Attribution to participators of chargeable gains accruing to non-resident company (S.590)

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Revenue
Cáin agus Custaim na hÉireann
Irish Tax and Customs

Attribution to participators of chargeable gains accruing to non-resident company (S.590)

13.1 **Section 590** makes provision to prevent persons avoiding capital gains tax by transferring property to controlled companies abroad. It enables the Revenue to look through the non-resident controlled company to its resident participators and, subject to certain exceptions, to assess them to capital gains tax on their share of the gains made by the company.

13.2 The section applies to chargeable gains accruing to a company on or after 11 February, 1999 where the company is not resident in the State and if it were resident, it would be a close company. The amount of the gain is computed as if the company were resident in the State.

13.3 Subject to certain exceptions every person who at the time when the gain accrues to the company is resident or ordinarily resident in the State, who, if an individual is domiciled in the State, and who is a participator in the company, is treated for capital gains tax purposes as if part of the chargeable gain had accrued to him or her. The part of the chargeable gain is the proportion of the gain that corresponds to the extent of the participator's interest as a participator in the company.

Example 1

X, who is both resident and domiciled in the State, is a participator in a company resident in Bermuda having purchased 75% of its issued share capital for €50,000.

In 2005 the company sells a holding of quoted shares and makes a capital gain (computed under the ordinary rules) of €20,000.

As X is a participator in the company she is chargeable in 2005 on the part of the gain attributable to her participation i.e. €15,000 (75% of €20,000).

13.4 A chargeable gain is not treated as accruing to a participator if the aggregate of the amount which would be so treated as so accruing, and the amount which is treated as accruing to persons connected with the participator does not exceed one twentieth of the gain accruing to the company.

13.5 **Section 590** does not apply to the following:-

(a) A chargeable gain accruing on the disposal of tangible property, whether movable or immovable, or a lease of such property or specified intangible assets within the meaning of **section 291A(1)** where the property was used solely for the purposes of a trade carried on by the company, or by another company which is a member of the same group within the meaning of **subsection (16),** wholly outside the State.

(b) A gain on the disposal of foreign currency or of a debt, within **section 541 (6)** where the currency or debt is or represents money used for the purposes of a trade carried on by the company wholly outside the State.

(c) A gain accruing to the non-resident company in respect of which it is itself subject to Capital Gains Tax by virtue of **Section 29** or subject to Corporation Tax by virtue of **Section 25(2)(b)** (see **Tax Instruction 2.3.1 Paragraph 3**).

13.6 Where any amount of capital gains tax is paid by a participator as a result of the charge to tax arising under this section, and an amount in respect of the gain charged is distributed (either by way of capital or on the dissolution of the company) within 2 years from the time when the gain accrued to the company, that amount of tax (so far as neither reimbursed by the company nor applied as a deduction under subsection (9)) can be used to reduce or eliminate any liability to tax in respect of the distribution. Where income tax is due in respect of the distribution, the distribution is treated as forming the highest part of the income of the person.

Any capital gains tax paid by a participator in a non-resident company under this section (so far as neither reimbursed by the company, nor used to reduce a liability to tax on a distribution) is treated as allowable expenditure in the capital gains tax computation of the gain arising on the disposal of the asset representing the participator's interest in the company.

Example 2

If X, the shareholder in Example 1, sells her shares in the company for €80,000 in 2006, the computation of the gain on the sale of these shares (subject to expenses) will be as follows:

	€	€
Sale price		80,000
Cost Price	50,000	
Tax paid by X on the attributed gain	3,000	53,000
Chargeable gain		27,000

13.7 Losses accruing to a non-resident company in a given year may be apportioned to resident shareholders in that year, but may be set off only against gains similarly apportioned in that year. Thus only the net gains accruing to the company in the year will be apportioned.

If a resident shareholder has shares in more than one non-resident company within **Section 590**, losses attributable to him in respect of one company may be set off against gains attributable to him in respect of another such

company. Net losses for the year of such a company may not otherwise be set off against any gains.

13.8 Where the participator in the non-resident company is itself a non-resident company (which would be a close company if it were resident), an amount equal to the amount of gain apportioned to the participator is further apportioned among the participators of the participator, and so on through a chain of companies.

13.9 The persons treated by the section as if part of a chargeable gain accruing to a non-resident company (or any company in the chain referred to in **13.8**) had accrued to them expressly include trustees who are participators, if when the gain accrues to the company, the trustees are neither resident nor ordinarily resident in the State. Such gain can then be attributed to beneficiaries of the trust under **section 579A**.

13.10 Where any tax payable by a participator under this section is paid by the non-resident company or a company in the chain referred to in **13.8**, the payment is not subject to tax.

13.11 For the purposes of section 590, group treatment is allowed in relation to transfers of assets between non-resident companies which are members of the same non-resident group.

The term "group" is to be construed in accordance with **subsections (1) (apart from paragraph (a)), (3) and (4) of section 616** which define "a group of companies" for the purposes of Part 20 (Companies Chargeable Gains).

A non-resident group of companies means –

(a) a group none of the members of which is resident in the State; or

(b) if two or more members of a group are not resident in the State, those members which are not resident.

Sections 617 to 620, which respectively deal with transfers of assets, other than trading stock, within a group, transfers of trading stock with a group, disposals or acquisitions outside a group and the replacement of business assets by members of a group, are to apply to a non-resident company which is a member of a non-resident group as they apply to a company resident in the State which is a member of a group. However, requirements in those sections for a company to be EU resident before it can be considered as a member of a group are inappropriate in the context of a non-resident group and, accordingly, are disapplied for the purpose of this section.

For the same purposes, **sections 623** (company ceasing to be a member of group) **and 625** (shares in subsidiary member of group) are to apply as if the references in those sections to companies and a group of companies were references to non-resident companies and a non-resident group of

companies. This is done to prevent non-resident companies disposing of assets entirely out of the non-resident group in such a way that any gain arising on the disposal would escape a charge to capital gains tax.

This provision does not apply where

(a) the chargeable company is resident in the State at the time of acquisition of the asset, or the asset is a chargeable asset in relation to that company immediately after that time, and

(b) the other company is resident in the State at the time of that acquisition, or the asset is a chargeable asset in relation to that company immediately before that time.