

**Receiverships – Explanatory Memorandum re Draft Proposed
Legislation**

Summary

There are 2 main purposes behind this draft provision. The first is to make clear that a receiver, or a mortgagee-in-possession of property of a debtor is not liable to tax on the income from the property over which they have control. That liability remains with the debtor. The second is to provide a mechanism for an amount of tax to be withheld by the receiver or mortgagee and paid over to Revenue, which, broadly speaking, will be available to be set against the ultimate tax liability of the debtor. If the amount of tax withheld in respect of the property under receivership exceeds the final liability in respect of the debtor's income chargeable under the same Case or Schedule as income arising from the property in receivership, the excess will be repaid to the receiver or mortgagee.

The basic premise for the computation of the amount of tax to be withheld (relevant tax) is on the basis of receipts less outgoings arising for each chargeable period of a debtor falling within the overall period of the receivership. However, it is not possible to apply this rule in its simplest form. For example, certain expenses which have been incurred may not, in normal circumstances, be deductible in the computation of income for tax purposes. Similarly, certain receipts may not be taxable. Furthermore, there are many examples in the tax code in which losses in one area cannot be set against income in another (a case in point is the restriction on the use of

rental losses outside a Case V context). These various limitations have to be accommodated within the proposed “relevant tax” framework.

There are limits to the amount of knowledge which a receiver or mortgagee may have concerning the tax status of the debtor (especially in circumstances of non-cooperation by the debtor), but where the receiver or mortgagee is satisfied, based on clear and demonstrable evidence, that the debtor will have no final tax liability, the relevant tax need not be withheld. The rate at which the tax is withheld is 20%, or 10% where the debtor is a company.

Provision is made for the submission of a return (accompanied by the payment of the relevant tax) to Revenue by the receiver or mortgagee, for informing the debtor of the receipts, outgoings and amount of relevant tax as well as other information within the knowledge of the receiver/mortgagee which the debtor may need to complete their normal tax return, as well as the retention of relevant records for 6 years.

Provision is also made to address circumstances of non-compliance by the receiver or mortgagee including the raising of assessments and the charging of interest on overdue tax, as well as for appeals. Finally, penalties may be incurred for failure to comply with the obligations imposed by the new provision.

Details

This draft section has 14 subsections.

Subsection (1)(a) defines the terms used in the section. The following should be noted.

‘deficit’, is defined in relation to a relevant property (defined later as property of a debtor which is in receivership or where a mortgagee is in possession) that is a rental property, where the profits or gains are chargeable under Case V. A deficit occurs where the formula in the definition of “net receipts” gives rise to a negative amount (i.e. where the outgoings from such property exceed the related receipts) for a specified period (i.e. a chargeable period or part of a chargeable period of the debtor occurring while property is in receivership or in the possession of a mortgagee).

‘net receipts’, in relation to a relevant property of a debtor, is a positive amount determined by the formula $A - B$, where A and B are respectively the aggregate of the receipts and outgoings in respect of the property.

‘outgoings’, in relation to a relevant property of a debtor is a sum, or sums, of money paid out by a specified person (i.e. a receiver or a mortgagee in possession) in a specified period, to the extent and on the same basis that the amount paid would be deductible in computing the amount of any income, profits or gains chargeable under Schedules C, D or F which arise from the property in any way.

‘receipts’ in relation to a relevant property of a debtor means a sum, or sums, of money received by a specified person in respect of any income, profits or gains which arise from the property in any way and which would be chargeable to tax under Schedules C, D or F.

The definition, however, confirms that the following are not to be treated as receipts for the purposes of this definition.

- (i) Balancing charges under section 274 or 288 and “section 23” clawbacks arising on the disposal of a relevant property by a specified person, and
- (ii) Any sum of money from which professional services withholding tax or relevant contracts tax has been deducted.

‘relevant income’ which is defined in relation to a specified period and any relevant property of a debtor, means the aggregate amount of the net receipts of the specified period from the relevant property, as reduced by the lesser of the following amounts;

- (i) the aggregate of any deficits from the relevant property, and
- (ii) the aggregate of net receipts from the relevant property that relate to rental profits chargeable under Case V of Schedule D.

In effect, this means that the aggregate of the net receipts to be included in relevant income for the purposes of this section is to be reduced by the amount of any deficits (i.e. negative amounts resulting from the application of the formula in the definition of “net receipts” to rental property in the

State, the income from which is chargeable under Case V of Schedule D), to the extent that the aggregate net receipts include net receipts relating to rental income chargeable under Case V.

For example, a receiver is appointed on 1 May 2014 over property belonging to A Ltd. The property comprises a factory unit, which is partially used by the company for trading purposes and partially let to a third party, and an apartment which is currently let. The receiver continues to trade and let the properties. A Ltd's accounting period end-date is 31 December.

The results for the specified period ending on 31 December 2014 are as follows. There are net receipts of €10,000 and €6,000 respectively in respect of the trading activities and the part of the unit which is let. The apartment shows a deficit of €7,000.

The computation of relevant income is as follows:

Aggregate of net receipts: (€10,000 + €6,000) =	€16,000
less the lower of-	
the deficit (€7,000) and the rent-related net receipts (€6,000)	<u>€6,000</u>
Relevant income for the specified period:	€10,000

'relevant period' means the period during which a mortgagee has possession of relevant property, or a receiver has been appointed. For the purpose of this definition, a 'mortgagee' includes any person having the benefit of a charge or lien, or any person deriving title to the mortgage under the original mortgagee.

‘relevant property’ means property of a debtor in respect of which a mortgagee is in possession or a receiver is appointed.

‘specified period’ is a chargeable period, or part of a chargeable period, falling within a relevant period.

For example, a receiver is appointed over a rental property belonging to B Ltd. (which has an accounting period ending on 31 December) on 1 June 2014. The receiver continues to rent the property and sells it on 30 April 2016 on which date the receivership ends.

In this example, the relevant period is the period commencing on 1 June 2014 and ending on 30 April 2016. There are three specified periods in the relevant period, i.e. the period from 1 June 2014 to 31 December 2014, the year ended 31 December 2015 and the period 1 January 2016 to 30 April 2016.

“specified person” for a specified period where property is in receivership or a mortgagee is in possession means the receiver or, where no receiver is appointed, the mortgagee.

In the previous example, the receiver is the specified person for each specified period. However, if the mortgagee terminated the receiver’s appointment on 30 November 2015 and took possession of the property with effect from 1 December 2015 the relevant period in relation to the receiver ends on 30 November 2015 and the final specified period for the receiver is

the period from 1 January 2015 to the date the appointment is terminated (i.e. 30 November 2015).

A new relevant period commences on 1 December in relation to the mortgagee and ends on 30 April 2016, when the property is sold. The specified periods for this relevant period are from 1 December 2015 to 31 December 2015 and from 1 January 2016 to 30 April 2016.

(b) Any person, other than the specified person, who receives receipts in a specified period in relation to a relevant property, is treated as the specified person in respect of the property for the specified period in question and is responsible for the filing of returns, remittance of tax etc. as required under the section. This paragraph applies, for example, where a receiver is appointed over property but the income from the property is received directly by the mortgagee. In this situation, the mortgagee, rather than the receiver, is required to satisfy the various obligations which the section imposes on specified persons.

(2)(a) A specified person is required to make a deduction representing an amount of tax at the specified rate, i.e. 20 per cent, or 10 per cent where the debtor is a company, (referred to in the section as “relevant tax”) from the relevant income for a specified period and remit the tax to the Collector-General in accordance with the requirements of this section.

(b) However, a specified person who is satisfied that relevant tax would, if deducted and remitted to the Collector-General in accordance with paragraph (a), be repayable in full in accordance with subsection (14), may

opt not to deduct such tax from the relevant income for the specified period in question. Where this option is exercised, the specified person must retain and preserve all relevant records that may be required to demonstrate, in the event of an enquiry by Revenue, the basis on which the option was exercised. Revenue would consider that this scenario could arise in circumstances where the debtor is fully cooperating with the receiver/lender such that the debtors complete tax position is known to the receiver/lender.

(3) A specified person who, in accordance with subsection (2), deducts relevant tax from the relevant income of a debtor or opts not to deduct such tax, must, in all cases, submit a return to the Collector-General within 3 months of the end of the specified period in question containing the specified person's name, address and tax reference number and the following particulars in relation to the debtor—

(i) the name, and where known to the specified person, the address and tax reference number,

(ii) the date the relevant period commenced,

(iii) the specified period to which the return refers,

(iv) the amount of relevant income of the specified period,

(v) the amount, if any, of the relevant tax deducted, and

(vi) confirmation as to whether or not the specified person has given the debtor a statement referred to in subsection (5).

(4) The relevant tax which a specified person deducts in accordance with this section, and which must be included on a return in accordance with subsection (3), must be remitted to the Collector-General, (without the issue of a notice of assessment) at the same time as the return is due, i.e. within 3 months of the end of the specified period in question. There is provision for assessing the specified person to income tax under Case IV of Schedule D in respect of any relevant tax that is not remitted by the due date.

(5) As the debtor is chargeable to income tax or, as the case may be, corporation tax in respect of any income, profits or gains arising while property is in receivership or the mortgagee is in possession, the specified person is required to provide the debtor with certain information in relation to each specified period, which will be required by the debtor in completing a return of income for the corresponding chargeable period.

In this regard, a specified person must provide a debtor with a written statement containing certain information within 3 months of the end of the debtor's specified period. Where the specified person is not aware of the debtor's address at that time, the statement must be given to the debtor within 4 weeks of the specified person obtaining the address. The information required is as follows:

(a) the specified person's name, address and tax reference number,

(b) the debtor's name, address and, where known, tax reference number,

(c) the specified period to which the statement refers, and

(d) particulars of

- (i) any relevant income and the amount and date of remittance of any relevant tax to the Collector-General, and
- (ii) any other information known to a specified person in respect of the debtor's relevant property that would be required by a debtor for the purposes of making a return of income or profits for a chargeable period in accordance with the Tax Acts. In this regard, it should be noted that a specified person's obligations under this subsection relate to all of the debtor's relevant property in relation to which the person is a specified person, not just the relevant property to which subsection (2) applies. For example, where there is no relevant income for a specified period, but there are receipts and outgoings, the specified person will be required to provide details of those matters to the debtor on the statement required under this subsection.

(6)(a) For the purposes of this subsection, "records" include accounts, books of account, documents or any other data maintained manually or by electronic, photographic or other process.

(b) A specified person must retain records of receipts, outgoings and, where relevant, the records referred to in subsection (2)(b) relating to the exercising

of a an option not to deduct relevant tax, for a period of 6 years after the end of the specified period to which those matters relate and make those records available to Revenue when so required by written notice.

(7) Any person who fails to comply with any of the obligations imposed on that person by subsections (2) to (6) shall be liable to a penalty of [€1,000] in respect of each failure.

(8) Where an amount of relevant tax has not been included in a return required under subsection (3) or where an officer of the Revenue Commissioners is dissatisfied with the return, he or she may make an assessment on the specified person for the relevant tax in question. In these circumstances, the due date for the purposes of interest on the unpaid tax is the date by which the return was due, i.e. 3 months after the end of the specified period in question.

(9) Where an amount has been incorrectly included in a return as relevant income, an officer of the Revenue Commissioners may make assessments, adjustments or set-offs to secure, as far as possible, that the relevant tax would be the same as if the amount had not been included in the return.

(10) Relevant tax assessed on a specified person under this section is due within 1 month of the issue of the notice of assessment (unless the tax is due earlier as provided for in subsection (8)) subject to an appeal against the assessment. However, an appeal will not affect the date when any amount is due under subsection (8).

(11) The standard late payment and appeal provisions apply in relation to relevant tax. Where interest is payable on any tax charged the provisions of section 1080(2)(b) will not apply.

(12)(a) Any amount of relevant tax payable in accordance with this section without the making of an assessment shall carry interest at the rate of 0.0219 per cent per day for each day or part of a day from the date when the amount becomes due and payable until payment.

(b) Subsections (3) to (5) of section 1080 shall apply in relation to interest payable under paragraph (a) as they apply in relation to interest payable under section 1080.

(c) In its application to any relevant tax charged by any assessment made in accordance with this section, section 1080 shall apply as if subsection (2)(b) of that section were deleted.

(13) Notwithstanding that a receiver is required under this section to compute the amount of relevant income for a specified period and deduct relevant tax from any such income (unless the option not to deduct tax is exercised), the provisions of the Tax Acts relating to the computation of the debtor's income, profits or gains for a chargeable period apply in the normal manner. This means, *inter alia*, that a debtor must take the receipts and outgoings of a specified period relating to relevant property into account in computing the income, profits or gains for the accounting period which corresponds to the specified period.

(14)(a) Relevant tax which has been deducted from relevant income of a debtor for a specified period falling within a chargeable period in respect of which the debtor is within the charge to income tax or corporation tax, and which has been remitted to the Collector-General in accordance with this section is to be set against income tax and universal social charge or, as the case may be, corporation tax chargeable on the debtor for the period to the extent that the tax comprises offsettable tax.

(b) 'Offsettable tax' means an amount equivalent to the amount determined by the formula—

$$\frac{(A \times B) \times D}{C \quad E}$$

where—

A is the amount of tax (i.e. income tax and universal social charge or, as the case may be, corporation tax) chargeable on the debtor's income, profits or gains (other than any amount included as profits in respect of chargeable gains) from all sources for the chargeable period,

B is the amount of the debtor's income, profits or gains ('income') for the chargeable period which is chargeable to tax under the same Case or Schedule as any income arising from the relevant property (in respect of which relevant tax has been deducted from the relevant income of that property). For the purposes of this paragraph, the income is the net amount after taking into account any allowance, charge, deduction or

loss (for example, capital allowances) specific to the debtor's income chargeable under the Case or Schedule in question ('allowable deductions'), but before taking "general deductions" into account, i.e. any allowance, charge, deduction or loss which is allowed or set off against the total profits of a company or, where the debtor is not a company, which is taken into account in computing the debtor's income from all sources, for example relief for investment in films under section 481,

C is the amount of the debtor's income from all sources (other than any amount included as profits in respect of chargeable gains) for the chargeable period after allowable deductions in respect of those sources but before general deductions.

D is the number of days in the specified period, and

E is the number of days in the chargeable period.

For example, M who is a self-employed trader has two rental properties and employment income taxed under Schedule E. A receiver is appointed over one of the properties (Property 1) on 1 May 2014.

The relevant income from Property 1 for the specified period 1 May 2014 to 31 December 2014 is €2,000, from which relevant tax of €400 has been deducted and remitted to the Collector-General.

M's chargeable income for the tax year 2014 is as follows:

Case I:		€10,000
less capital allowances:		<u>€2,000</u>
Net Case I:		€8,000
Salary		€20,000
Case V:		
Property 1 (surplus)	€3,000	
Property 2 (surplus)	€600	
Case V		<u>€3,600</u>
Income from all sources (after allowable deductions)		€31,600
Tax @ 20%		€6,320
Tax credits:		€3,300
Tax payable:		€3,020
USC: (say)		<u>€1,535</u>
Income tax & USC:		€4,555
Tax & USC deducted from salary:		<u>€1,420</u>
Balance due		€3,135

In this example

A = €3,135,

B = €3,600,

C = €31,600,

D = 245 days, and

E = 365 days.

The amount of offsettable tax is €240, $(3,135 \times 3,600/31,600) \times 245/365$.

(c) Notwithstanding the standard repayment and set-off provisions contained in sections 865 and 960H respectively, where the amount of relevant tax which has been deducted and remitted to the Collector-General in accordance with subsection (3) exceeds the amount of offsettable tax computed in accordance with paragraph (b), the excess is to be repaid to the specified person.

In the above example, the specified person is entitled to a repayment of €160 (relevant tax of €400 – offsettable tax of €240).

If the relevant income from Property 1 in the above example was €1,000, from which relevant tax of €200 had been deducted, the specified person would not be due a repayment as the relevant tax is less than the offsettable tax of €240.