareholders.

   Tax effects for SH A in Member State A

   c) Will the issue of shares by SE to SH A in exchange for shares in A give rise to any taxation of the income, profits or capital gains of SH A or is there roll-over relief?

      No, rollover applies.

   d) Will the answers to the question 1c) differ if SH A is:
      i) A corporate shareholder?
      ii) An individual shareholder not owning a substantial interest?
      iii) An individual shareholder owning a substantial interest?
      iv) An individual entrepreneur?

No, assuming that the shares are not held by a share dealer (see A.3).

2) Assume Member State B is your country

<u>Tax effects for SH B in Member State B</u>

a) Will the issue of shares by SE to SH B in exchange for shares in B give rise to any taxation of the income, profits or capital gains of SH B or is there roll-over relief?

No, see Q.1.c above.

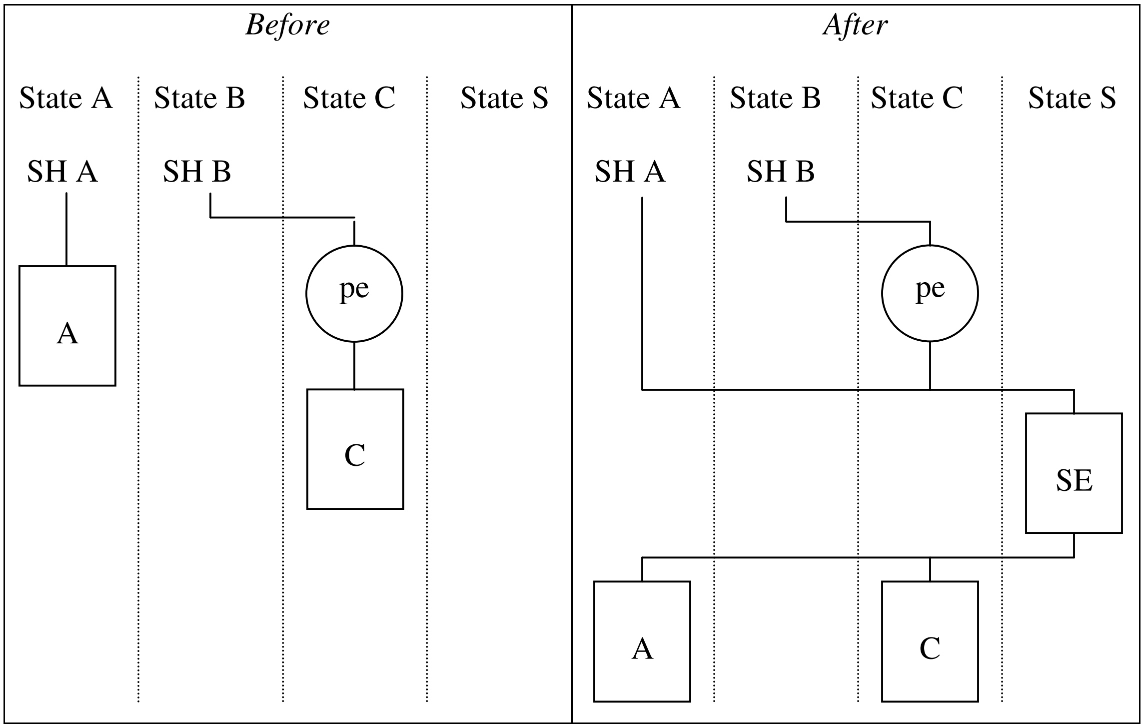
b) Will the answers to the question 1a) differ if SH B is:
   i) A corporate shareholder?
   ii) An individual shareholder not owning a substantial interest?
   iii) An individual shareholder owning a substantial interest?
   iv) An individual entrepreneur?

No, assuming that the shares are not held by a share dealer (see A.3).

CASE 4

Formation of a Holding – SE

(Art. 2 par. 2(a) and (b) jo. Art. 32, Art. 33, and Art. 34 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A and C are existing companies
- The shares in C are attributable to pe in State C
- SE is a new company
- A and C are public or private limited-liability companies (see Annex II)
- State A, State B, State C and State S are EU Member States
- A:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- C:
    - formed under law of Member State C
    - registered office in Member State C
    - head office in Member State C
- SE:
    - formed under law of Member State S

- registered office in Member State S
- head office in Member State S
- will be covered by the EC Merger Directive

Transactions

- SE:
  - will be regarded as public limited-liability company governed by the law of Member State S
  - acquires holding in A and C
  - such that it obtains more than 50% of the permanent voting rights in A and C
  - in exchange for shares in SE
  - issued to the shareholders of A and C

Questions

1) Assume Member State A is your country

   Tax effects for SH A in Member State A

   a) *Will the issue of shares by SE to SH A in exchange for shares in A give rise to any taxation of the income, profits or capital gains of SH A or is there roll-over relief?*

      Rollover applies (see Case 3, Q.1.c above).

   b) Will the answer to the above question be different in the case of:
      i) SH A being an individual shareholder not owning a substantial interest?
      ii) SH A being an individual shareholder owning a substantial interest?
      iii) SH A being an individual entrepreneur?
      iv) SH A being a corporate shareholder?

      No, assuming that the shares are not held by a share dealer (see A.3).

2) Assume Member State B is your country

   Tax effects for SH B in Member State B

   a) *Will the issue of shares by SE to SH B in exchange for shares in C give rise to any taxation of the income, profits or capital gains of SH B or is there roll-over relief?*

      Rollover applies (see Case 3, Q.1.c above).

   b) Will the answer to the above question be different in the case of:
      i) SH B being an individual entrepreneur?

ii) SH B being a corporate shareholder?

No, assuming that the shares are not held by a share dealer (see A.3).

3) Assume Member State C is your country

Tax effects for SH B in Member State C

a) Will the issue of shares by SE to SH B in exchange for shares in C give rise to any taxation of the income, profits or capital gains of SH B or is there roll-over relief?

Rollover applies (see Case 3, Q.1.c above).

b) Will the answer to the above question be different in the case of:
i) SH B being an individual entrepreneur?
ii) SH B being a corporate shareholder?

No, assuming that the shares are not held by a share dealer (see A.3).

4) Assume Member State S is your country

Tax effects for SE in Member State S

a) Are there any provisions for the valuation for tax purposes in Member State S of the shares of A and C acquired by SE? Do the shares have to be valued at the book value of the exchanging shareholder or at a higher value?

Yes (see Case 3,Q.1.a above).

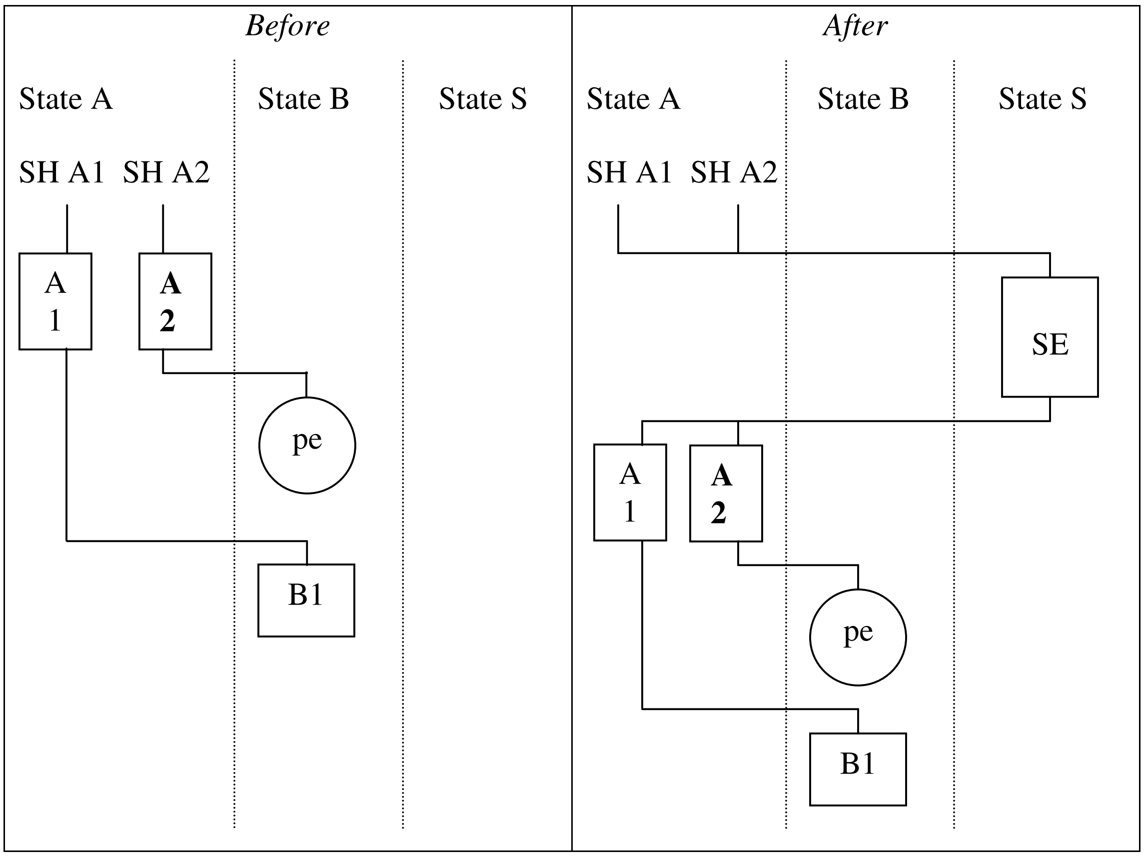
b) Are there any provisions for the valuation for tax purposes in Member State S of the shares issued to SH A and SH B? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

Yes (see Case 3,Q.1.b above).

CASE 5

Formation of a Holding – SE

(Art. 2 par. 2(b) jo. Art. 32, Art. 33, and Art. 34 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A1, A2, and B1are existing companies
- pe is an existing permanent establishment of A2 in Member State B
- SE is a new company
- A1, A2, and B1 are public or private limited-liability companies (see Annex II to Reg. 2157/2001)
- State A, State B, and State S are EU Member States
- A1 and A2:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- B1:
    - formed under law of Member State B

  - registered office in Member State B
  - head office in Member State B
- SE:
  - formed under law of Member State S
  - registered office in Member State S
  - head office in Member State S
  - will be covered by the EC Merger Directive

Transactions

- SE:
  - will be regarded as public limited-liability company governed by the law of Member State S
  - acquires holding in A1 and A2
  - such that it obtains more than 50% of the permanent voting rights in A1 and A2
  - in exchange for shares in SE
  - issued to the shareholders of A1 and A2

Questions

1) Assume Member State A is your country

   Tax effects for SH A2 in Member State A

   a) *Will the issue of shares by SE to SH A2 in exchange for shares in A2 give rise to any taxation of the income, profits or capital gains of SH A2 or is there roll-over relief?*

      Rollover applies (see Case 3, Q.1.c. above).

   b) Will the answer to the above question be different in the case of:
      i) SH A2 being an individual shareholder not owning a substantial interest?
      ii) SH A2 being an individual shareholder owning a substantial interest?
      iii) SH A2 being an individual entrepreneur?
      iv) SH A2 being a corporate shareholder?

      No, assuming that the shares are not held by a share dealer (see A.3.).

2) Assume Member State S is your country

   Tax effects for SE in Member State S

a) Are there any provisions for the valuation for tax purposes in Member State S of the shares of A1 and A2 acquired by SE? Do the shares have to be valued at the book value of the exchanging shareholder or at a higher value?

   Yes (see Case 3,Q.1.a above).

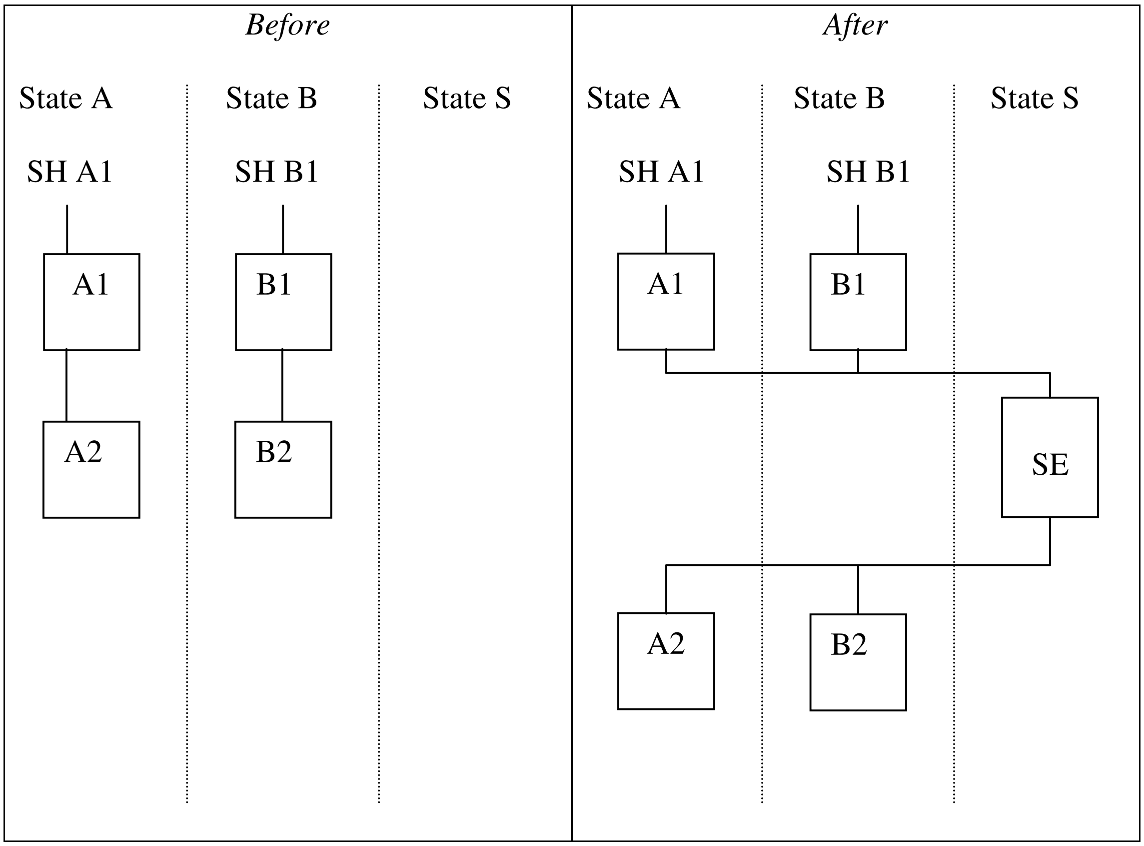
b) Are there any provisions for the valuation for tax purposes in Member State S of the shares issued to SH A1 and SH A2? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

   Yes (see Case 3,Q.1.b above).

CASE 6

Formation of a Subsidiary–SE by exchange of shares

(Art. 2 par. 3(a) jo. Arts. 35 and 36 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A1, A2, B1, and B2 are existing companies
- SE is a new company
- A1 and B1 are companies or firms within the meaning of Art. 48 par. 2 of the Treaty establishing the European Community or other legal bodies governed by public or private law (Art. 2 par. 3 Reg. 2157/2001)
- State A, State B, and State S are EU Member States
- A1 and A2:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- B1 and B2:
    - formed under law of Member State B

  - registered office in Member State B
  - head office in Member State B

- SE:
  - formed under law of Member State S
  - registered office in Member State S
  - head office in Member State S
  - will be covered by the EC Merger Directive

Transactions

- A1 and B1:
  - *form a subsidiary SE by way of contributing their subsidiaries A2 and B2 respectively to SE*
- *SE:*
  - will be regarded a public limited-liability company governed by the law of Member State S
  - will acquire the shares in A2 and B2 in exchange for shares issued to A1 and B1

Questions

1) Assume Member State A is your country

   <u>Tax effects for A1 in Member State A</u>

   a) Will the issue of shares by SE to A1 in exchange for shares in A2 give rise to any taxation of the income, profits or capital gains of A1 or is there roll-over relief?

      Rollover applies (see Case 3, Q.1.c above).

2) Assume Member State S is your country

   <u>Tax effects for SE in Member State S</u>

   a) Are there any provisions for the valuation for tax purposes in Member State S of the shares of A2 and B2 acquired by SE? Do the shares have to be valued at the book value of the exchanging shareholder or at a higher value?

      Yes (see Case 3,Q.1.a above).

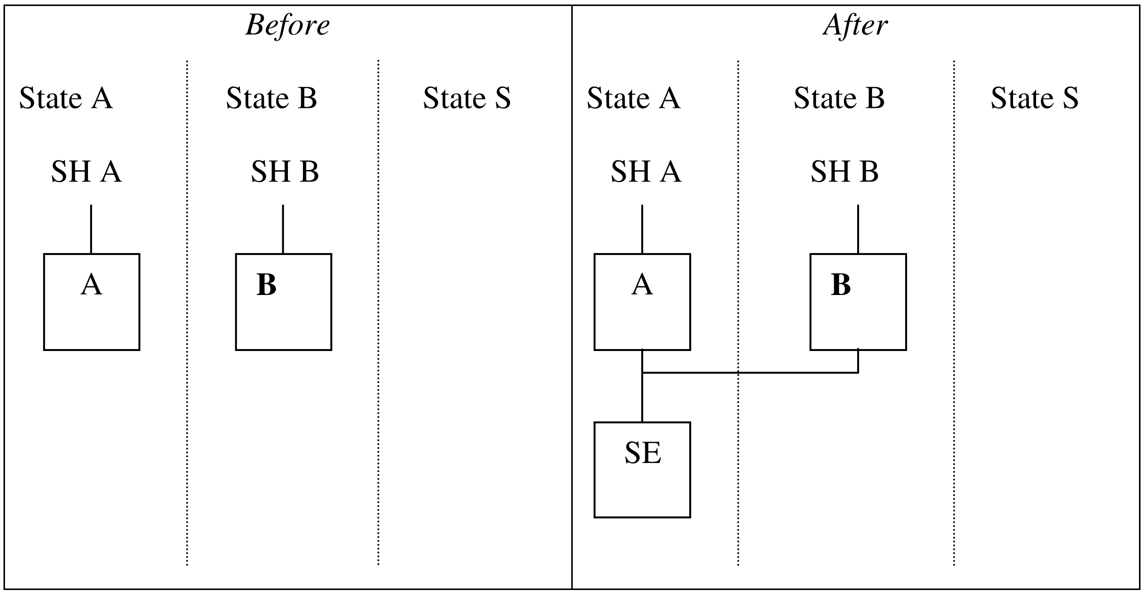
   b) Are there any provisions for the valuation for tax purposes in Member State S of the shares issued to A1 and B1? Do the shares have to be valued at the book value of the shares exchanged by the shareholder or at a higher value?

Yes (see Case 3,Q.1.b above).

CASE 7

Formation of a Subsidiary–SE by contribution of cash

(Art. 2 par. 3(a) jo. Arts. 35 and 36 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A, and B are existing companies
- SE is a new company
- A and B are companies or firms within the meaning of Art. 48 par. 2 of the Treaty establishing the European Community or other legal bodies governed by public or private law (Art. 2 par. 3 Reg. 2157/2001)
- State A, State B, and State S are EU Member States
- A:
  - formed under law of Member State A
  - registered office in Member State A
  - head office in Member State A
- B:
  - formed under law of Member State B
  - registered office in Member State B
  - head office in Member State B
- SE:
  - formed under law of Member State A
  - registered office in Member State A
  - head office in Member State A
  - will be covered by the EC Merger Directive

Transactions

- *SE:*
    - will take the form of an SE
    - will be regarded a public limited-liability company governed by the law of Member State A
- A and B:
    - *form a subsidiary SE*

Questions

It is generally assumed that an SE will for domestic corporate income tax purposes be treated as a corporate entity. However, there may be differences between the treatment of an SE and other legal entities, if certain possibilities, e.g. participation exemption or fiscal unity etc. are only allowed between certain types of legal entities and the SE is not yet included. If relevant, please mention some of these situations in your answers to the following questions.

1) Assume Member State A is your country

   Tax effects for A in Member State A

   Will there be any tax effect for A in Member State A as a consequence of the formation of the subsidiary SE in Member State A?

   A acquires shares in SE at a base cost equal to the cash consideration paid.

2) Assume Member State B is your country

   Tax effects for B in Member State B

   Will there be any tax effect for B in Member State B as a consequence of the formation of the subsidiary SE in Member State A?

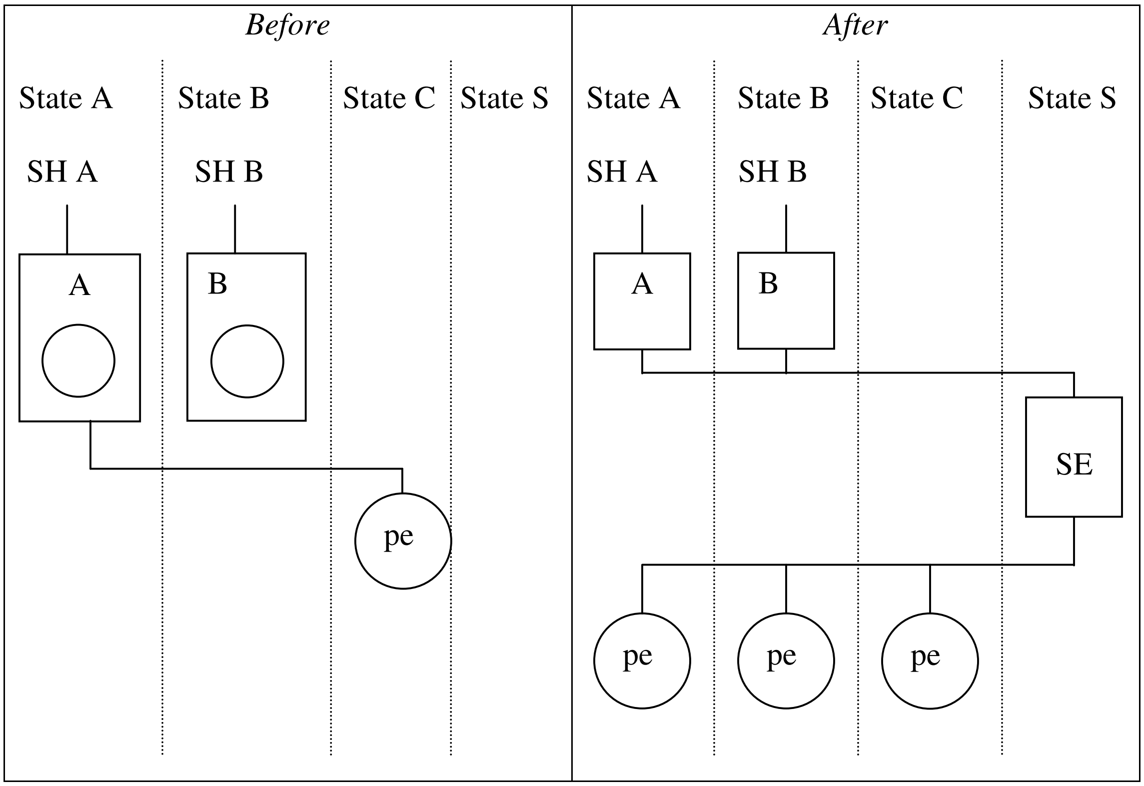
   B acquires shares in SE at a base cost equal to the cash consideration paid.

   If SE is a subsidiary of either A or B (i.e. either A or B holds > 50% of SE), SE will be a member of the same group as A or B for certain tax purposes and therefore certain group tax privileges will be available depending on the extent of A's (or B's) shareholding in SE (see A.7.).

CASE 8

Formation of a Subsidiary–SE by transfer of assets

(Art. 2 par. 3(a) jo. Arts. 35 and 36 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A, and B are existing companies
- SE is a new company
- A and B are public or private limited-liability companies (see Annex II)
- A and B are companies or firms within the meaning of Art. 48 par. 2 of the Treaty establishing the European Community or other legal bodies governed by public or private law
- A has a permanent establishment in State C
- State A, State B, State C and State S are EU Member States
- A:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- B:

  - formed under law of Member State B
  - registered office in Member State B
  - head office in Member State B
- SE:
  - formed under law of Member State S
  - registered office in Member State S
  - head office in Member State S
  - will be covered by the EC Merger Directive

Transactions

- SE:
  - will take the form of an SE
  - will be regarded a public limited-liability company governed by the law of Member State S
- A (and B):
  - *form a subsidiary by way of contributing their branches in Member State A (and B respectively) to SE in exchange for the issue of shares by SE to A (and B respectively)*
- A:
  - will transfer its permanent establishment in Member State C to SE in exchange for the issue of shares by SE to A

Questions

1) Assume Member State A is your country

<u>Tax effects for A and SE in Member State A</u>

a) Will the transfer of assets give rise to any taxation of capital gains (= real value of the assets and liabilities minus their value for tax purposes) or is there roll-over relief?

Rollover relief will apply (see B.2.1.).

b) May provisions or reserves which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State A be taken over with the same roll-over relief by the permanent establishment of SE in Member State A?

Not applicable (see Case 1, Q.1.b above).

c) Are there any provisions in the legislation of Member State A for the valuation for tax purposes of the shares in SE acquired by A?

Yes (see Case 3, Q.1.a above).

d) Will SE's permanent establishment in Member State A be allowed to take over the losses of A which have not been exhausted for tax purposes? (If SE would be a company resident in Member State A, would it then be allowed to take over these losses?)

   Yes, subject to certain conditions (see A.7).

e) Will Member State A renounce any right to tax the permanent establishment in Member State C?

   Yes, as regards post-event transactions.

f) Will Member State A reinstate in the taxable profits of A such losses of the permanent establishment in Member State C as have been set off against the taxable profits of A in Member State A and which have not be recovered (see art. 10 par. 2 of the EC Merger Directive)?

   Once losses have been utilised, they cannot be reinstated.

g) Or will Member State A tax profits or capital gains of the permanent establishment resulting from the transfer of assets?

   Yes, subject to any available reliefs (see Case 1, Q.1.e above).

h) If question g) is answered affirmatively, will Member State A give relief for the notional tax charged on these profits or capital gains by Member State C, assuming that Member State C would have levied tax (see art 10 par. 2 of the EC Merger Directive)?

   Yes (see Case 1, Q.1.e above).

2) Assume Member State S is your country

   <u>Tax effects for SE in Member State S</u>

   a) What is the value for tax purposes that SE has to attribute to the assets and liabilities of the permanent establishments in Member States A, B and C that is transferred to SE as part of the merger?

      B takes over:
      - *capital gains assets at their base cost to the transferor company;*
      - *capital assets on which capital allowances (tax depreciation) has been claimed at their tax written down value in the transferor company;*
      - *trading stock at an arm's length price;*

unless the parties jointly elect otherwise (see B.2.1.).

Tax effects for A as shareholder of SE in Member State S

b) Is there any provision in the tax legislation of Member State S that affects A as shareholder of SE?

No, since A is a non-resident shareholder outside the scope of capital gains tax.

3) Assume Member State C is your country

Tax effects for A and SE in Member State C in respect of its permanent establishment in Member State C

a) Will the transfer of assets give rise to any taxation of capital gains (= real value of assets & liabilities transferred minus their value for tax purposes) or is there roll-over relief?

Rollover applies (see A.7).

b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State C, be taken over with the same roll-over relief by the permanent establishment of SE in Member State C?

Not applicable (see Case 1, Q.1.b above).

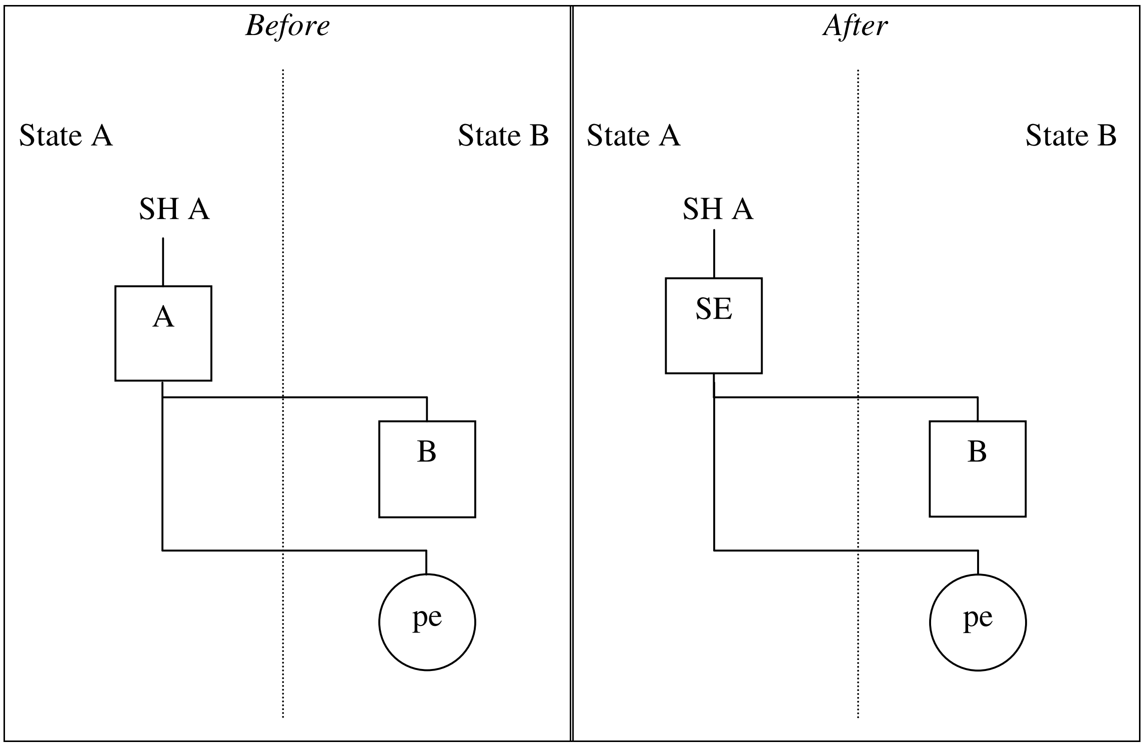
c) Will SE's permanent establishment in Member State C be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes? If SE would be a company resident in Member State C, would it then be allowed to take over these losses?

Yes, subject to certain conditions (see A.7).

CASE 9

Transformation of public limited-liability company into an SE

(Art. 2 par. 4 jo. Art. 37 Reg. 2157/2001)



Facts and assumptions

- SH = shareholder(s), resident in the respective country in which SH is situated
- A and B are existing companies
- pe is an existing permanent establishment
- A and B public limited-liability companies (see Annex I of Reg. 2157/2001)
- State A and State B are EU Member States
- A:
    - formed under law of Member State A
    - registered office in Member State A
    - head office in Member State A
- B:
    - formed under law of Member State B
    - registered office in Member State B
    - head office in Member State B

Transactions

- A will be transformed into an SE, governed by the law of Member State A (Pursuant to Art. 37 par. 2 Reg., the transformation shall not result in the winding up of A or in the creation of a new legal person. However, the Regulation itself does not give guidance with regard to taxation.)

Questions

1) Assume Member State A is your country

   Tax effects for A in Member State A

   a) Will the transformation of A into an SE give rise to any taxation of capital gains (= real value of assets and liabilities transferred minus their value for tax purposes) or is there roll-over relief for the business carried on in Member State A, or in Member State B through a permanent establishment?

      Assuming that an SE is recognised as a corporate body, there should be no disposal for tax purposes (see A.6).

   b) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State A, be carried over to SE in Member State A?

      Not applicable (see Case 1, Q.1.b above).

   c) Will SE be allowed to take over the losses of A that have not been exhausted for tax purposes?

      Assuming that an SE is recognised as a corporate body, there should be no effect for tax purposes (see A.6).

   Tax effects for SH A in Member State A

   d) Will there be any effect for SH A because of the transformation of its subsidiary company A into an SE?

      Assuming that the conversion qualifies as a reorganisation, rollover will apply.

   e) Will the answer to question d) be different in the following situations:
      i) SH is a corporate shareholder?
      ii) SH is an individual shareholder not owning a substantial interest?
      iii) SH is an individual shareholder owning a substantial interest?
      iv) SH is an individual entrepreneur?

No, assuming that the shares are not held by a share dealer (see A.3).

2) Assume Member State B is your country

Tax effects for the shareholder of B in Member State B

a) Will there be any effect for the shareholder of B because of the transformation of its parent company A into an SE?

No, assuming that a SE can be a member of a group for taxation purposes and the conditions for continued utilisation of trading losses are not breached (see A.7).

Tax effects for A and SE in Member State B

b) Will A be subject to any taxation of capital gains (=real value of assets and liabilities minus their value for tax purposes) or is there roll-over relief?

Rollover will apply on a conversion.

c) If not, what is the value for tax purposes that SE has to attribute to the assets and liabilities of the permanent establishment in Member State B?

Not applicable.

d) May provisions and reserves, which are partly or wholly exempt from tax and which are not derived from permanent establishments outside Member State B, be taken over with the same roll-over relief by the permanent establishment of SE in Member State B?

Not applicable (see Case 1, Q.1.b above).

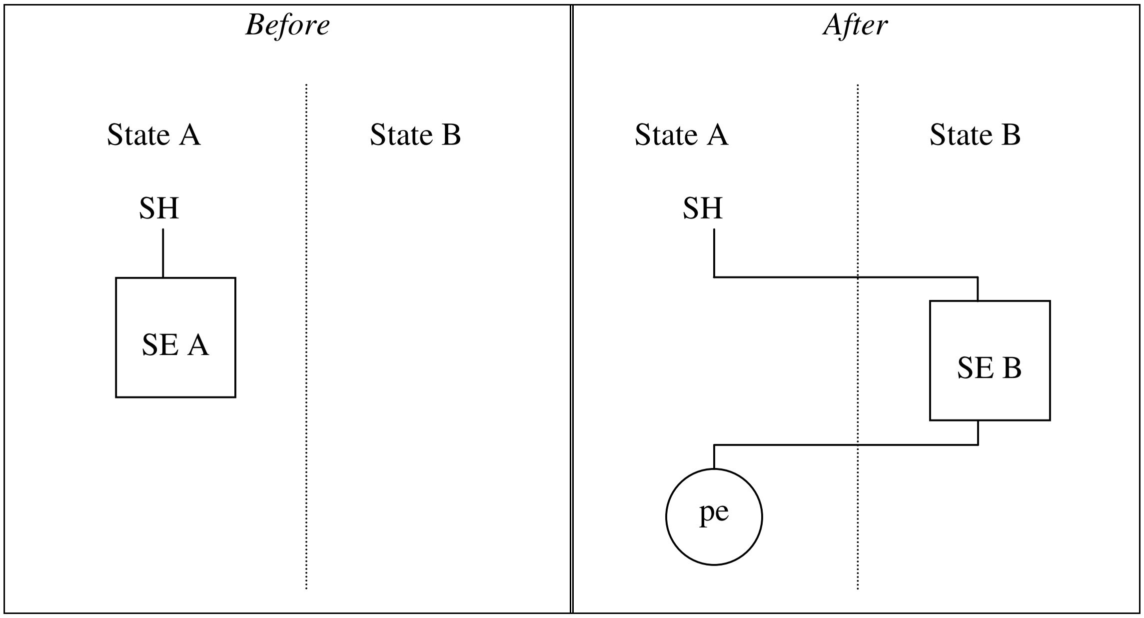
e) Will SE's permanent establishment in Member State B be allowed to take over the losses of A's permanent establishment that have not been exhausted for tax purposes?

Yes, subject to certain conditions (see A.7).

CASE 10

Transfer of registered office of an SE

(Art. 8 par. 1 jo. Art. 37 Reg. 2157/2001)



Facts and assumptions

- SE is an existing SE
- State A and State B are EU Member States
- SE A:
    - formed under the law of Member State A
    - registered office in Member State A
    - head office in Member State A
- SE B:
    - statutes are amended to conform to the law of Member State B
    - registered office in Member State B
    - head office in Member State B

Transactions

- registered office and head office of SE are transferred to Member State B (pursuant to Art. 8 Reg. 2157/2001 such a transfer shall not result in the winding up of SE or in the creation of a new legal person)*

** Note: The transfer of a registered office is not currently possible under Irish law The transfer of a head office will not generally have tax consequences unless it amounts to a transfer of tax residence (see A.5). It is assumed that this is the case for the purposes of the questions below.*

Questions

1) Assume Member State A is your country

Tax effects of the transfer for SE

a) Does the transfer entail a winding up of SE for tax purposes?

No, but deemed disposals of assets can arise (see A.5).

b) What are the tax consequences in case of a winding up of SE?

Not applicable.

c) Does it make a difference whether or not a permanent establishments of SE B remains in Member State A?

Yes, if a permanent establishment in A terminates there is in principle a deemed disposal at market value for capital gains purposes of assets attributable to the permanent establishment (see A.5).

d) If after the transfer of the registered office, SE B will have a permanent establishment in Member State A, can SE B take over the provisions and reserves which are partly or wholly exempt from tax with the same roll-over relief?

Not applicable (see Case 1, Q.1.b above).

e) If after the transfer of the registered office, SE B will have a permanent establishment in Member State A, can SE B's permanent establishment in Member State A take over the losses of SE A that have not been exhausted for tax purposes?

Yes, since no transfer of a trade is involved.

Tax effects of the transfer for SH

f) What are the tax effects for SH in case the transfer results in a winding up of SE for tax purposes?

Not applicable.

g) Is the answer to 1f) different if:
   i) SH is a corporate shareholder?
   ii) SH is an individual shareholder?
   iii) SH is an individual not owning a substantial interest?
   iv) SH is an individual owning a substantial interest?
   v) SH is an individual entrepreneur?

No.

h) Are there any effects for tax purposes if the transfer of the registered office is not considered as a winding up for tax purposes?

No, but income and gains derived by shareholders from SE B may have a foreign source after the transfer.

i) Is the answer to 1h) different if:
   i) SH is a corporate shareholder?
   ii) SH is an individual shareholder?
   iii) SH is an individual not owning a substantial interest?
   iv) SH is an individual owning a substantial interest?
   v) SH is an individual entrepreneur?

No.

2) Assume Member State B is your country

<u>Tax effects of the transfer for SE</u>

a) If SE is considered to be a new company, how should the assets and liabilities of SE be valued?

If a deemed disposal for capital gains purposes applies (see Q.1.a above), the base cost of the assets concerned will be uplifted to market value.

<u>Tax effects of the transfer for SH</u>

b) Are there any tax effects for SH in case the transfer results in a formation of a new SE in your country? For example, with regard to the valuation of the shares in SEB?

No, the transfer will not result in the formation of a new SE.