Payment and receipt of interest and royalties without deduction of income tax

Part 08-03-06

This document should be read in conjunction with:
Interest Payments: Section 246 TCA 1997

Royalty Payments: Section 238, Section 242A and Chapter 6 of Part 8 TCA 1997

Document last updated March 2024

Table of Contents

1 Introduction

1.1 Interest Payments

As a general rule section 246 Taxes Consolidation Act 1997 (TCA 1997) requires the deduction of income tax at the standard rate from yearly interest[1] paid by:

- companies or
- any person to another person whose usual place of abode is outside the State.

Section 246(3) contains an extensive range of exemptions from the general rule to withhold tax. The legislation provides for these exemptions to be allowed automatically and do not require prior approval from Revenue, apart from the exemption under section 246(3)(d) which is discussed at section 7. This TDM sets out guidance, procedures and principles to help taxpayers to operate these exemptions. It also sets out a number of practices in relation to these exemptions.

Ireland's double tax agreements ("DTAs") may limit (i.e. reduce) the rate of Irish tax that can be charged on interest payments made to a resident of a treaty partner (referred to in this TDM as the "DTA rate"). In addition to the exemptions in section 246(3), set out in section 9 of this TDM are the circumstances where the withholding tax rate applied to the payment of interest to a resident of a treaty partner can be reduced to the DTA rate.

If withholding tax is withheld in error, or if a refund is available under a DTA, then a claim for the repayment of the withholding tax deducted can be submitted via the Form IC6 (Company) or Form IC7 (Individual), as appropriate, which are available in the International Claims Section of www.revenue.ie.

For the purpose of applying the provisions of section 246(3) and the guidance contained in this TDM, the term "**paid in the State**" means the payment of any yearly interest amount where -

(a) the source of the interest payment is in the State, and

(b) the payment of the interest is, without regard to the exemptions contained in section 246(3), within the scope of Irish interest withholding tax under section 246(2).

1.2 Royalty Payments

As a general rule section 238(2) TCA 1997 requires that on the making of a royalty payment or other sum paid in respect of the user of a patent, the payer is obliged to deduct out of the payment income tax at the standard rate.

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[1] Refer to Tax and Duty Manual (TDM) Part 08-03-11 which contains guidance on the commercial paper exemption in section 246A on the basis that the commercial paper must mature within 2 years, and factors to consider in relation to whether or not "rolled over" commercial paper is eligible for that exemption. The same factors are applicable in determining whether or not interest is "yearly interest".

However, Chapter 6 (Implementation of Interest and Royalties Directive) of Part 8 TCA 1997 provides an exemption from withholding taxes for royalty payments made to an associated company resident in another EU Member State, and section 242A TCA 1997 provides that withholding tax will not apply to royalties paid by a company in the course of a trade or business to a company resident in a treaty country. In addition to these, Ireland's DTAs may limit the rate of Irish tax that can be charged on royalty payments made to a resident of a treaty partner. Set out in section 9 of this TDM are the circumstances where the withholding tax rate applied to the payment of a royalty to a resident of a treaty partner can be reduced to the DTA rate.

1.3 Outbound payments defensive measures

Finance (No.2) Act 2023 inserted Chapter 5 'Outbound payments defensive measures' in Part 33 of TCA 1997. The measures provide for the implementation of defensive measures[2] by way of withholding taxes, on outbound payments of interest and royalties, and on the making of distributions, in certain circumstances. The measures apply to payments or distributions by Irish resident companies, or payments by Irish branches of non-resident companies, to associated entities who are resident, or situated, in specified territories. The territories within the scope of the measures are those included in Annex I of the EU list of non-cooperative jurisdictions for tax purposes and 'no-tax' and 'zero-tax' territories (together referred to as 'specified territories').

To the extent that section 817V TCA 1997 applies to the payment of interest (including non-yearly interest), and to the extent that section 817W applies to the payment of a royalty, withholding tax will arise. This results from the defensive measures disapplying the exclusions and exemptions from the obligation to deduct withholding tax. However, in certain circumstances, the payment of interest, or the payment of a royalty, may be made to an associated entity who is resident, or situated, in a territory with whom Ireland has a DTA. In such cases, subject to all the conditions being met, the administrative procedures set out in section 9 may apply, such that the appropriate rate of withholding tax in the relevant DTA applies.

2 Meaning of bona fide banking business in the State

Section 246(3)(a) and 246(3)(b) provide that interest paid in the State on an advance from a bank carrying on a bona fide banking business in the State may be paid without deduction of tax and also that interest paid by such a bank in the ordinary course of its business may be paid without deduction of tax.

The term "bona fide banking business in the State" is not defined in the legislation. However, Revenue interprets the phrase to mean an undertaking the business of which is to take deposits from the public in the State and to grant credits for its own account in the State, under the necessary authorisations to do so.

[2] Refer to TDM Part 33-05-012 'Outbound payments defensive measures'.

Such authorisations include:

- a banking licence granted under Section 9 of the Central Bank Act 1971;
- authorisations given to a building society within the meaning of the Building Societies Act 1889 or a society established in accordance with the law of any other Member State of the European Communities which corresponds to that Act;
- authorisations recognised under the terms of the EU Directive 2013/36/EU.

Additionally, the Central Bank of Ireland should be considered to be a bank carrying on a bona fide banking business in the State.

3 Debt acquired by Irish banks

Section 246(3)(a) excludes from withholding tax interest paid in the State on an advance from a bank carrying on a bona fide banking business in the State. Exemption under this section will apply to interest paid by an Irish corporate borrower to a bank carrying on a bona fide banking business in the State, where the bank did not provide the original advance but took an assignment of the original loan or part of the loan from a foreign institutional lender.

4 Capital Borrowing

Certain circumstances may arise where the payment of interest by a bank or building society on funding raised abroad may not be regarded as arising in the ordinary course of a bona fide banking business in the State, but the interest is treated as an allowable deduction in the computation of trading profits. Revenue is prepared, in these circumstances, to treat the interest as payable on ordinary course borrowing for the purposes of section 246(3)(b)[3], so that such interest can be paid gross (i.e. without the application of interest withholding tax).

5 Interest paid to partnerships and certain foreign entities

Section 246(3)(ccc) and (3)(h) provide that withholding tax is not to be deducted from certain interest payments where the recipient of the interest is, by virtue of the law of a relevant territory, resident for the purposes of tax in a relevant territory. A relevant territory means a Member State of the European Communities, other than the Republic of Ireland, or a territory with which Ireland has a DTA.

5.1 U.S. Companies

The requirement to be resident for the purposes of tax in a relevant territory may give rise to difficulties for US companies as the concept of residence for tax purposes is not recognised under US tax law and it is not possible for the payer of the interest to get such a confirmation. It is not the intention of the legislation to exclude US companies from the exemption from

[3] Refer to TDM Part 04-06-21 for a discussion on the deductibility of such interest.

withholding tax provided for in either section 246(3)(ccc) or 246(3)(h). To clarify the position for US companies Revenue is prepared to accept that a company which is -

- incorporated in the US, and
- taxed in the US on its worldwide income

will qualify for the exemption from withholding tax provided for in section 246(3)(ccc) and 246(3)(h).

5.2 U.S. LLCs

An additional difficulty arises for US Limited Liability Companies (LLC's). An LLC has corporate form and personality but can be categorised as a partnership under the Internal Revenue Code of the USA. In these circumstances the LLC is not separately taxed but is treated as a transparent or 'look through' entity for US tax purposes and its income is taken to flow through to its members who are taxed according to US principles as though they received the money directly. Therefore, on a strict interpretation of the legislation an exemption from withholding tax cannot be granted where the interest is paid to US residents through a US LLC.

In recognition of the difficulties arising from the use of US LLCs, for the purposes of applying the exemptions set out in section 246(3)(ccc) or 246(3)(h), Revenue is prepared to 'look through' the US LLC to the ultimate recipients of the interest subject to the following conditions:

1. Where the ultimate recipients of the interest themselves would qualify for exemption from withholding tax under section 246(3)(ccc) or 246(3)(h), and

2. Where business is conducted through an LLC for non-tax commercial reasons and not for tax avoidance purposes.

5.3 Partnerships and tax transparent entities

In certain circumstances interest may be paid to an Irish partnership or a foreign tax transparent entity, being an entity that would be treated for income or corporation tax as equivalent to an Irish partnership.

An Irish partnership is not regarded as having separate legal personality. Instead, it is regarded as an aggregate of the partners who make up the firm. However, although it does not have legal personality, as a matter of law, it is common for the firm to be treated as distinct from the individual partners comprising the firm in commercial life. This follows from the fact that firms do things which are commonly associated with separate legal entities such as adopting names which are unconnected with the partners, having bank accounts and contracts in that name and having partners come and go without any outward change to that firm[4]. In this context they are regarded as having the capacity to perform legal acts. Foreign partnerships that are established under laws that are similar to Irish partnership law, in this context, would also fall within this category. Please see TDM 35C-00-02 'Foreign Entity Classification for Irish Tax Purposes' for further guidance.

[4] Twomey on Partnership Michael Twomey and Maedhbh Clancy 2nd Ed.2019

Entities that do not have legal personality are often treated as tax transparent. For example, Irish partnerships are treated as tax transparent in Ireland. Similarly, both English general partnerships and English limited partnerships (both without legal personality) are treated as tax transparent in the UK.

Entities, such as partnerships, that do not have separate legal personality typically cannot own assets. Irish partnership property is, for example, held by the partners as tenants in common. Under Irish partnership law, partners are not legally entitled individually to exercise proprietary rights over any of the partnership assets but rather they are collectively entitled to each and every asset of the partnership, in which each of them has an undivided share[5].

Section 246(2) TCA 1997 provides that:

> "Where any yearly interest charged with tax under Schedule D is paid—
>
> (a) by a company, otherwise than when paid in a fiduciary or representative capacity, **to a person** whose usual place of abode is in the State, or
>
> (b) by any person **to another person** whose usual place of abode is outside the State,
>
> the person by or through whom the payment is made shall on making the payment deduct out of the payment a sum representing the amount of the tax on the payment at the standard rate in force at the time of the payment…"

Section 18(c) of the Interpretation Act 2005 provides:

> "'Person' shall be read as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons, as well as an individual, and the subsequent use of any pronoun in place of a further use of "person" shall be read accordingly."

Therefore, references to 'person' in section 246(2) TCA 1997 are read as references to a partnership, being an unincorporated body of persons. While the source of interest income (the debt from which the economic benefits flow) may be owned by the partners in an undivided share, the underlying charge to income tax rests with the members of the partnership, in line with each partner's share of the partnership income.

On a strict interpretation of the legislation, an exemption from withholding tax under section 246(3)(ccc) and section 246(3)(h) cannot be granted where the interest is paid to an Irish partnership or a tax transparent foreign entity (for the purposes of section 246(3)(ccc) the tax transparent foreign entity may not be considered to be resident for the purposes of tax in the relevant territory, and for the purposes of section 246(3)(h) the tax transparent foreign entity may not be considered to be a company).

For the purposes of applying the exemptions set out in section 246(3)(ccc) or 246(3)(h), and the corresponding exemptions from the charge to income tax in section 198 (1)(c) (ii) and (iv), for

[5] Hoffmann LJ in Inland Revenue Commissioners v Gray [1994] STC 360

payments made on or after 1 January 2023 Revenue is prepared to 'look through' an Irish partnership or a tax transparent foreign entity to the members of that entity subject to the following conditions:

1. Where all the members of the Irish partnership or tax transparent foreign entity themselves would qualify for exemption from withholding tax under section 246(3)(ccc) or 246(3)(h) and the corresponding exemptions from the charge to income tax in section 198 (1)(c) (ii) and (iv), if the interest had been paid directly to those members,

2. Where the Irish partnership or tax transparent foreign entity is considered to be tax transparent in its jurisdiction of residence (or, where the entity is not considered to be resident in any jurisdiction, its place of creation) and by all of the jurisdictions where the members of the tax transparent entity are resident i.e., the interest income is treated as arising to those members directly, and

3. Where business is conducted through the Irish partnership or tax transparent foreign entity for non-tax commercial reasons and not for tax avoidance purposes.

If any one or more of the members in the tax transparent entity is unable to satisfy the conditions above, or the conditions set out in section 9.1.1 below, withholding tax, under the provision of section 246(2) TCA 1997, should be deducted from the gross interest payment. Where a member of the tax transparent entity is itself a tax transparent entity, Revenue is prepared to 'look through' the second mentioned tax transparent entity where the above conditions are met in respect of the second mentioned entity (and so on where, for bona fide commercial purposes, there are multiple tax transparent entities in an investment chain).

5.3.1 Return of interest payments made

In order to avail of the treatment outlined in 5.3, the person making the interest payments is required to include details of those payments in their tax return for each year in which a payment is made.

There is no facility to indicate on the Form CT1 for 2023 that the treatment outlined in 5.3 has been availed of. Therefore, details of the payments should be included in the Additional Notes panel of the Company Details panel of the ROS Form CT1 for 2023 using the following text:

> The practice set out in Paragraph 5.3 of TDM 08-03-06 has been availed of.
>
> The gross amount of the interest payment was €(insert amount of interest paid).
>
> Relevant territory, or territories, where the members reside for the purposes of tax (insert Name of Country or Countries).

Where the person making interest payments is not required to file a Form CT1 and avails of the practice outlined in 5.3, then the use of the practice should be indicated for each person to whom the practice was applied by including the text 'The practice set out in Paragraph 5.3 of TDM 08-03-06 has been availed' following the information provided for that person in the return required by section 891A TCA 1997.

6 Remittance basis and territorial systems of taxation

Section 246(3)(h)(I) provides an exemption from withholding tax on interest paid by a company or an investment undertaking ("relevant person") where:

1. the interest is paid to a company that is resident for tax purposes in a relevant territory, and
2. the tax regime in the relevant territory is one that imposes a tax that generally applies to interest **receivable** in that territory by companies from sources outside that territory.

6.1 Remittance basis

Where the relevant territory provides for a remittance basis of taxation, under which the relevant territory's tax applies only to interest payments from sources outside that territory that have been received in that territory, such interest would not be exempt from the withholding tax.

However, where such interest:

- is paid to a company that is resident for tax purposes in the relevant territory, and
- is payable by the relevant person to an account located in the relevant territory,

it will be treated by Revenue as exempted:

1. under section 246(3)(h)(I) TCA 1997, from withholding tax and
2. under section 198(1)(c)(ii)(I) TCA 1997, from the charge to income tax.

Where the interest is not payable by the relevant person to an account located in the relevant territory it will be subject to withholding tax and chargeable to income tax.

6.2 Territorial systems – Hong Kong

Where the relevant territory provides for a territorial system of taxation, the law of the relevant territory may charge tax on income receivable by a company by reference to such income having its source in the relevant territory, rather than by treating the company as resident for tax purposes in that relevant territory. The company may be chargeable to tax on interest payments only to the extent that such interest payments are treated as derived from a source within the relevant territory. Where such a territorial system applies to the company by which interest is receivable, that interest will not be exempt from tax under section 246(3)(h)(I) TCA 1997 or section 198(1)(c)(ii)(I) TCA 1997.

However, where:

- such interest is paid to a company treated as a resident of Hong Kong for the purposes of the DTA with Ireland, and
- the interest is:

- subject to the full rate of corporate profits tax that applies in Hong Kong, on the basis that it is treated, by virtue of Hong Kong's Inland Revenue Ordinance, as derived from a Hong Kong source, or
- included in the corporate treasury profits of the qualifying Corporate Treasury Centre, under section 14D of Chapter 112 of Hong Kong's Inland Revenue Ordinance, and corporate profits tax under Hong Kong's Inland Revenue Ordinance is imposed on those profits, it will be treated by Revenue as exempted:

1. under section 246(3)(h)(I) TCA 1997, from withholding tax and
2. under section 198(1)(c)(ii)(I) TCA 1997, from the charge to income tax.

Where the relevant conditions set out in the preceding paragraph are not satisfied, the interest will be subject to withholding tax and chargeable to income tax.

7 Exceptional circumstances

Revenue has discretionary power under the provisions of section 246(3)(d) to grant permission to a company to pay interest without deduction of withholding tax. However, due to the wide range of exemptions generally available under the section, authorisation under sub-section (3)(d) would only be granted in very exceptional circumstances. An example of where this permission may be given is a **bona fide** transaction involving the payment of interest to an Approved Retirement Fund (within the meaning of section 784A TCA 1997) by a third party. Appendix 1 also sets out one very specific set of circumstances where this permission will be given.

8 Payments to certain statutorily tax-exempt bodies

The European Investment Bank (EIB) is exempt from all direct taxes in Ireland by virtue of Article 21 of Protocol (No 7) on the Privileges and Immunities of the European Union.

The European Bank for Reconstruction and Development (EBRD) is exempt from all direct taxes in Ireland by virtue of S.I. No. 65/1991 - European Bank For Reconstruction and Development (Designation and Immunities) Order, 1991.

The Council of Europe Development Bank (CEDB) is exempt from all direct taxes in Ireland by virtue of the Council of Europe Development Bank Act 2004 (no 37 of 2004).

The International Finance Corporation (IFC) is exempt from taxation in Ireland by virtue of Section 9 of Article VI of the agreement for the establishment and operation of an international body to be called the international Finance Corporation, as provided for in the International Finance Corporation Act 1958.

The International Monetary Fund (IMF) is exempt from direct taxation in Ireland by virtue of Section 9 of Article IX of the agreement for the establishment and operation of an international body to be called the International Monetary Fund, as provided for in the Bretton Woods Agreements Act, 1957.

The International Bank for Reconstruction and Development (IBRD) is exempt from direct taxation in Ireland by virtue of Section 9 of Article VII of the agreement for the establishment

and operation of an international body to be called the International Bank for Reconstruction and Development, as provided for in the Bretton Woods Agreements Act, 1957.

The European Stability Mechanism (ESM) and the ESM acting through a subsidiary body or sub-entity is exempt from direct taxation in Ireland by virtue of Section 7 of the European Stability Act 2012 (as amended) to the extent and in the manner provided by Article 36 of the Treaty (as defined in that Act, as amended).

Therefore, while these payments are not covered by a specific exemption in section 246, companies may pay interest gross to the EIB, the EBRD, CEDB, the IFC, the IMF, the IBRD and the ESM (including its subsidiary bodies or sub-entities). There is no requirement that companies seek confirmation from Revenue under section 246(3)(d).

9 Double taxation agreements

This section of the TDM sets out the situations where taxpayers can withhold tax at the DTA rate[6] from interest or royalties paid to residents of a treaty partner, rather than withhold and remit an amount of tax that is subsequently refundable under that DTA.

9.1 Payment of interest

In circumstances where a person would, under a DTA, be entitled to a full or partial refund of any withholding tax deducted, the person may make a self-certification, on a Form 8-3-6 Interest, to the person making the interest payments in order that withholding tax, as required under the provisions of section 246(2) TCA 1997, is applied at the appropriate DTA rate.

The self-certification can only be made in the following circumstances:

1. The person making the payment returns the details required under paragraph 9.1.2 to Revenue and must keep the documents set out under 9.1.3;
2. Absent the self-certification, the payment would be subject to withholding under section 246(2) and the payment being made would not be entitled to an exemption from withholding tax under any of the provisions of section 246(3);
3. The person to whom the interest is paid is the beneficial owner of the interest;
4. The person to whom the interest is paid is not resident in the State and the interest is not being paid in connection with a trade or business which is being carried on in the State through a branch or agency;
5. The person to whom the interest is paid is treated as a person (that is to say, treated as opaque rather than transparent)
   a. for Irish tax purposes and for the purposes of tax imposed by the treaty partner, or
   b. under the DTA;
6. Under the relevant DTA, that person is treated as a resident only of the treaty partner.
7. The DTA rate provided for under the Interest Article of the DTA that will apply on payments of interest to residents of the treaty partner is lower than 20%;

[6] Information on Double Taxation Treaties is available at https://www.revenue.ie/en/tax-professionals/tax-agreements/double-taxation-treaties/index.aspx

8. The payee is entitled to relief under the DTA in respect of the interest payment, such that any tax withheld would be fully, or partially, refundable.

Revenue acknowledge that residents of the United States of America may encounter difficulties having the Form 8-3-6 Interest certified by the US tax authorities therefore Revenue will consider a certificate of residence for United States tax purposes (Form 6166) acceptable in lieu of having the Form 08-03-06 Interest certified by the US tax authorities.

The Form 6166 and completed uncertified Form 8-3-6 Interest should be given to the person making the interest payments. A Form 6166 is available from the Department of the Treasury, Internal Revenue Service, Philadelphia, PA 19255, USA. Please see to www.irs.gov to apply for Form 6166.

Revenue understands that there may be circumstances whereby foreign tax administrations may not sign and stamp declarations which facilitate the application of the withholding tax rate contained in a double taxation agreement between those jurisdictions and Ireland. In these circumstances, Revenue will accept that where the non-resident person provides the person paying the interest with

- a completed uncertified Form 8-3-6 Interest i.e. the declaration in section 1 of the form is fully completed and signed, together with

- a certificate from the tax administration of the treaty partner jurisdiction which confirms that the non-resident person is resident in that jurisdiction for the purposes of the double taxation agreement in force between that jurisdiction and Ireland,

this will be acceptable in lieu of having those tax administrations certifying Form 8-3-6 Interest.

The certificate of residency for the purposes of the relevant double taxation agreement with Ireland and completed uncertified Form 8-3-6 Interest must be given to the person making the interest payment.

The Form 6166 or certificate of residence for the purposes of the double tax agreement with Ireland, whichever is appropriate, must be valid as at the date of completion of the uncertified declaration.

The Self-Certification will not be valid if the person making the interest payments is or becomes aware that any of the information provided in the self-certification is incorrect.

The Self-Certification will expire after a period of 5 years or upon any material change in the facts and circumstances of the payee.

9.1.1 Payments to transparent entities

In certain circumstances interest may be paid to a tax transparent vehicle, being one that would be treated for income or corporation tax as equivalent to an Irish partnership. Section 5.3 above considers this topic in greater detail.

For the purposes of applying the self-certification as referenced in section 9.1 above, Revenue is prepared to 'look through' an Irish partnership or a tax transparent foreign entity to the members of that entity subject to the following conditions:

1. Where all the members of the Irish partnership or tax transparent foreign entity themselves would, under a DTA, be entitled to a full or partial refund of any withholding tax deducted, if the interest had been paid directly to those members,

2. Where the Irish partnership or tax transparent foreign entity is considered to be tax transparent in its jurisdiction of residence (or, where the entity is not considered to be resident in any jurisdiction, its place of creation) and by all of the jurisdictions where the members of the tax transparent entity are resident i.e., the interest income is treated as arising to those members directly, and

3. Where business is conducted through the Irish partnership or tax transparent foreign entity for non-tax commercial reasons and not for tax avoidance purposes.

In addition, in all such cases, in order for the self-certification process described in paragraph 9.1 above to apply:

i. each investor (being equivalent to a partner) in the transparent entity must be able to satisfy the conditions set out paragraph 9.1, and

ii. each investor in the transparent entity must complete a self-certification.

For the purposes of (i) above, references to "the person to whom the interest is paid" in the conditions set out in paragraph 9.1 and in Form 8-3-6 Interest shall be references to the beneficial owner of the interest.

If any one or more of the members in the transparent entity is unable to satisfy the conditions set out above, or the conditions set out in section 5.3, withholding tax, under the provision of section 246(2) TCA 1997, should be deducted from the gross interest payment being made to the transparent entity. Where a member of the tax transparent entity is itself a tax transparent entity, Revenue is prepared to 'look through' the second mentioned tax transparent entity where the above conditions are met in respect of the second mentioned entity (and so on where, for bona fide commercial purposes, there are multiple tax transparent entities in an investment chain).

9.1.2 Return of interest payments made[7]

In order to avail of the treatment outlined in 9.1, the person making the interest payments after deducting tax at the DTA rate rather than at 20%, as provided for above, is required to include details of those payments in their tax return for each year in which a payment is made (either their Form CT1 [Corporation Tax return] or Form 11 [Income Tax return]).

Where the Self-Certification has been obtained and the details of the interest paid are included in the tax return then the fact that tax was not deducted on the payment will not preclude the paying company from obtaining relief which would otherwise be due under section 243(5)(a)(I) TCA 1997 in respect of the payment.

[7] Section 894 places a responsibility on certain persons or "third parties" to automatically make returns of certain information. Further information regarding third party returns is available in Tax and Duty Manual 38-03-13

9.1.3 Documents to be retained

The paying company should retain, for the time period specified in section 886 TCA 1997, the Self-Certification form provided by the payee and all necessary information and documentation required to show that

1. the payee is not resident in the State and the interest is not being paid in connection with a trade or business which is being carried on in the State through a branch or agency;

2. the payee is the beneficial owner of the interest payment;

3. the payee is resident in a country with which Ireland has entered into a DTA;

4. under the terms of the relevant DTA the payee would be entitled to a full or partial refund of any withholding tax suffered.

9.2 Payment of Patent Royalties to Individuals Resident Outside the State[8]

In circumstances where an individual would, under a DTA, be entitled to a full or partial refund of any withholding tax deducted the individual may make a self-certification, on a Form 8-3-6 Patent Royalties, to the person making the royalty payments in order that royalty withholding tax, as required under the provisions of section 238 TCA 1997, is applied at the appropriate DTA rate[9].

The Self-Certification can only be made in the following circumstances:

1. The person making the royalty payment returns the details required under paragraph 9.2.1 to Revenue and must keep the documents set out in paragraph 9.2.2.

2. Absent the self-certification, the payment would be subject to withholding tax under the provisions of section 238 and the payment being made would not be entitled to an exemption from withholding tax under any other provision.

3. The payee is:

    - an individual who is not resident in the State and the royalty payment is not being made in connection with a trade or business which is being carried on in the State through a branch or agency;

    - the beneficial owner of the royalty payment;

[8] A similar practice applies in respect of certain patent royalty payments made to Companies Resident Outside the State. For guidance please refer to Tax and Duty Manual 08-04-01

[9] For up to date information on the countries with whom Ireland has a DTA please refer to the Revenue website at: https://www.revenue.ie/en/tax-professionals/tax-agreements/double-taxation-treaties/tax-treaties-by-country.aspx

- resident for the purposes of tax in a country with which Ireland has entered into a DTA;
- under the relevant DTA, treated as a resident only of the treaty partner;
- the DTA rate provided for under the Royalty Article of the DTA that will apply on payments of royalties to residents of the treaty partner is lower than 20%, and
- the payee is entitled to relief under the DTA in respect of the royalty payment, such that any tax withheld would be fully, or partially, refundable.

The payer can only make payments under this Self-Certification process when the payment is being made in the course of the paying company's trade.

Revenue acknowledges that residents of the United States of America may encounter difficulties having the Form 8-3-6 Patent Royalties certified by the US tax authorities therefore a certificate of residence for United States tax purposes (Form 6166) is acceptable in lieu of having the Form 8-3-6 Patent Royalties certified by the US tax authorities.

The Form 6166 and completed uncertified Form 8-3-6 Patent Royalties should be given to the person making the royalty payments. A Form 6166 is available from the Department of the Treasury, Internal Revenue Service, Philadelphia, PA 19255, USA. Please see www.irs.gov to apply for Form 6166.

Revenue understands that there may be circumstances whereby foreign tax administrations do not sign and stamp declarations which facilitate the application of the withholding tax rate contained in a double taxation agreement between those jurisdictions and Ireland. In these circumstances, Revenue will accept that where the non-resident person provides the person paying the royalty with

- a completed uncertified Form 8-3-6 Patent Royalties i.e. the declaration in section 1 of the form is fully completed and signed, together with
- a certificate from the tax administration of the treaty partner jurisdiction which confirms that the non-resident person is resident in that jurisdiction for the purposes of the double taxation agreement in force between that jurisdiction and Ireland,

this will be acceptable in lieu of having those tax administrations certifying Form 8-3-6 Patent Royalties.

The certificate of residency for the purposes of the relevant double taxation agreement with Ireland and the completed uncertified Form 8-3-6. Patent Royalties must be given to the person making the royalty payment.

The Form 6166 or certificate of residence for the purposes of the double tax agreement with Ireland, whichever is appropriate, must be valid as at the date of completion of the uncertified declaration.

Where a valid Self-Certification has been obtained, and the appropriate information is included on the Form CT1, the fact that tax was not deducted on the payment will not preclude the

paying company from obtaining relief which would otherwise be due under section 243(5)(a)(I) TCA 1997 in respect of the payment.

The Self-Certification will not be valid if the person making the royalty payments is or becomes aware that any of the information provided in the self-certification is incorrect.

The Self-Certification will expire after a period of 5 years or upon any material change in the facts and circumstances of the payee.

9.2.1 Return of royalty payments made

In order to avail of the treatment outlined in 9.2, the person making the royalty payments after deducting tax at the DTA rate rather than at 20%, as provided for above, is required to include details of those payments in their Form CT1 [Corporation Tax return] for each period in which a payment is made.

9.2.2 Documents to be retained

The paying company should, for the time period specified in section 886 TCA 1997, retain the Self-Certification form provided by the individual and all necessary information and documentation required to show that:

1. the payee is not resident in the State and the royalty payment is not being made being paid in connection with a trade or business which is being carried on in the State through a branch or agency;

2. the payee is the beneficial owner of the royalty payment;

3. the payee is resident in a country with which Ireland has entered into a DTA;

4. under the terms of the DTA the payee would be entitled to a full or partial refund of any withholding tax suffered; and

5. the payment is made by the paying company in the course of its trade; and

6. the payment is not part of a back-to-back or conduit arrangement whereby the payment represents all or substantially all of the income received or receivable by the paying company in connection with licensing the same foreign patent.

Appendix 1 – specific circumstances where 246(3)(d) will apply

Assignment[10] / Novation[11] of a loan by a bank:

Section 246(3)(a) provides that interest paid in the State on a loan from a bank carrying on a bona fide banking business in the State may be paid without deduction of tax[12]. If a loan advanced to a company is subsequently sold, reassigned or novated from the bank to an SPV then the company will have a withholding tax obligation.

Where the loan is assigned to a "section 110 company" then the provisions of section 246(3)(cc) removes the withholding obligation. However, a "section 110 company" cannot offer any proof of their section 110 status to the company meaning that in the majority of cases a company may not know whether or not a withholding tax obligation has arisen following an assignment of their original loan.

If there is a gross-up clause[13] included in the loan agreement this would in effect increase the company's interest charge by the amount of the withholding tax to be deducted. Where the company is an SME, in order to avoid this increase it can apply for exemption under the provisions of section 246(3)(d).

Example of gross-up:

A small company had originally borrowed from its bank. Its loan was subsequently reassigned to an entity which is not a bank. The loan agreement does include a gross-up clause. The company is due to pay €100 in interest on its loan. The following will apply:

- The interest payment has to be re-grossed to €125 by the company to take account of the withholding tax to be deducted on the interest payment
- €25 [i.e. €125 @ 20% = €25] withholding tax is deducted by the company from the grossed-up interest payment. The withholding tax will be remitted to Revenue on the company's annual tax return.
- The new lender receives the full €100 interest payment. The new lender will then file its tax return and claim a credit for the tax withheld, thus receiving €125 in total.

In order for the company to avail of this exemption an application in writing must be made to Revenue under section 246(3)(d). The full facts regarding the loan must be disclosed. Please note that copies of all agreements between each of the parties to the loan and relevant documentation which sets out details of arrangements in place between each of the parties regarding interest payments on the advance/loan may be requested.

[10] A company may only become aware that the loan has been assigned when they receive new payment instructions or details of a new intermediary who is handling the loan.
[11] A company should be involved in the novation of a loan from their old bank to the new lender.
[12] Please refer to Section 2 for the meaning of bona fide banking business in the State.
[13] A gross-up clause provides that the interest payment is to be paid in full. If withholding tax applies the payment is grossed up in order that the lender receives its interest payment in full.

Applications under section 246(3)(d) should be made via My Enquiries[14], together with a completed Form RTS 1A[15] and copies of relevant supporting documentation/agreements. To make the application via My Enquiries:

- Complete the "Enquiry relates to" field with "Other than the above" from the dropdown menu, and
- Complete the "More specifically" field with "My query relates to something else" from the dropdown menu, and
- Direct the application to section246@revenue.ie in the "For attention of (optional)" field. Note that this email address can **only** be used for 246(3)(d) confirmations. Any other request for a confirmation concerning section 246 should be made via My Enquiries to the RTS Query Management Team, as described in Tax and Duty Manual (TDM) Part 37-00-00a, or to Large Corporates Division, see TDM Part 37-00-40, whichever is appropriate.

Upon receipt of all information Revenue will consider applications under section 246(3)(d) whereby interest may be paid gross.

[14] Further information on MyEnquires is available in TDM Part 37-00-36.
[15] Further information on Form RTS 1A is available in TDM Part 37-00-00a.