

# **Notes for Guidance - Taxes Consolidation Act 1997**

**Finance Act 2024 edition**

## **Part 6**

# **Company Distributions, Tax Credits, Franked Investment Income and Advance Corporation Tax**

**December 2024**



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## **Notes for Guidance - Taxes Consolidation Act 1997**

### **Finance Act 2024 edition**

Part 6 Company Distributions, Tax Credits, Franked Investment Income and Advance Corporation Tax

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**PART 6**  
**COMPANY DISTRIBUTIONS, TAX CREDITS, FRANKED INVESTMENT  
INCOME AND ADVANCE CORPORATION TAX**

CHAPTER 1  
*Taxation of company distributions*

**129 Irish resident company distributions not generally chargeable to corporation tax**

In general, corporation tax is not charged on dividends and other distributions made by a company resident in the State and such dividends and distributions are not taken into account in computing income for corporation tax purposes. The exceptions to this general rule enable dividends and other distributions to be taken into account in computing the income of life insurance companies – see *sections 714* (life business: computation of profits), *717* (pension business) and *726* (foreign life assurance companies: investment income).

**129A Dividends paid out of foreign profits**

**Summary**

This section is an anti-avoidance provision that removes from the scope of *section 129* distributions between Irish-resident connected companies where the profits out of which the dividends are paid were earned by the paying company while it was resident outside the State. The section provides that distributions out of such profits be subject to tax much in the same way as foreign-sourced dividends.

To ensure that this section does not adversely affect normal business transactions not involving the avoidance of tax, e.g. companies moving to Ireland to take advantage of the holding company regime, it is provided that dividends paid by companies which were not controlled by Irish residents before becoming resident in the State will not fall within the scope of the section. Also, to ensure that companies who may already have re-domiciled or who are in the process of doing so are not affected, the provisions only apply where the paying company became tax resident here on or after 3 April 2010. This section will also not apply in circumstances where the participation exemption under *section 831B* would have applied if the dividend had been paid on the last day before the paying company became Irish tax resident.

**Details**

**Definitions**

“Profits” are defined as the accounting profits. (1)(a)

*Section 10* applies for the purposes of determining if companies are connected. (1)(b)  
Companies involved in a scheme or arrangement to circumvent the section will be connected for the purposes of the section.

“Control” is defined by reference to *section 432*. (1)(c)

**Dividends between connected companies**

Where a company receives a dividend from a connected company which became resident in the State in the period beginning on the date 10 years before the payment of the dividend or 3 April 2010, whichever is the later, the dividend or part of the dividend (2)

which is paid out of profits earned while a company was resident outside the State will not be exempt under *section 129* but will be chargeable to corporation tax under Case IV of Schedule D.

The amount by which a dividend exceeds the distributable profits of the company for the period (“specified period”) since the company became resident in the State will be treated as paid out of profits earned while the company was non-resident. The specified period begins on the date the company became resident in the State and ends on the last day of either: (3)(a)

- the accounting period immediately preceding the accounting period in which the distribution is made, or
- the accounting period in which the distribution is made, where the distribution is an interim dividend paid, in that accounting period, out of profits arising in that accounting period.

The distributable profits for the specified period are defined as the aggregate of the accounting profits for the periods of account which fall wholly or partly within the specified period as reduced by any distributions for that period which were exempt under *section 129*. (3)(b)

#### ***Credit relief for foreign tax***

The credit relief for related foreign tax will be available for set off against the corporation tax payable on the dividends, which are subject to tax by virtue of this section. (4)

#### ***Company controlled by non-resident persons***

The section does not apply where the company paying the dividend was, at all times before it became resident in the State, not controlled by persons resident in the State. (5)

#### ***Participation exemption***

This section does not apply to the extent that the distribution paid out of foreign profits would have qualified for the participation exemption under *section 831B*, if that distribution had been paid on the last date before the paying company became tax resident in the State and if a relevant claim as required by *section 831B(8)* had been made. (6)

## CHAPTER 2

### *Meaning of distribution*

#### **Overview**

This Chapter provides a meaning for the term “distribution” for the purposes of the Corporation Tax Acts. It is to be noted that the meaning of “distribution” is extended by *sections 436, 436A and 437* in relation to close companies. The Chapter also provides in *sections 133 and 134* for the limitation of the meaning of “distribution” in certain circumstances.

#### **130 Matters to be treated as distributions**

#### **Summary**

This section gives the meaning of the term “distribution” for the purposes of the Corporation Tax Acts. Broadly, a distribution comprises any dividend to a shareholder.

The scope of the definition is widened to include a variety of other transactions or payments which are treated as distributions for corporation tax purposes. The meaning of the expression is further extended, in relation to close companies, by **sections 436, 436A and 437** and, in relation to shares issued in place of dividends, by **section 816**. It is to be noted that the definition also applies for the purpose of income tax under Schedule F (see **section 20**).

## Details

### *Distributions*

The term “distribution” is to be given the meaning laid down in this Chapter and in **sections 436, 436A and 437** which contain special provisions in relation to close companies and in **section 816(2)(b)** in relation to shares issued in place of dividends. The definition does not include distributions made in respect of share capital on the winding up of a company. (1)

The term “distribution” means — (2)

- any dividend paid by a company, including a capital dividend,
- any other distribution out of the company’s assets in respect of shares in the company except any part of the distribution which represents a repayment of capital or is equal in amount or value to any new consideration received by the company in respect of the distribution,
- any amount in respect of the redemption or part redemption of bonus securities which is not referable to new consideration,
- any interest or other amount paid out of the assets of a company in respect of —
  - bonus securities issued on or after 27 November, 1975,
  - unquoted securities convertible directly or indirectly into shares of the company and unquoted securities with rights to receive shares or securities of the company,
  - securities the consideration for which (that is, the interest given by the company for the use of the principal) is to any extent dependent on the company’s results or is at more than a reasonable commercial rate (in the latter case the excess interest over the reasonable commercial rate is a distribution) – this provision does not apply to certain securities issued in the course of securitisation transactions to which **section 110** applies (see note to that section),
  - securities issued by a company and held by a non-resident company where the company is a 75 per cent subsidiary of the non-resident company,
  - securities issued by a company and held by a non-resident company where both companies are 75 per cent subsidiaries of a third company which is not resident in the State,
  - except where 90 per cent or more of the share capital of the company which issued the securities is directly owned by a resident company, securities issued by a company and held by a non-resident company where both companies are 75 per cent subsidiaries of a third company which is resident in the State,

In relation to the last three categories of securities, the application of this provision can be disapplied in certain circumstances (see notes to *sections 452* and *845A* for details),

- securities connected with shares in the company (that is, where the rights attaching to either the securities or the shares, and in particular the conditions on which the securities or the shares can be transferred, are such that it is necessary or advantageous that the securities and the shares be held, disposed of or acquired together), or
- any amount treated as a distribution by *subsection (3)* and any amount in respect of a bonus issue followed by a repayment of share capital as described in *section 131*.
- any qualifying amount, (defined in *subsection (2C)*) which is paid to a beneficiary of an Employee Share Ownership Trust (ESOT), where that ESOT is linked to an Approved Profit Sharing Scheme (APPS).

### ***Interest on “Ratchet Loans”***

Interest is not treated as a distribution where it is paid on a “ratchet loan” i.e. a loan which provides higher levels of interest where the borrowing company’s profits fall and lower levels of interest where the borrowing company’s profits rise. These “ratchet loans” are commercial in nature and are not a mechanism to disguise an equity investment as a loan. (2A)

### ***Interest paid to associated companies resident in the EU***

Interest is not treated as a distribution where it is paid to a company referred to in *subsection (2)(d)(iv)* which company is a resident of another EU Member State or the United Kingdom. The option contained in *sections 452* and *845A* for certain companies to elect for the non-application of *subsection (2)(d)(iv)* in certain circumstances is retained. (2B)

### ***“Qualifying Amount”***

“Qualifying amount” is defined as a payment made out of dividends received by the ESOT on their holding of securities in a chargeable period. The two general savers in *section 519(6)* and *paragraph 13(4)* of *Schedule 12* relating to the order in which funds are utilised are disapplied for the purposes of this calculation. Certain deductions are made to the amount of dividend income received in determining how much is available to be paid out as a “qualifying amount”. These are — (2C)

- (a) any sum expended meeting expenses of the trust,
- (b) any interest paid on borrowings of the trust,
- (c) any amount paid to the personal representative of a deceased beneficiary of the trust,
- (d) any amount expended on the repayment of borrowings. Included in this is any amount of borrowings which could have been repaid but was not. The trust is allowed to maintain the level of borrowings necessary to comply with *paragraph 11(2B)(d)* or *paragraph 11A(5)(d)* of *Schedule 12*, and
- (e) any amount spent on the acquisition of shares. This includes the amount of any shares which could have been acquired at market value (within the meaning of *section 548*) but were not.

### ***Transfer of assets and liabilities***

Where a company transfers assets or liabilities to its members or vice versa, the amount by which the market value of the amount or benefit of the transfer exceeds the amount or value of any new consideration given is treated as a distribution. However, such transfers between resident companies are not treated as distributions where one company is a subsidiary of the other or both are subsidiaries of another company which is resident in the EU, a Member State of the European Economic Area with which Ireland has a tax treaty or the United Kingdom. For this purpose, a company is a subsidiary of another if it is a 51 per cent subsidiary of that other company. However, in applying the 51 per cent subsidiary rules (*section 9*), shares held directly or indirectly by a share dealing company and shares held directly or indirectly by a company in a non-resident company are excluded. (3) & (4)

### ***Exceptions***

A transfer of assets (other than cash) or liabilities between 2 companies is not treated as a distribution by virtue of *subsection (2)(b)* or (3) if both companies are resident in the State, neither is a 51 per cent subsidiary of a non-resident company and the companies are not under common control either at the time of the transfer or as a result of it. Companies are under common control if they are under the control of the same person or persons and for this purpose the definition of “control” in *section 11* applies. (5)

## **131 Bonus issue following repayment of share capital**

### **Summary**

Where a company repays share capital and at or after the repayment there is, for no new consideration, a bonus issue of shares, the amount of the bonus issue, up to the amount of the share capital repaid, is treated as a distribution. In the case of a company which is not a close company, a bonus issue of share capital which is not redeemable and which is made more than 10 years after the capital repayment is not to be treated as a distribution.

### **Details**

#### ***Definitions***

The terms “ordinary shares” and “preference shares” are self-explanatory. (1)

“new consideration not derived from ordinary shares” is new consideration other than consideration consisting of —

- the surrender, transfer or cancellation of ordinary shares whether of the company issuing the shares or of any other company,
- the variation of rights in ordinary shares of the company or of any other company, or
- consideration derived from a repayment of share capital paid in respect of ordinary shares of the company or of any other company.

#### ***Bonus issue following repayment of share capital treated as distribution***

Where a company repays share capital (other than certain preference shares) and at or after the time of that repayment issues as paid up share capital for which full consideration is not made (that is, a bonus issue), then, the amount so paid up (that is, the amount of the bonus issue) is treated as a distribution made in respect of the shares (2)

on which the amount is paid up. The amount or value of the distribution is the nominal amount of the share capital issued (that is, the bonus issue) less —

- the amount in cash or the market value of any new consideration received (up to the amount of the repayment), and
- any amounts already treated as distributions (in respect of the same repayment) under this provision.

#### **Example**

A company makes a repayment of share capital of €100,000. Subsequently it makes an issue of 50,000 fully paid €1 ordinary shares at €0.40 a share and later it makes a bonus issue of 200,000 fully paid €1 preference shares for no consideration.

The first issue is treated as a distribution of the amount of €30,000 (50,000 x €0.60). The second issue is treated as a distribution of €70,000 (€100,000 less €30,000).

#### **Exceptions**

The above provision does not apply in the case of the repayment of share capital relating to certain preference shares. The preference shares must be either — (3)

- fully paid preference shares in issue on 27 November, 1975, which continue to be fully paid preference shares from that date until their repayment, or
- preference shares issued after 27 November, 1975, as fully paid up preference shares wholly for new consideration (provided the new consideration was not derived from ordinary shares – see above) and continued to be fully paid up preference shares from their issue until repayment.

This exclusion enables a company with preference share capital to redeem it and issue unsecured loan stock in its place, thereby eliminating the distributions represented by preference dividends and replacing them with loan stock interest which is an allowable deduction for corporation tax purposes.

A further exclusion from this section applies where a company (other than a close company) makes a bonus issue, following the repayment of share capital, and the bonus issue is not redeemable share capital and takes place more than 10 years after the repayment of the share capital which preceded the bonus issue. (4)

## **132 Matters to be treated or not treated as repayments of share capital**

### **Summary**

This section deals with bonus issues of shares followed by the repayment of share capital. Where a company issues share capital as paid up otherwise than for full consideration (that is, as a bonus issue) and afterwards makes a repayment of share capital, the repayment is not to be treated as a repayment of share capital. As the repayment is not treated as a repayment of share capital it is treated as a distribution by virtue of **section 130(2)(b)**.

### **Details**

#### **Definition**

“relevant distribution” is the amount of any distribution made in respect of share capital which but for the operation of **subsection (2)(a)** would be treated as the repayment of share capital. (1)

### ***Repayment of share capital following bonus issue not treated as repayment of share capital***

Where a company issues shares otherwise than for full consideration (that is, a bonus issue) and the issue is not treated as a distribution, any share capital repayments made subsequently in respect of those shares are not to be treated as the repayment of share capital unless — (2)(a)

- the aggregate amount of the repayments made exceeds the amount of the bonus issue, or
- the bonus issue itself was treated as a distribution at the time of its issue under **section 131(2)**.

As a consequence of not treating the repayment as the repayment of share capital the repayment is treated as a distribution by virtue of **section 130(2)(b)**.

This provision applies where different classes of shares are involved. For example, where there is a bonus issue of ordinary shares to preference shareholders, a repayment of the preference shares is regarded as a repayment of the bonus issue. (2)(b)

### ***Premiums paid on redemption of shares***

A premium paid on the redemption of shares is not treated as a repayment of share capital (and, accordingly, is treated as a distribution by virtue of **section 130(2)(b)**), unless and to the extent that — (3) & (4)

- the repayment was covered by a premium paid (or otherwise met by new consideration) on the issue of the shares, and
- the share premium account arising from the issue of the shares had not been used in paying up other shares.

### ***Exception***

The rules (**subsection (2)(a)**) whereby the repayment of shares following a bonus issue is not treated as a repayment of share capital do not apply where — (5)

- the company is not a close company,
- the bonus issue is of shares other than redeemable shares, and
- the repayment takes place more than 10 years after the bonus issue.

## **133 Limitation on meaning of “distribution” – general**

### **Summary**

In general, interest paid by a company is tax deductible in computing the company’s income. To counter the possibility of equity and distributions being dressed up as loans and interest so that the interest would be tax deductible, certain interest is treated for corporation tax purposes as being a distribution (see **section 130**). These have been generally known as “**section 84**” loans. (In the context of the Taxes Consolidation Act, 1997 the corresponding section is **section 130** and the reader should be aware of the possibility of such loans being referred to as “**section 130**” loans – where necessary in these notes the reference used is “**section 130**”). The result is that the interest is not tax deductible in the case of the borrower and is an exempt distribution in the hands of the recipient. In order to prevent misuse of that provision, **section 133** limits the circumstances in which the interest can be treated as an exempt distribution in the hands of the “lender”.

## Details

### *Definitions and construction*

The meaning of “agricultural society” and “fishing society” are set out. Such societies must have a certain minimum number of members a majority of whom are engaged in husbandry or fishing, as the case may be. (1)(a)

“relevant principal”, the term used to describe the principal advanced in a loan covered by the section, must be money for which the borrower has given a security which is a “relevant security”. The interest or other form of distribution must be paid by the borrower in respect of a “relevant security”. A “relevant security” is a security within the meaning of certain paragraphs of *section 130(2)(d)*. The lender of a “relevant security” must be a company the ordinary trading activities of which include the lending of money. Thus, in such cases, the interest must be on a loan from a bank or other financial institution.

“selling by wholesale” includes not only sales of goods for re-sale, but also goods sold for use in a trade or undertaking.

“specified trade” is a trade which consists wholly or mainly of the manufacture of goods (within the ordinary meaning of that term).

“specified trade” includes certain trades carried on by 75 per cent subsidiaries of agricultural or fishery co-operatives. The trades concerned include trades consisting of the selling by wholesale of agricultural products and fish, as appropriate. (1)(b)

A trade is regarded as consisting wholly or mainly of particular activities in an accounting period if, in that accounting period, not less than 75 per cent of the total amount receivable from sales made in the course of the trade comes from sales made in the course of those particular activities. (1)(c)

A qualifying shipping trade (as defined in *section 407*) is not regarded as a specified trade. This applies despite the fact that such a trade qualifies for manufacturing relief. (1)(d)

A certificate referred to in subparagraph (ii) of the definition of “agricultural society” or subparagraph (ii) of the definition of “fishery society” is a certificate given by the Minister for Finance, on the recommendation of the Minister for Agriculture and Food or the Minister for Marine and Natural Resources, which entitled a society to be treated as an agricultural or fishery society, as the case may be. (1)(da)

### *Certain interest not to be a distribution*

Apart from the exceptions certain interest (or other distributions such as a premium on repayment of a loan) paid on or after 12 April, 1989 by a borrowing company to another company which is within the charge to corporation tax is not treated as a distribution. As the other company must be within the charge to Irish corporation tax this provision does not apply to interest (or other distribution) paid to a non-resident company (except where the non-resident company is carrying on a trade in the State through a branch or agency) or to any other person. The effect of this is that the interest (or other distribution) is effectively liable to corporation tax in the hands of the recipient company. (2)

This provision affects interest, etc payable in respect of loans made to the borrower where the interest would otherwise be treated, under certain stated provisions of *section 130(2)(d)*, as a distribution.

The provisions of *section 130(2)(d)* concerned are —

- **subparagraph (ii)**, which treats interest as a distribution if the security for the loan is convertible into shares;
- **subparagraph (iii)(I)**, which treats interest as a distribution if the level of interest is made dependent on the results of the borrower's business; and
- **subparagraph (v)**, which treats interest as a distribution where the security for a loan is tied to the holding by the lender of some shares in the borrowing company.

### **Exceptions**

The rule in **subsection (2)**, under which interest (or other distribution) is not to be treated as a distribution, does not apply in certain circumstances. These are —

- Foreign owned lenders  
Where the principal has been advanced out of share capital which is beneficially owned (directly or indirectly) by one or more persons resident outside of the State. (3)
- More than a reasonable commercial return  
Where the interest (that is, the consideration given) on the loan represents more than a reasonable commercial return on the loan. In this case, however, the amount of interest which does represent a reasonable commercial return will not be treated as a distribution. This is intended to ensure the effectiveness of the anti-avoidance measure of **section 130** against excessive interest paid on loans. (4)
- Specified trades  
Where the borrower carries on a specified trade in the accounting period concerned, the interest would otherwise be a trading expense of that trade and the relevant principal is used for the purposes of a trade — (5)
  - of manufacturing or deemed manufacturing (other than certified Shannon service activities) activities, or
  - if the trade concerned is carried on by a subsidiary of an agricultural or fishing society, of the selling by wholesale of agricultural products or fish.

This, however, is subject to restrictions on new lenders and on the overall volume of interest which may be treated as a distribution under the provisions.

### **Restriction on new lenders**

The exceptional treatment afforded to interest paid by companies in respect of specified trades does not apply in respect of interest paid after 12 April, 1989 to a lending company which, at that date, had no outstanding relevant principal. (6)

### **Restrictions on overall volume of interest which may be treated as a distribution**

- Loans made after 12 April, 1989  
From 12 April, 1989 only interest related to relevant principal up to 110 per cent of the amount of such principal advanced (that is, actually drawn down by borrowers) by a lender on that date is recognised as a distribution in its hands. Interest received by the lender which relates to an excess of relevant principal over the 110 per cent ceiling is not an exempt distribution in its hands and is taxable on the lender as interest. The payment continues to be treated as a distribution made in the case of the borrower. (7)
- Loans made after 30 January, 1990  
A reduced ceiling on the amount of interest which qualifies as a distribution was introduced from 31 January, 1990. From that date only interest related to relevant (8)(b)

principal up to 75 per cent of the amount of such principal advanced by a company on 12 April, 1989 is recognised as a distribution in its hands. All interest received by a lending company which relates to an excess of principal over the 75 per cent ceiling is not an exempt distribution in its hands and is taxable on the lender as interest. The payment continues to be treated as a distribution made in the case of the borrower.

Under transitional arrangements, interest received by a company on foot of loans made by it after 30 January, 1990 which would not otherwise qualify as a distribution (because the total amount of the lender's relevant loans exceeds the 75 per cent ceiling) does qualify as a distribution if certain conditions are met. The conditions are —

- the borrower was in negotiation in relation to such a loan with a lender before 31 January, 1990,
- the borrower had received before 31 January, 1990 a written offer of grant aid from the IDA, SFADCo or Údarás na Gaeltachta in respect of a specified trade for which the loan is made,
- the specified trade of the borrower is a new manufacturing project which started to be carried on since 31 January, 1990 or an existing manufacturing project committed to the creation of further employment under a business plan approved by the IDA, SFADCo or Údarás na Gaeltachta,
- the borrower's specified trade was included before 25 March, 1992 in a list prepared by the IDA and approved before that date by the Minister for Finance and the Minister for Industry and Commerce (the list had to specify the amount of funding considered to be essential for the success of the trade),
- the borrower or a company connected with the borrower did not carry on, or intend to carry on, IFSC trading operations after 20 April, 1990,

An overall limit of €215,855,473.33 is placed on the amount of loans available under these transitional arrangements as between all the companies which satisfy the conditions as set out above. Any interest on loans above this total does not qualify as a distribution in the hands of the lender.

- Loans made after 20 December, 1991

The 75 per cent ceiling on relevant principal mentioned above was reduced to 40 per cent as respects loans made after 31 December, 1991. From that time only interest related to relevant principal up to 40 per cent of the amount of such principal advanced by a company on 12 April, 1989 is recognised as a distribution in the lender's hands. All interest received by a company which relates to an excess of principal over the 40 per cent limit is not an exempt distribution in the lender's hands and is taxable as interest. The payment continues to be treated as a distribution made in the case of the borrower.

The 40 per cent ceiling was reduced before 31 December, 1991 to zero as respects loans made from 20 December, 1991. From that date, interest on relevant principal advanced on or after 20 December, 1991 is not recognised as a distribution in the hands of the lender and is taxed as interest. Again, the payment continues to be treated as a distribution made in the case of the borrower.

The 40 per cent ceiling had effect earlier than 31 December, 1991 in the case of a lender to whom an amount of relevant principal was repaid by a non-manufacturing company in the Shannon Airport Zone. If an amount of loan was repaid by such a company before 31 December, 1991, the 40 per cent ceiling applied to the lender

from the date of that repayment. In addition, if at any time after that date the balance of relevant principal outstanding fell below the 40 per cent ceiling, the amount of loans outstanding is to be substituted for the 40 per cent ceiling.

Under transitional arrangements, interest received by a company on foot of loans made by it after 20 December, 1991 which would not otherwise qualify as a distribution (because the total amount of the company's relevant loans exceeds the 40 per cent or zero ceiling as outlined above) qualifies as a distribution if certain conditions are met. These are —

- the specified trade of the borrower is a new manufacturing project which started to be carried on after 31 January, 1990 or an existing manufacturing project committed to the creation of further employment under a business plan approved by the IDA, SFADCo or Údarás na Gaeltachta, **(9)(c)(i) & (10)(b)(i)**
- the borrower's specified trade was included before 25 March, 1992 in a list prepared by the IDA and approved before that date by the Minister for Finance and the Minister for Industry and Commerce, **(9)(c)(ii) & (10)(b)(ii)**
- the borrower (or in the case of the 40 per cent ceiling a company connected with the borrower) did not carry on, or intend to carry on, IFSC trading operations after 20 April, 1990. **(9)(c)(iii) & (10)(b)(iii)**

An overall limit was placed on the amount of loans available (under the 40 per cent or zero ceilings) as between all the companies which satisfy the conditions as set out above. Any interest on loans above this total does not qualify as a distribution in the hands of the lender. The overall limit is the aggregate of €317,437,519.61 and the balance of the €215,855,473.33 list mentioned above which had not been advanced by 31 December, 1991. **(11)**

### ***Miscellaneous rules***

For the purposes of the various ceilings set out above and the exceptions to those ceilings —

- a loan is regarded as made at the time of the advance rather than at the time of entering into the loan agreement, **(8)(d)(i)**
- any extension of the loan period is regarded as involving repayment of the loan at the scheduled repayment date and the making of a new loan, **(8)(d)(ii)**
- the amount specified on the IDA list in relation to a project is to be reduced when any amount is advanced to the borrower concerned, **(8)(d)(iii)**
- transitional rules apply where before 7 December, 1993 a loan was repaid prematurely and was replaced by one or more further loans, **(12)**
- the assignment by a lender of rights or obligations under a loan agreement in relation to relevant principal is ignored. **(8)(e)**

### ***Time limit on certain loans***

A limit of 7 years applies to the period in which interest on relevant principal advanced after 11 April, 1994 may be treated as a distribution. Interest on advances on or before that date are not to be treated as a distribution after 11 April, 2001. **(8)(a)**

### ***High Coupon Loans***

High coupon loans are loans denominated in a foreign currency and on which a high rate of interest is charged. If such loans were structured so as to be within the scope of **section 130** and in the absence of legislation, the interest would not be deductible in computing **(13)(b)**

the income of the borrower and would not be taxable in the hands of the lender. This could result in a significant saving where the borrower was taxed at 10 per cent and the lender was taxed at the standard corporation tax rate. The saving was maximised where high rates of interest were charged. The high funding costs could be used by the lender to offset other income accruing to it. It was possible for the borrower to mitigate the real funding cost by entering into currency swap arrangements.

Interest on high coupon loans is not regarded as a distribution in the hands of the lender if the rate of interest on the loan exceeds 80 per cent of the 3 month European Interbank Offered Rate (EURIBOR). Interest on such loans is taxable in the hands of the lender. However, interest on a high coupon loan may be treated as a distribution in any of the following circumstances —

- if the loan was advanced before 30 January, 1991 and carried an interest rate higher than 80 per cent of EURIBOR but this applies only for so long as the interest rate on the loan does not exceed the rate which would have applied if the loan were denominated in the currency in which it had been denominated on 30 January, 1991, *(13)(c)(i)*
- if the loan was advanced after 29 January, 1991, the relevant principal is listed in the IDA list of projects mentioned in the exceptions to the ceilings and the borrower had received an undertaking that interest on the loan would be treated as a distribution. However, for the interest to be treated as a distribution the interest rate cannot exceed — *(13)(c)(ii)*
  - the rate which would have applied if the loan were denominated in the currency in which it was denominated at the time it was advanced (only applies to loans advanced between 30 January, 1991 and 20 December, 1991), or
  - a rate approved by the Minister for Finance in consultation with the Minister of Enterprise, Trade and Employment,
- if the loan is denominated in sterling, or
- if the borrower is a non-manufacturing company trading in Shannon. *to (iv)*

### **134 Limitation on meaning of “distribution” in relation to certain payments made in respect of “foreign source” finance**

#### **Summary**

The section provides rules in respect of loans, known generally as “*section 84*” loans (in the context of the Taxes Consolidation Act, 1997, the corresponding section is *section 130* and the reader should be aware of the possibility of such loans been referred to as “*section 130*” loans – where necessary in these notes the reference used is to “*section 130*”) where the lender is a company and the relevant principal concerned has been advanced out of share capital which is beneficially owned (directly or indirectly) by one or more persons resident outside the State. Other “*section 84*” loans are dealt with in *section 133*.

#### **Details**

##### **Definitions**

“agricultural society” and “fishing society” have the meanings set out in *section 133(1)(a)*. Such societies must have a certain minimum number of members a majority of whom are engaged in husbandry or fishing, as the case may be. *(1)(a)*

“selling by wholesale” includes not only sales of goods for re-sale, but also goods sold for use in a trade or undertaking.

“specified trade” is a trade which consists wholly or mainly of the manufacture of goods (within the ordinary meaning of that term), including activities deemed for the purposes of manufacturing relief to be the manufacture of goods.

In relation to loans made before 13 May, 1986 (transitional arrangements cover loans being negotiated at that date) a specified trade can consist wholly or mainly of manufacturing activities or certain service activities in respect of which employment grants were made by the IDA under section 2 of the Industrial Development (No. 2) Act, 1981. **(1)(a) & (6)**

“specified trade” includes certain trades carried on by 75 per cent subsidiaries of agricultural or fishery co-operatives. The trades concerned include trades consisting of the selling by wholesale of agricultural products and fish, as appropriate. **(1)(b)**

A trade is regarded as consisting wholly or mainly of particular activities in an accounting period if, in that accounting period, not less than 75 per cent of the total amount receivable from sales made in the course of the trade comes from sales made in the course of those particular activities. **(1)(c)**

A qualifying shipping trade (as defined in *section 407*) is not regarded as a specified trade. This applies despite the fact that such a trade qualifies for manufacturing relief. **(1)(d)**

### ***Application***

This section only applies to foreign sourced loans (that is, where the loan – the relevant principal – has been advanced out of share capital which is beneficially owned (directly or indirectly) by one or more non-resident persons). **(2)**

### ***Certain interest not to be a distribution***

Apart from the exceptions certain interest (or other distributions such as a premium on repayment of a loan) paid by a borrowing company to another company which is within the charge to corporation tax is not treated as a distribution. As the other company must be within the charge to Irish corporation tax this provision does not apply to interest (or other distribution) paid to a non-resident company (except where the non-resident company is carrying on a trade in the State through a branch or agency) or to any other person. The effect of this is that the interest (or other distribution) is effectively liable to corporation tax in the hands of the recipient company. **(3)**

This provision affects interest, etc payable in respect of loans made to the borrower where the interest would otherwise be treated, under certain provisions of *section 130(2)(d)*, as a distribution.

The provisions of *section 130(2)(d)* concerned are —

- ***subparagraph (ii)***, which treats interest as a distribution if the security for the loan is convertible into shares;
- ***subparagraph (iii)(I)***, which treats interest as a distribution if the level of interest is made dependent on the results of the borrower’s business; and
- ***subparagraph (v)***, which treats interest as a distribution where the security for a loan is tied to the holding by the lender of some shares in the borrowing company.

### **Exceptions**

The rule in **subsection (3)**, under which interest (or other distribution) is not to be treated as a distribution, does not apply in certain circumstances. These are —

- more than a reasonable commercial return: where the interest (that is, the consideration given) on the loan represents more than a reasonable commercial return on the loan (in this case, however, the amount of interest which does represent a reasonable commercial return is not to be treated as a distribution, this is intended to ensure the effectiveness of the anti-avoidance measure of **section 130** against excessive interest paid on loans), and (4)
- specified trades: where the borrower carries on a specified trade in the accounting period concerned and the interest would otherwise be a trading expense of that trade. (5)

### **135 Distributions: supplemental**

#### **Summary**

This section provides for a number of additional rules of interpretation for the purposes of this Chapter. It also contains anti-avoidance measures to counter collusive arrangements whereby companies could make distributions to each other's members and schemes whereby individuals could extract value from a company as capital as opposed to income.

#### **Details**

##### **Meaning of “new consideration”**

The term “new consideration” means consideration which is not provided out of the assets of a company. A capitalisation of profits is not new consideration. Share capital paid up out of a share premium account (itself representing new consideration) is treated as issued for new consideration, unless the premium has previously been taken into account in deciding that a return on shares represented a repayment of share capital and not a distribution. (1)

##### **Example**

The capital of a company consists of 100,000 ordinary €1 shares issued at a premium of 25 cent. The company transfers €25,000 to a share premium account and subsequently capitalises €75,000 out of its revenue reserves and then issues bonus shares, one for one.

The company now has capital of 200,000 €1 shares and these are paid up as to 62.50 cent per share by new consideration and as to 37.50 cent per share by capitalised company reserves.

If the company at a later date reduces its capital by 50 cent per share it would be treated as having made a distribution of 37.50 cent per share and as having repaid subscribed capital of 12.50 cent per share. The distribution is income in the hands of the shareholders.

Any consideration derived from the value of any share capital or security of a company or from voting or other rights in a company is not treated as new consideration unless it consists of — (2)(a)

- money or value received from the company as a distribution,
- money received from the company which payment represents a repayment of share capital or a repayment of the principal secured by the security, or

- the giving up of a right to the share capital or security on its cancellation, extinguishment or acquisition by the company.

Where the new consideration consists of a repayment of share capital or a repayment of the principal secured by a security or the giving up of such a right, the amount to be regarded as new consideration is not to exceed — (2)(b)

- the new consideration received by the company for the issue of the share capital or security in question, or
- where the share capital constituted a distribution on issue, the nominal value of that share capital.

### ***Anti-avoidance***

Any consideration derived from the share capital or security of a close company which is issued to another close company, pursuant to a share for share exchange, is not to be regarded as new consideration received by the other company in so far as it exceeds any new consideration received by the former company for the issue of the said share capital or security. (2A)

Where arrangements exist between 2 or more companies to make distributions to each other's members, all the parties concerned are treated as if anything done by one company has been done by any other. (3)

Where arrangements are entered into by a member of a close company whereby shares or securities are disposed of by a member and the consideration for the disposal is met out of the assets of the company, then any amount received by the member from another close company in respect of the disposal is to be treated as a distribution. (3A)

### ***Company groups***

The meaning of "distribution" is extended in the case of companies which form a 90 per cent group. In relation to a company which is a member of a 90 per cent group (that is, a principal company and all its 90 per cent subsidiaries) the references in this Chapter and in *section 137* to — (4)

- "in respect of shares in the company" extend also to shares in any other company in the group,
- "in respect of securities of the company" extends also to securities of any other company in that group, and
- "distribution", in addition to the extension of the meaning provided for by the foregoing, includes anything distributed out of the assets of the company in respect of shares in or securities of another company in the group.

This provision does not apply where —

- the recipient is another company in the same group and is resident in the State, or
- a subsidiary acquires its quoted holding company's shares for the purposes of a life assurance policyholders fund.

### ***Miscellaneous***

A distribution is treated as having being made or other consideration treated as provided out of the assets of a company where the company bears the cost of the distribution. (5)

The term "share" includes stock and any other interest which a member may have in a company. This provision also applies to *section 137*. (6)

Issuing share capital as paid up includes the paying up of any share capital previously issued. (7)

The term “security” includes securities not creating or evidencing a charge on assets. Interest paid on (or other consideration given for the use of) money advanced without the issue of a security for that advance is treated as if the interest is paid (or other consideration is given) in respect of a security for the advance. The effect of this is that any loan capital (whether secured or not) is capable of being a security and the interest on an unsecured loan or a premium on its repayment could be a distribution (for example, under *section 130(2)(d)(iii)(I)*). This provision also applies to *section 137*. (8)

Where securities are issued at a discount or are issued subject to being repayable at a premium and are not quoted on a recognised stock exchange, then, unless the securities are issued on terms reasonably comparable with the terms of quoted securities, the principal secured is not to be taken to exceed the issue price. (9)

Where this Chapter applies to anything done in respect of a share or security, the Chapter applies not only to anything done to a person as the then holder, or the former holder, of the share or security, but also to anything done in pursuance of a right granted or offer made in respect of the share or security. This provision also applies to *section 137*. (10) & (11)

## CHAPTER 3

### *Distributions and tax credits – general*

#### Overview

As tax credits do not attach to distributions made on or after 6 April 1999 this Chapter, other than *section 137* (disallowance of reliefs in respect of bonus issues) and *section 138* (treatment of dividends on certain preference shares) is largely redundant.

#### 136 Tax credit for certain recipients of distributions

This section was repealed by *section 69(2)* of, and Part 2 of *Schedule 2* to, the Finance Act 2000 with effect from 6 April 1999 in the case of income tax and for accounting periods commencing on or after that date in the case of corporation tax.

#### 137 Disallowance of reliefs in respect of bonus issues

##### Summary

Where the profits of a company are stripped by means of a distribution which is, or arises out of, an issue of bonus shares or the repayment of a security (that is, matters which are treated as a distribution under *paragraph (c)* or *(d)* of *section 130(2)* or *section 131* or *132(2)(a)*) then, except in so far as any recipient of such a distribution receives a normal return on his/her investment, no account is taken of such a distribution for the purpose of any exemptions, reliefs or set-offs.

##### Details

##### *Application*

This section applies to matters (referred to as a “bonus issue”) treated as distributions by virtue of being — (1)

- the redemption of bonus issues, and certain interest which is in the nature of a distribution (*paragraph (c)* or *(d)* of *section 130(2)*),

- a bonus issue following the repayment of share capital (*section 131*),
- a payment in repayment of share capital following a bonus issue (*section 132(2)(a)*).

### **Restriction**

A bonus issue is, subject to *subsection (5)*, not to be taken into account for any claim for recovery of tax based on — (2)

- any exemption from tax,
- the setting-off of losses against profits or income, or
- the payment of interest.

### **Franked investment income**

A bonus issue is, subject to *subsection (5)*, not treated as franked investment income (that is, income of a company which consists of a distribution) for the purposes of any reliefs available against franked investment income. See note to *section 156* for the meaning of franked investment income. (3)

### **Abatement of restrictions**

Excluded from the scope of the preceding provisions is the proportion (if any) of any bonus issue made in respect of any shares or securities which, if the bonus issue were declared a dividend, would represent a normal return on the consideration provided by the recipient for the shares or securities in respect of which the bonus issue was made. If the securities derive from shares or securities previously acquired by the recipient, the normal return is to be related to the earlier acquisition. (5)

### **Market value**

For the purpose of *subsection (5)*, the recipient is taken to have acquired the shares or securities at their market value at the date of acquisition. This applies irrespective of whether the consideration (if any) for the shares or securities was, at the time of acquisition, in excess or below their market value. In determining whether an amount received by way of dividend exceeds a normal return, regard is to be had to the length of time between the receipt of that amount and the time when the recipient first acquired any of the relevant shares or securities. Regard is also to be had to any dividends or other distributions made in respect of them during that period. (6)

## **138 Treatment of dividends on certain preference shares**

### **Summary**

This section seeks to remove certain tax advantages attaching to certain artificial preference share arrangements. Under such arrangements what is in reality loan interest payable by a company is receivable by the lending company (normally a bank) in the form of dividends on a class of specially created preference shares. Unlike interest on a normal loan, such dividends received by a bank from another Irish company are under normal rules exempt from corporation tax. In addition, the full cost of funding the loans is deductible for tax purposes by the banks. In order to prevent the loss of corporation tax resulting from such artificial arrangements, this section provides that, in respect of dividends paid in respect of such shares the actual amount of the dividend is chargeable to corporation tax when received by a company liable to that tax.

## Details

### *Definitions*

Excluded from the meaning of “preference shares” are preference shares (including preference stock) which —

- are quoted on a stock exchange in the State,
- are unquoted but which carry similar rights, as to dividends and capital, to those generally found in the case of fixed-dividend shares quoted on a stock exchange in the State, or
- are non-transferable shares issued on or after 6 April, 1989 by a company carrying on a financial service trade in the Custom House Docks Area (that is, in the International Financial Services Centre – IFSC) or in the Shannon Customs-Free Airport Area to a company —
  - none of whose shares are owned directly or indirectly by a person resident in the State, and
  - which (if this provision had not been enacted) would not be chargeable to corporation tax in respect of any profits other than dividends on those preference shares which would be so chargeable by virtue of this section.

### *Application*

The section applies to preference share dividends paid to a company within the charge to corporation tax (that is, an Irish resident company or a foreign company carrying on trade in the State through a branch or agency). (2)

### *Tax treatment*

Preference share dividends to which this section applies are chargeable to corporation tax under Case IV of Schedule D in the hands of the recipient company. (3)

This treatment takes precedence over any other provision to the contrary in the Tax Acts.

### *Saver provision*

Where shares issued by a company would not be preference shares for the purposes of this section then, notwithstanding the deletion of *sections 445* and *446*, such shares shall continue to be treated as not being preference shares. (4)

## **139 Dividends and other distributions at gross rate or of gross amount**

This section was repealed by section 69(2) of, and Part 2 of Schedule 2 to, the Finance Act 2000 with effect from 6 April 1999 in the case of income tax and for accounting periods commencing on or after that date in the case of corporation tax.

## CHAPTER 4

### *Distributions out of certain exempt profits or gains or out of certain relieved income*

## **Overview**

This Chapter provides for the tax treatment of distributions paid out of certain exempt profits/gains. The treatment of such distributions can vary depending on the nature of the profits/gains out of which the distributions are made. For example, *sections 140, 141* (up

to 23 November 2010) and **142** give an income tax and corporation tax exemption in respect of the distributions to which they apply.

## **140 Distributions out of profits or gains from stallion fees, stud greyhounds services fees and occupation of certain woodlands**

### **Summary**

Dividends and other distributions paid out of exempt profits/gains from stallion fees, greyhound service fees or from the occupation of certain woodlands are, in the hands of an individual, disregarded for income tax purposes and, in the case of companies, treated as exempt income of the company for corporation tax purposes.

### **Details**

#### ***Definitions***

“exempt profits” are profits/gains which are exempt from tax by virtue of — **(1)**

- **section 231** (profits/gains arising to the owner or part-owner of a stallion from the sale of services of mares),
- **section 232** (profits/gains from the commercial occupation of woodlands), or
- **section 233** (profits/gains arising to the owner or part-owner of a stud greyhound from the sale of services of greyhound bitches).

“other profits” includes distributions received by a company, but does not include distributions received by a company which have been made out of exempt profits (under **subsection (3)(a)(i)** such distributions when received by a company are treated as exempt profits of the recipient company).

#### ***Distributions***

Where a company makes a distribution partly out of exempt profits and partly out of other profits, the distribution is treated as 2 distributions one made out of exempt profits and the other made out of other profits. **(2)**

Where the recipient of a distribution out of exempt profits is a company, the distribution is deemed for corporation tax purposes to be exempt profits of that company. A distribution out of exempt profits is, subject to outbound payments defensive measures contained in **Chapter 5 of Part 33** of the Act, disregarded for income tax purposes. **(3)**

#### ***Dividend warrants***

Where a company makes a distribution to which this section applies, including part of a distribution treated as a distribution, the dividend warrant must show, in addition to the particulars required to be given apart from this section, that the distribution has been made out of exempt profits. **(5)**

#### ***Attribution to accounting periods***

A distribution for an accounting period is regarded as being made, as far as is possible, out of the distributable income of that period, and any excess of the distribution over that income is treated as having been made out of the income of the most recent preceding accounting period in priority to earlier accounting periods. **(7)**

Where a company makes a distribution which is not expressed to be for any specified period the distribution is treated as having been made for the accounting period in which it is made. **(9)**

### ***Apportionment***

Where a company makes a distribution for a period of account which is not an accounting period for corporation tax purposes and part of the period of account falls within an accounting period, the distribution is apportioned on a time basis to determine the part to be regarded as being for or in respect of the accounting period. (8)

## **141 Distributions out of income from patent royalties**

### **Summary**

Prior to the Finance Act 2011, certain distributions made out of income from certain patents which income had been disregarded for income tax purposes under *section 234*, or for corporation tax purposes by that section as applied for corporation tax purposes, were themselves disregarded for the purposes of income tax and corporation tax under the provisions of this section. The exemption was, however, abolished in respect of distributions made out of disregarded income on or after 24 November 2010 under the provisions of section 26 of the Finance Act 2011.

### **Details**

#### ***Definitions***

“disregarded income” is income derived from — (1)

- a qualifying patent which by virtue of *section 234(2)* has been disregarded for income tax purposes, and
- a qualifying patent which by virtue of that section, as applied for corporation tax purposes by *section 76(6)*, is disregarded for corporation tax purposes.

However, such income accruing to a company on or after 28 March, 1996, does not include income from a qualifying patent paid by a connected manufacturing or deemed manufacturing company (such income is referred to as “specified income”).

“eligible shares” are shares forming part of the ordinary share capital of the company which —

- are fully paid-up,
- carry no present or future preferential right to dividends or to assets on the company’s winding up,
- carry no present or future right to be redeemed, and
- are not subject to any different treatment from other shares of the same class, in particular different treatment as to dividends payable, repayment, restrictions, or offers of substituted or additional shares, securities or any other rights in respect of the shares.

“other profits” includes dividends and distributions, but excludes a distribution made to a company out of disregarded income where that distribution is in respect of eligible shares.

#### ***Distributions***

A distribution made partly out of disregarded income and partly out of other profits is treated as if it consisted of 2 distributions, one made out of disregarded income and the other made out of other profits. (2)

Distributions out of disregarded income made to a person are —

(3)(a)(i)  
& (4)

- where the distribution is made in respect of eligible shares, or
- where the distribution is made out of disregarded income, being income derived from a qualifying patent where the person to whom it is paid was involved in the carrying out of the research, etc which gave rise to the invention the subject of the patent (referred to as “relevant income”),

disregarded for income tax purposes. A distribution made partly out of disregarded income which is relevant income and partly out of other disregarded income is treated as if it were 2 separate distributions, one made out of relevant income and the other out of the other disregarded income.

Distributions out of disregarded income made to a company are, where the distributions are made in respect of eligible shares, treated as disregarded income of the recipient company for the purposes of this section.

(3)(a)(ii)

### ***Research and development activities***

“research and development activities” has the meaning set out in **section 766** (deduction for certain expenditure on research and development).

(5)(a) & (b)

“the amount of the expenditure on research and development” is expenditure on emoluments, materials, goods, and payments to third parties made in relation to research and development activities. Research and development expenditure incurred by companies which are members of a group may on a joint written election be treated as such expenditure by one member of the group. For this purpose, in addition to the usual requirement that one company is a 75 per cent subsidiary of another company or that the 2 companies are 75 per cent subsidiaries of a third company, 2 companies are in a group if both are owned to the extent of 75 per cent by the same individual or individuals.

“the amount of aggregate expenditure on research and development incurred by a company in relation to an accounting period” is the amount of expenditure on research and development activities incurred in the State by a company in an accounting period and each of the 2 preceding accounting periods. Where 75 per cent or more of all expenditure on research and development is incurred in the State then all such expenditure is to be taken into account in determining this aggregate.

Where a company makes a distribution out of specified income (see note on the definition of disregarded income) which accrued to the company on or after 28 March, 1996, and the specified income is income from a qualifying patent in respect of an invention which was patented for bona fide commercial reasons and not primarily for the purpose of avoiding liability to tax, the distribution is treated as a distribution out of disregarded income to the extent that the distribution does not exceed the aggregate expenditure on research and development incurred by the company for the accounting period in which the distribution is made.

(5)(c)

Alternatively, where a person in receipt of specified income shows to Revenue’s satisfaction that the specified income derived from a qualifying patent for an invention involving radical innovation which was not patented primarily for tax avoidance purposes, Revenue may determine that all distributions made out of the specified income derived from the patent are to be treated as made out of disregarded income. In making this determination Revenue may consult appropriate experts. A person aggrieved by Revenue’s determination has a right to appeal the determination to the Appeal Commissioners and subsequently to the High Court.

(5)(d)

The Revenue Commissioners are authorised to nominate any of their officers to perform the functions given to the Commissioners under this subsection. (5)(e)

A restriction applies in relation to an arrangement that dresses up what are, in reality, franchising, licensing or other similar fees between unconnected parties as exempt patent royalty payments. Exemption for distributions in the hands of shareholders out of such income are limited, as respects distributions made on or after 2 February 2006, by reference to the aggregate research and development expenditure incurred by the company, and its group companies, over a three-year period. This limited exemption will only apply if the patent was patented for bona-fide commercial reasons and not primarily for the purpose of avoiding liability to tax. Otherwise, no exemption applies. (5A)

#### ***Dividend warrants***

The statements required to accompany dividends and other distributions must show, where appropriate, that distributions are made out of disregarded income. (7)

#### ***Attribution to accounting periods***

A distribution for an accounting period is regarded as being made, as far as is possible, out of the distributable income of that period, any excess of the distribution over that income is treated as having been made out of the income of the most recent preceding accounting period in priority to earlier ones. (9)

***Subsections (8) and (9) of section 140*** apply to distributions out of disregarded income. These provisions provide, respectively, for the apportionment of distributions where the period for which a company makes up accounts is partly within and partly outside an accounting period for corporation tax purposes, and for regarding a distribution which is not for any specified period as having being made for the accounting period in which it is made. (10)

#### ***Abolition of exemption***

This section shall not apply to distributions made out of disregarded income on or after 24 November 2010. (11)

## **142 Distributions out of profits of certain mines**

### **Summary**

This section is concerned with distributions made out of certain mining profits which qualified for relief from tax up to 5 April, 1976. The distributions to which this relief applied are distributions made out of income which has been relieved from taxation under the Finance (Profit of Certain Mines) (Temporary Relief from Taxation) Act, 1956, or Chapter II (Profits of Certain Mines) of Part XXV of the Income Tax Act, 1967. Such distributions are disregarded for income tax purposes and, in the case of companies, treated as if the recipient company had itself been granted relief in respect of the income represented by the distribution.

### **Details**

#### ***Definitions***

“exempted income” is income of a company which has been relieved under — (1)

- the Finance (Profit of Certain Mines) (Temporary Relief from Taxation) Act, 1956, or

- Chapter II (Profits of Certain Mines) of Part XXV of the Income Tax Act, 1967. “other income” is income of a company which is not exempted income.

### ***Distributions***

Where for an accounting period a company makes a distribution out of exempted income the distribution does not rank, subject to outbound payments defensive measures contained in **Chapter 5 of Part 33** of the Act, as income for the purpose of the Income Tax Acts. (2)

Where a distribution is made partly out of exempted income and partly out of other income, the distribution is treated as if it consisted of 2 distributions, one made out of exempted income and the other made out of other income. The distribution made out of exempted income does not rank as income for the purpose of the Income Tax Acts. (3)

A distribution received by a company (including part of a distribution treated as a distribution) and made out of exempted income is treated in the hands of the receiving company as if it were exempted income, with the same consequences as if the receiving company had itself being granted mining relief in respect of the income represented by the distribution. (4)

### ***Attribution to accounting periods***

**Subsections (7) and (8) of section 144** apply to distributions out of exempted income. These provisions provide that a distribution for an accounting period is regarded as made as far as possible out of the distributable income of that period and any excess of the distribution over that income is attributed to the preceding accounting period or periods. (6)

**Subsections (8) and (9) of section 140** apply to distributions out of exempted income. These provisions provide, respectively, for the apportionment of distributions where the period for which a company makes up accounts is partly within and partly outside an accounting period for corporation tax purposes, and for regarding a distribution which is not for any specified period as having being made for the accounting period in which it is made.

### ***Dividend warrants***

The statements accompanying dividends and other distributions must show, where appropriate, that distributions are made out of exempted income. (7)

## **143 Distributions out of profits from coal, gypsum and anhydrite mining operations**

### **Summary**

This section is concerned with distributions made out of profits derived from the mining of coal, gypsum and anhydrite which were relieved from taxation for years up to and including 1968– 69 under the Finance (Miscellaneous) Provisions Act, 1956, **section 32** of the Finance Act, 1960 or **section 395** of the Income Tax Act, 1967. Such a distribution which is received by a company is treated in the hands of the receiving company as if it were itself relieved income of the recipient company. Individuals in receipt of such dividends are liable to income tax at a reduced rate.

## Details

### *Definitions*

“relieved income” is income of a company on which income tax was paid, or borne by deduction, at a reduced rate by virtue of relief under — (1)

- section 7, 8 or 9 of the Finance (Miscellaneous Provisions) Act, 1956,
- section 32 of the Finance Act, 1960, or
- sections 395(1) or 396(1) of the Income Tax Act, 1967,

or which is franked investment income, which consists of a distribution made out of relieved income.

### *Distributions*

Where a distribution is made partly out of relieved income and partly out of unrelieved income, the distribution is treated as if it consisted of 2 distributions, one made out of the relieved income and the other made out of the unrelieved income. (3)

A distribution received by a company and made out of relieved income is treated in the hands of the receiving company as if it were itself relieved income of the recipient company, with the same consequences as if the receiving company had itself being granted mining relief. (4)

An individual chargeable to income tax at the standard rate who is in receipt of distributions made out of relieved income is charged to income tax in respect of such distributions at a rate equal to 50 per cent of the standard rate of income tax. (6)

An individual chargeable to income tax at the higher rate who is in receipt of distributions made out of relieved income is charged to income tax at the higher rate on only 50 per cent of the distributions received. (7)

### *Attribution to accounting periods*

*Subsections (7) and (8) of section 144* apply to distributions out of relieved income. These provisions provide that a distribution for an accounting period is regarded as made as far as possible out of the distributable income of that period and any excess of the distribution over that income is attributed to the preceding accounting period or periods. (10)

*Subsections (8) and (9) of section 140* apply to distributions made out of relieved income. These provisions provide, respectively, for the apportionment of distributions where the period for which a company makes up accounts is partly within and partly outside an accounting period for corporation tax purposes, and for regarding a distribution which is not for any specified period as having being made for the accounting period in which it is made.

### *Dividend warrants*

The statements required to accompany dividends and other distributions must show, where appropriate, that distributions are made out of relieved income. (11)

## **144 Distributions out of profits from trading within Shannon Airport**

### Summary

This section deals with distributions made out of profits from trading operations within Shannon Airport and which have been exempted from corporation tax. Such a

distribution when made to another company is treated as if it is itself income from exempted trading operations of the recipient company. Individuals in receipt of such dividends are fully liable to income tax in respect of the dividends.

“Shannon Relief” was an exemption from corporation tax in respect of profits from certain trades carried on in the Shannon Airport Zone. The relief is not available after 6 April, 1990.

## Details

### *Definitions*

“exempted trading operations” are trading operations which were exempted trading operations for the purposes of Part V of the Corporation Tax Act, 1976 (that is, profits from trading operations within Shannon Airport). (1)

“other profits” includes distributions made by resident companies, but excludes distributions made out of income from exempted trading operations which is treated as if it were income from exempted trading operations carried on by the recipient company.

### *Distributions*

A distribution made partly out of income from exempted trading operations and partly out of other profits is treated as if it consisted of 2 distributions, one made out of income from exempted trading operations and the other made out of other profits. (2)

A distribution out of income from exempted trading operations when made to another company is treated as if it is itself income from exempted trading operations of the recipient company. (3)(a)

### *Dividend warrants*

In the case of distributions made out of income from exempted trading operations, the statements required to accompany dividends and other distributions must show, where appropriate, that distributions are made out of income from exempted trading operations. (5)

### *Attribution to accounting periods*

A distribution for an accounting period is regarded as made as far as possible out of the distributable income of that period, and any excess of the distribution over that income is attributed to the preceding accounting period or periods. (7)

*Subsections (8) and (9) of section 140* apply to distributions out of relieved income. These provisions provide, respectively, for the apportionment of distributions where the period for which a company makes up accounts is partly within and partly outside an accounting period for corporation tax purposes, and for regarding a distribution which is not for any specified period as having being made for the accounting period in which it is made. (9)

### *Distributable income*

The distributable income of a company for an accounting period is determined by the formula — (8)

$$(R - S) + T$$

**R** is the company’s total income chargeable to corporation tax for the accounting period (excluding corporation tax on chargeable gains) but including exempt income from stallion fees (*section 231*), income from commercial woodlands

(*section 232*), income from greyhound fees (*section 233*), income from certain patent royalties (*section 234*) and Shannon exempt income (section 71 of the Corporation Tax Act, 1976).

**S** is the company's total corporation tax chargeable for the accounting period (excluding corporation tax on chargeable gains) after granting manufacturing relief (*section 448*), certain loss relief (*paragraphs 16 and 18 of Schedule 32*) and export sales relief (section 58 of the Corporation Tax Act, 1976), but before any set off or credit for tax, including foreign tax.

**T** is the total distributions received by the company in the accounting period, including distributions made out of:

- exempt income from stallion fees, greyhound fees or commercial woodlands (*section 140(3)*),
- disregarded income from certain patent royalties (*section 141(3)*),
- exempted income of certain mines (*section 142(4)*), or
- income from exempted trading operations within Shannon Airport (*section 144(3)(a)*).

#### **145 Distributions out of profits from export of certain goods**

This section was repealed by section 69(2) of, and Part 2 of Schedule 2 to, the Finance Act 2000 with effect from 6 April 1999 in the case of income tax and for accounting periods commencing on or after that date in the case of corporation tax.

#### **146 Provisions supplementary to section 145**

This section was repealed by section 69(2) of, and Part 2 of Schedule 2 to, the Finance Act 2000 with effect from 6 April 1999 in the case of income tax and for accounting periods commencing on or after that date in the case of corporation tax.

### CHAPTER 5

#### *Distributions Out of Certain Income of Manufacturing Companies*

#### **147 Distributions**

This section was repealed by section 69(2) of, and Part 2 of Schedule 2 to, the Finance Act 2000 with effect from 6 April 1999 in the case of income tax and for accounting periods commencing on or after that date in the case of corporation tax.

#### **148 Treatment of certain deductions in relation to relevant distributions**

This section was repealed by section 69(2) of, and Part 2 of Schedule 2 to, the Finance Act 2000 with effect from 6 April 1999 in the case of income tax and for accounting periods commencing on or after that date in the case of corporation tax.

#### **149 Dividends and other distributions at gross rate or of gross amount**

This section was repealed by section 69(2) of, and Part 2 of Schedule 2 to, the Finance Act 2000 with effect from 6 April 1999 in the case of income tax and for accounting periods commencing on or after that date in the case of corporation tax.

## **150 Tax credits for recipients of certain distributions**

This section was repealed by section 69(2) of, and Part 2 of Schedule 2 to, the Finance Act 2000 with effect from 6 April 1999 in the case of income tax and for accounting periods commencing on or after that date in the case of corporation tax.

## **151 Appeals**

This section was repealed by section 69(2) of, and Part 2 of Schedule 2 to, the Finance Act 2000 with effect from 6 April 1999 in the case of income tax and for accounting periods commencing on or after that date in the case of corporation tax.

## CHAPTER 6 *Distributions – supplemental*

### **Overview**

*Chapter 6* provides supplemental provisions relating to distributions.

## **152 Explanation of tax credit to be annexed to interest and dividend warrants**

### **Summary**

This section provides that every warrant or cheque drawn in payment of a dividend or interest which is a distribution is to be accompanied by a statement in writing giving particulars of the dividend/interest paid.

### **Details**

#### ***Dividend warrants***

Every warrant or cheque drawn in payment by a company of a dividend, or in respect of interest treated as a distribution, must be accompanied by a statement in writing giving particulars of — **(1)**

- the amount of the dividend (distinguishing any part of the dividend paid out of capital profits) or the amount of interest paid, and
- the period for which the payment is made.

#### ***Penalties***

A company failing to comply with the requirements in connection with the information to accompany dividend warrants is liable for a penalty of €200 for each failure, subject to a maximum penalty of €2,000 in respect of failures connected with any one payment of a distribution, dividend or interest. **(2)**

#### ***Information***

A company making a distribution (other than a distribution to which *subsection (1)* refers) is obliged, when requested by the recipient of the distribution, to furnish a statement showing the amount of the distribution. **(3)**

## 153 Distributions to certain non-residents

### Summary

This section provides that certain non-residents are exempt from income tax in respect of distributions made by Irish resident companies. The non-residents in question are —

- a person, other than a company, who is neither resident nor ordinarily resident in the State but is resident in another EU Member State, in a territory with which Ireland has a double taxation treaty in force or in a territory with which Ireland has a double taxation treaty signed which has yet to come into force (“a treaty country”);
- a non-resident company which is resident in another EU Member State or in a treaty country, but which is not controlled, either directly or indirectly, by Irish residents,
- a company which is not resident in the State and which is ultimately controlled by persons resident in another EU Member State or in a treaty country;
- a company which is not resident in the State and the principal class of the shares of which, or of a company of which it is a 75 per cent subsidiary, is substantially and regularly traded on a recognised stock exchange in another EU Member State or a in a treaty country, or on such other exchange as may be approved of by the Minister for Finance;
- a company which is not resident in the State and which is wholly-owned by two or more companies each of whose principal class of shares is substantially and regularly traded on a recognised stock exchange in another EU Member State or in a treaty country, or on such other exchange as may be approved of by the Minister for Finance;
- a parent company in another EU Member State in respect of distributions made to it by its Irish resident subsidiary company where withholding tax on such distributions is prohibited under the EU Parent-Subsidiaries Directive.

In the case of non-resident individuals who do not qualify for the exemption provided for by this section, the charge to income tax is confined to a rate of 25%. In effect, this means that the deduction of dividend withholding tax (DWT) from distributions received by such persons is a final liability tax.

### Details

#### *Definitions*

“qualifying non-resident person”, in relation to a distribution, is the person beneficially entitled to the distribution, being a person who is within a number of categories as set out below. (1)

- A person, not being a company, who is neither resident nor ordinarily resident in the State but is resident for tax purposes in a “relevant territory”.
- A company not resident in the State which is resident for tax purposes in a “relevant territory” and which is not under the control (whether directly or indirectly) of a person or persons who is or are resident in the State.
- A company not resident in the State which is under the control (whether directly or indirectly) of a person or persons resident for tax purposes in a “relevant

territory” who is or are not under the control (whether directly or indirectly) of a person who is, or persons who are, not so resident.

- A company not resident in the State and the principal class of the shares of which are substantially and regularly traded on a recognised stock exchange in a “relevant territory” or on such other stock exchange as may be approved of by the Minister for Finance.
- A company not resident in the State which is a 75 per cent subsidiary of a company whose principal class of shares are substantially and regularly traded on a recognised stock exchange in a “relevant territory” or on such other stock exchange as may be approved of by the Minister for Finance.
- A company which is not resident in the State and which is wholly-owned by two or more companies each of whose principal class of shares are substantially and regularly traded on a recognised stock exchange in a “relevant territory” or on such other exchange as may be approved of by the Minister for Finance.

“relevant territory” is an EU Member State other than Ireland, a territory with which Ireland has a double taxation treaty in force or in a territory with which Ireland has a double taxation treaty signed which has yet to come into force;

“tax”, when used in relation to residency in a “relevant territory”, means any tax imposed in that territory which corresponds to Irish income tax or corporation tax.

### ***Meaning of “control”***

The word “control” in ***paragraph (b)(i)*** of the definition of “qualifying non-resident person” is to be construed in accordance with ***subsections (2) to (6)*** of ***section 432*** as if in ***subsection (6)*** of that section for “5 or fewer participators” there were substituted “persons resident in the State”. In effect, this means that if the rules contained in those subsections for determining who “controls” a company can be applied in such a way as to enable control of the company to be exercised by a person or persons (however many in number) resident in the State, then those rules are to be so applied. (1A)

In ***paragraph (b)(ii)*** of the definition of “qualifying non-resident person”, the word “control” is also to be construed in accordance with the rules contained in ***subsections (2) to (6)*** of ***section 432*** (which determine who “controls” a company) so that if these rules can be applied in such a way as to enable control of the company to be exercised by a person or persons (however many in number) resident for tax purposes in a relevant territory, then those rules are to be so applied. Similarly, if those rules can be applied in such a way as to enable such persons to be controlled by a person who is, or persons (however many in number) who are, not resident for tax purposes in a relevant territory, then the rules are to be so applied. (2)

### ***Meaning of “75 per cent subsidiary”***

For the purposes of determining whether a company is a 75 per cent subsidiary of another company, the provisions of ***sections 412 to 418*** apply as if ***section 411(1)(c)*** were deleted. This ensures that a company may only be treated as a 75 per cent subsidiary of another company if that other company has a 75 per cent entitlement in the company in regard to the holding of shares, profits on a distribution and a share of assets on a winding-up. The deemed deletion of ***section 411(1)(c)*** is necessary as otherwise a company would not be treated as owning any share capital which it owned directly or indirectly in a company which is not resident in an EU State. (3)

***Meaning of “wholly-owned by two or more companies”***

A company (called an “aggregated 100 per cent subsidiary”) is treated as being wholly-owned by 2 or more companies (called the “joint parent companies”) if and so long as 100 per cent of the ordinary share capital of the aggregated 100 per cent subsidiary is owned, directly or indirectly, by the joint parent companies. (3A)

For this purpose, *subsections (2) to (10) of section 9* apply as they apply for the purposes of that section. The subsections in question set out rules for the determination of the ownership of the ordinary share capital of one company by another company whether that ownership is held directly or indirectly through one or more other companies.

For this purpose too, *sections 412 to 418* apply with any necessary modifications as those sections apply for the purposes of group relief (*Chapter 5 of Part 12*). This ensures that a company may only be treated as an aggregated 100 per cent subsidiary of the joint parent companies if, in addition to owning 100 per cent of the ordinary share capital of that company, the joint parent companies between them also have a 100 per cent entitlement in the company in regard to profits on a distribution and a share of assets on a winding up. In applying *sections 412 to 418* for this purpose, two modifications are made. Firstly, *section 411(1)(c)* is to be disregarded. This is necessary as otherwise companies resident outside the EU could not be taken into account in establishing ownership of a company. Secondly, a new subsection replaces the existing *subsection (1) of section 412*. This is necessary to more accurately reflect the concept of an aggregated 100 per cent subsidiary of joint parents.

***Main exemption***

A qualifying non-resident person is, subject to outbound payments defensive measures contained in *Chapter 5 of Part 33* of the Act, not chargeable to income tax in respect of a distribution made by a company resident in the State. In addition, the amount or value of the distribution is treated for the purposes of *sections 237 and 238* (which deal with the taxation of annual payments) as not brought into charge to income tax. (4)

The exemption in *subsection (4)* does not apply to a distribution which is a property income dividend paid by a Real Estate Investment Trust (REIT) within the meaning of *section 705A*. (4A)

***Exemption of distributions to which Parent-Subsidiaries Directive applies***

Income tax is not chargeable in respect of a distribution made to a parent company resident in another EU Member State by its Irish resident subsidiary where, as a result of *section 831(5)* which implements the EU Parent-Subsidiaries Directive in so far as it relates to the non-application of withholding taxes on distributions, dividend withholding tax under *Chapter 8A of Part 6* does not apply to the distribution. In addition, the amount or value of the distribution is treated for the purposes of *sections 237 and 238* (which deal with the taxation of annual payments) as not brought into charge to income tax. (5)

***Certain individuals who are not “qualifying non-resident persons”***

If the income of an individual for any tax year includes an amount in respect of a distribution made by a company resident in the State and the individual, though neither resident nor ordinarily resident in the State, is not a qualifying non-resident person, then income tax is not to be chargeable in respect of that distribution at a rate in excess of 25%. In effect, this makes the deduction of DWT from such a distribution (under *Chapter 8A of Part 6*) a final liability tax as DWT is deductible at a rate of 25%. (6)

## 154 Attribution of distributions to accounting periods

### Summary

Subject to certain exceptions, a company making a distribution may elect to have a distribution treated as being made out of the profits of any accounting period in the 9 year period before the accounting period in which the distribution is made. This election must be made in writing to the inspector within 6 months of the end of the accounting period in which the distribution is made. Such an election is effective for the purposes of determining the way certain *sections* providing for the special tax treatment of certain distributions are to apply (namely, *sections 140, 141 and 144*).

### Details

#### *Attribution of distributions to accounting periods*

The general rule is that a distribution is deemed to have been made for the accounting period immediately preceding the accounting period in which the distribution is made (1) (see *sections 140(7), 141(9), 144(7)*). As an alternative to this general rule, this section allows a company making a distribution to specify in writing, within 6 months of the end of the accounting period in which the distribution is made, the accounting period or periods for which the distribution is to be treated as having been made.

In specifying that a distribution was made for a particular accounting period or periods (2) in accordance with *subsection (1)* —

- a company may only specify that so much of a distribution as does not exceed the undistributed income of an accounting period is made for that accounting period;
- a company may specify that a distribution is made for an accounting period or periods ending more than 9 years before the date of the distribution so long as the distribution does not exceed the undistributed income of the company for those periods. If there is no undistributed income left in any such periods, the company may treat the distribution or part of it as being made for an older accounting period or periods.

Subject to certain exceptions, a company is prohibited from treating a distribution as being made for the accounting period in which the distribution is actually paid. The exceptions are (3) —

- interim dividends paid before 1 January 2003,
- interest treated as a distribution by virtue of *subparagraph (ii), (iii)(I) or (v) of section 130(2)(d)*,
- distributions in respect of certain preference shares (within the meaning of *section 138(1)*),
- distributions made by a company for the accounting period when it first came within the charge to corporation tax or when it ceased to be within the charge to corporation tax.

#### *Distributable income*

A company's undistributed income for an accounting period on any day is the amount of the distributable income of the company for the accounting period represented by the formula — (6) & (7)

$$(R - S) + T - W$$

as reduced by distributions treated as made for accounting periods on or after 6 April, 1989, but before the day in question.

Where:

R is the company's total income chargeable to corporation tax for the accounting period (excluding corporation tax on chargeable gains) but including exempt income from stallion fees (*section 231*), income from commercial woodlands (*section 232*), income from greyhound fees (*sections 233*), income from certain patent royalties (*section 234*) and Shannon exempt income (section 71 of the Corporation Tax Act, 1976).

S is the company's total corporation tax chargeable for the accounting period (excluding corporation tax on chargeable gains) after granting manufacturing relief (*section 448*), certain loss relief (*paragraph 16 or 18 of Schedule 32*) and export sales relief (section 58 of the Corporation Tax Act, 1976), but before any set off or credit for tax, including foreign tax.

T is the total distributions received by the company in the accounting period, including distributions made out of —

- exempt income from stallion fees, greyhound fees or commercial woodlands (*section 140(3)*),
- disregarded income from certain patent royalties (*section 141(3)*),
- exempted income of certain mines (*section 142(4)*), or
- income from exempted trading operations within Shannon Airport (*section 144(3)(a)*).

W is the total distributions made by the company before 6 April 1989 which were made for the accounting period, including distributions which are treated as having been made for the accounting period under *subsection (7)*, and distributions which would have been treated as having been made for the accounting period had the rule in *subsection (9)* of *section 140* applied to such distributions.

The distributions which are to be treated under *subsection (7)* as having been made for the accounting period are the amount by which the total amount of distributions made by the company for the accounting period exceed the amount for that accounting period which is given by the formula —

$$(R - S) + T$$

Where R, S and T have the meanings set out above.

## **155 Restriction of certain reliefs in respect of distributions out of certain exempt or relieved profits**

### **Summary**

This is an anti-avoidance provision designed to restrict certain reliefs in respect of distributions out of exempt or relieved profits. Generally, the provision applies where there is a reasonable basis for asserting that risk has been eliminated in respect of either the receipt of distributions or the repayment of capital in respect of subscriptions for shares. Where the section applies, the dividends in respect of those shares lose their tax exempt or tax relieved status. Exceptions ensure that flows of foreign funds to Irish companies are unaffected by the section.

## Details

### *Definition*

“distribution” has the same meaning as in the Corporation Tax Acts (see *Chapter 2* of (1) this Part).

### *Application*

The section applies to shares in a company in respect of which the shareholder is (2)(a) either —

- assured of recovering part or all of the capital subscribed, or
- assured of receiving an agreed distribution.

The use of the words “agreement, arrangement or understanding” aims at covering a spectrum of methods which may be used to eliminate risk ranging from formal agreements to informal understandings. For this section to apply it is necessary to show not that risk has been reduced but that the risk has been eliminated. While this is a stringent test, it is balanced by the fact that it is to be applied on a reasonable basis (that is, is it reasonable to say that the shareholder’s risk has been eliminated).

The beneficial owner of the shares is deemed to include the person owning the shares (2)(b) and any person connected with that person.

The guaranteed amount includes an amount specified or implied in a foreign currency. It (2)(c) is not possible, therefore, to argue that a guaranteed amount in a foreign currency is in reality a fluctuating amount in terms of Irish pounds due to possibilities of exchange rate movements.

### *Withdrawal of tax exempt or tax relieved status*

This subsection withdraws, subject to *subsection (4)*, the tax exempt or tax relieved (3) status from certain distributions made in respect of shares to which this section applies. These dividends are those made out of —

- income from woodlands and stallion and greyhound fees (*section 140(3)(a)*),
- income from patent royalties (*section 141(3)(a)*),
- Shannon exempt income (*section 144(3)(a)*).

The distributions are treated as income chargeable to income tax or corporation tax, as appropriate, and are chargeable under Case IV of Schedule D.

### *Exceptions*

The withdrawal of tax exempt or tax relieved status for such distributions does not apply (4) to —

- a company none of whose shares are beneficially owned by resident persons, and whose only income chargeable to corporation tax consists of distributions which (but for this provision) would be chargeable by virtue of this section, or
- non-residents.

These exceptions are designed to ensure that the section does not affect the foreign funding arrangements which Irish companies have with foreign banks and which involve no cost to the Irish Exchequer.

In determining how a dividend received by an Irish resident (other than a company to (5) which *subsection (4)(a)* applies) is to be charged, *subsection (4)* is to be ignored. This

ensures that the exclusion in **subsection (4)** will not be used by Irish residents for tax planning purposes.

## CHAPTER 7 *Franked Investment Income*

### Overview

**Chapter 7** provides for the tax treatment of distributions made and received by Irish resident companies.

### 156 Franked investment income and franked payments

#### Summary

This section defines franked investment income and franked payments. Franked investment income consists of the amount or value of a distribution which is received by an Irish resident company from another resident company.

When an Irish resident company makes a distribution, the amount or value of the distribution is known as a franked payment.

#### Details

- Franked investment income is income of a company resident in the State arising from distributions received from other resident companies. It is the amount or value of the distribution. (1)
- A franked payment arises when a resident company makes a distribution. It is the amount or value of the distribution. (2)

### 157 Set-off of losses, etc against franked investment income

This section was deleted by section 41 of the Finance Act 2003 as respects accounting periods ending on or after 6 February 2003.

### 158 Set-off of loss brought forward or terminal loss against franked investment income in the case of financial concerns

This section was deleted by section 41 of the Finance Act 2003 as respects accounting periods ending on or after 6 February 2003.

## CHAPTER 8 *Advance corporation tax*

### Overview

This Chapter contained the legislative provisions relating to advance corporation tax (ACT). The purpose of ACT was, broadly, to ensure that tax credits on distributions by Irish companies were matched by corporation tax actually paid by such companies. ACT was paid only in respect of distributions made by Irish resident companies before 6 April, 1999. Any ACT paid by a company can be set off against that company's normal corporation tax on its income, but not on its chargeable gains. **Sections 159 to 164** and **sections 166** and **167** were deleted by section 41 of the Finance Act 2003, **section 165**

was deleted by section 69 of the Finance Act 2000. **Section 845B** provides for the continued set-off of surplus advance corporation tax.

### **159 Liability for advance corporation tax**

*This section was deleted by section 41 of the Finance Act 2003 as respects accounting periods ending on or after 6 February 2003.*

### **160 Set-off of advance corporation tax**

*This section was deleted by section 41 of the Finance Act 2003 as respects accounting periods ending on or after 6 February 2003.*

### **161 Rectification of excessive set-off of advance corporation tax**

*This section was deleted by section 41 of the Finance Act 2003 as respects accounting periods ending on or after 6 February 2003.*

### **162 Calculation of advance corporation tax where company receives distributions**

*This section was deleted by section 41 of the Finance Act 2003 as respects accounting periods ending on or after 6 February 2003.*

### **163 Tax credit recovered from company**

*This section was deleted by section 41 of the Finance Act 2003 as respects accounting periods ending on or after 6 February 2003.*

### **164 Restrictions as to payment of tax credit**

*This section was deleted by section 41 of the Finance Act 2003 as respects accounting periods ending on or after 6 February 2003.*

### **165 Group dividends**

*This section was repealed by section 69(2) of, and Part 2 of Schedule 2 to, the Finance Act 2000 with effect from 6 April 1999 for income tax and for accounting periods commencing on or after that date for corporation tax.*

### **166 Surrender of advance corporation tax**

*This section was deleted by section 41 of the Finance Act 2003 as respects accounting periods ending on or after 6 February 2003*

### **167 Change of ownership of company: calculation and treatment of advance corporation tax**

*This section was deleted by section 41 of the Finance Act 2003 as respects accounting periods ending on or after 6 February 2003.*

### **168 Distributions to certain non-resident companies**

*This section was repealed by section 69(2) of, and Part 2 of Schedule 2 to, the Finance Act 2000 with effect from 6 April 1999 for income tax and for accounting periods commencing on or after that date for corporation tax.*

### **169 Non-distributing investment companies**

*This section was repealed by section 69(2) of, and Part 2 of Schedule 2 to, the Finance Act 2000 with effect from 6 April 1999 for income tax and for accounting periods commencing on or after that date for corporation tax.*

### **170 Interest in respect of certain securities**

*This section was repealed by section 69(2) of, and Part 2 of Schedule 2 to, the Finance Act 2000 with effect from 6 April 1999 for income tax and for accounting periods commencing on or after that date for corporation tax.*

### **171 Returns, payment and collection of advance corporation tax**

*This section was repealed by section 69(2) of, and Part 2 of Schedule 2 to, the Finance Act 2000 with effect from 6 April 1999 for income tax and for accounting periods commencing on or after that date for corporation tax.*

### **172 Application of Corporation Tax Acts**

*This section was repealed by section 69(2) of, and Part 2 of Schedule 2 to, the Finance Act 2000 with effect from 6 April 1999 for income tax and for accounting periods commencing on or after that date for corporation tax.*

## CHAPTER 8A *Dividend withholding tax*

### **Overview**

This Chapter, containing 14 sections numbered *sections 172A to 172M* (including *section 172LA*), provides for a scheme of dividend withholding tax (DWT for short) on distributions made by Irish resident companies on or after 6 April, 1999.

In general, DWT applies at the standard rate of income tax for the year in which the dividends are paid, and other distributions are made, by all companies resident in the State. DWT does not apply, however, where the resident company is also a collective investment undertaking but not an offshore fund.

DWT applies only to relevant distributions. The term “relevant distribution” includes all payments normally treated as a distribution for income tax and corporation tax purposes, namely —

- normal cash dividends and non-cash dividends;
- in the case of close companies, expenses incurred in providing benefits or facilities for a participator in the company, and excess interest paid by the company to directors; and

- scrip dividends of quoted companies, that is, additional share capital of a quoted company taken in place of a cash distribution.

It does not include, however, a distribution made to a Government Minister (in his or her capacity as such), to the National Pensions Reserve Fund Commission, to a Commission investment vehicle, to the National Asset Management Agency or to a company referred to in *section 616(1)(g)*. It should be noted, though, that the term does include scrip dividends of unquoted companies, that is, any amount assessable and chargeable to tax under Case IV of Schedule D by virtue of *section 816(2)(c)*. Such dividends, being assessable under Case IV of Schedule D, are not distributions for income tax purposes but are nonetheless within the scope of DWT.

DWT does not apply to a relevant distribution made by an Irish resident subsidiary company to its parent company resident in another EU Member State where the distribution is covered by *section 831* which section implements the EU Parent Subsidiaries Directive. This exclusion extends to distributions made by an Irish unlimited company to its parent company in another EU Member State in the same circumstances as a limited company may do so.

Provision is made for an exemption from DWT for relevant distributions made to a person who is beneficially entitled to the distributions and who is within one of the following categories —

- an Irish resident company,
- a pension scheme,
- managers of approved retirement funds, approved minimum retirement funds and special savings incentive accounts,
- a qualifying employee share ownership trust,
- a collective investment undertaking,
- a charity,
- a sports body which is exempt from income tax by virtue of the income concerned being applied for the sole purpose of promoting athletic or amateur games or sports
- a designated stockbroker who is receiving relevant distributions as part of the income of a special portfolio investment account,
- a permanently incapacitated individual who is exempt from income tax in respect of income from the investment of compensation payments made by the courts or under an “out of court” settlement for personal injuries,
- the trustees of a trust fund raised by public subscriptions for an individual who is permanently incapacitated from maintaining him or her self where the trust is exempt from income tax in respect of income from the investment of trust funds,
- a permanently incapacitated individual who is exempt from income tax in respect of payments from a trust referred to in the preceding indent and in respect of income arising to such an individual from the investment of such payments, or
- a thalidomide victim who is exempt from income tax in respect of income arising from the investment of compensation payments made by the Minister for Health and Children or the “thalidomide victims foundation”.

To qualify for exemption, the person concerned must have made the appropriate declaration of entitlement to exemption as set out in *Schedule 2A*. However, an Irish resident company making a relevant distribution to its Irish resident parent company may

make a distribution free of DWT without the need for a formal declaration by the parent company.

An exemption is also given in respect of relevant distributions which are not liable to income tax in the hands of the recipients (that is, certain patent dividends, dividends out of profits or gains from stallion fees, stud greyhound services or the occupation of woodlands and dividends out of the profits of certain mines). Paying companies are, however, obliged to continue to return details of such distributions in their DWT returns.

From 6 April, 2000 an exemption from DWT applies in the case of relevant distributions made to a non-resident person who is beneficially entitled to the distributions and who is within the following category —

- a person (other than a company) who is neither resident nor ordinarily resident in the State but is resident for tax purposes in a relevant territory and has made a relevant declaration and provided a current certificate to the relevant person.

Arrangements for non-resident companies (Distributions received on or after 3 April 2010):

- a non-resident company which by virtue of the law of a relevant territory is resident for the purposes of tax in the relevant territory and which is not controlled by Irish residents,
- a non-resident company which is controlled by a person or persons who by virtue of the law of a relevant territory is or are resident for the purposes of tax in the relevant territory who is or are not under the control of a person or persons not so resident,
- a non-resident company the principal class of shares of which, or of a company of which it is a 75 per cent subsidiary, or where the company is wholly owned by two or more companies each of whose principal class of shares, is substantially and regularly traded on a recognised stock exchange in a relevant territory or territories, in the State (in respect of distributions made on or after 1 February 2007), or on or on such other stock exchange as may be approved of by the Minister for Finance.

To qualify for exemption from 6 April, 2000, the person concerned must have made the appropriate declaration of entitlement to exemption as set out in *Schedule 2A*.

Special arrangements are provided to deal with the common situation whereby distributions are paid through intermediaries such as nominees or custodians, including cases where distributions are paid to depositary banks for the benefit of the holders of American depositary receipts. Likewise, special arrangements apply in the case of market claims (that is, where distributions are incorrectly paid to persons due to delays in updating share registers).

DWT deducted from distributions made in any month must be paid over to the Collector-General within 14 days of the end of the month and will have to be accompanied by a return giving details of the distributions and the recipients of the distributions.

## **172A Interpretation**

### **Summary**

This section gives the meaning of certain terms, and sets out rules for the construction of certain references, used in *Chapter 8A*. It also provides that *Schedule 2A* has effect for the purposes of supplementing *Chapter 8A*.

## Details

### Definitions

The meaning of certain terms used in the Chapter is set out. Some of the terms are, in fact, actually defined elsewhere in the Chapter but are listed in the section so as to give them general application throughout the Chapter. The provisions where these definitions are found are — (1)(a)

- **section 172G** – “authorised withholding agent”;
- **section 172C(2)** – “excluded person”;
- **section 172D(3)** – “qualifying non-resident person”;
- **section 172E** – “qualifying intermediary”.
- **section 172FA** – “recognised qualifying intermediary”.

Other definitions are linked to a definition of the term concerned contained in other sections of the Act. These include “approved body of persons” linked to **section 235**; “approved retirement fund” linked to **section 784A**; “approved minimum retirement fund” linked to **section 784C**; “qualifying fund manager” linked to **section 784A**; “PRSA administrator” and “PRSA assets” linked to **section 787A**; “PEPP assets” and “PEPP provider” linked to **section 787V**; “qualifying savings manager” linked to **section 848B**; “special savings incentive account” linked to **section 848M**; “designated broker” linked to **section 838**; “special portfolio investment account” linked to **section 838**; and “tax reference number” linked to **section 885**. Please refer to the Guidance Note on the relevant section for details.

Most of the other definitions are self-explanatory. Key definitions are —

“dividend withholding tax” (or DWT for short) is a sum representing income tax on the amount of the relevant distribution at a rate of 25%.

“electronic dividend voucher” is essentially a dividend voucher issued via the electronic settlement system that is in use in the Irish market. Such vouchers contain codes instead of the names and addresses that are on paper vouchers. Under legislation introduced in the Finance Act 2007, electronic dividend vouchers (e-vouchers for short) are accepted for DWT purposes in certain circumstances. Related definitions are electronic number (the unique number on the e-voucher), ISI Number (the dividend’s unique International Securities Identification Number (ISIN)) and recipient ID code (the code identifying each e-voucher recipient – i.e. settlement system participant).

“intermediary” is a person who carries on a trade which includes the activity of receiving, on behalf of other persons, relevant distributions made by Irish resident companies or amounts or other assets representing such distributions received from other intermediaries. This definition is necessary so as to cater for distributions made through custodians or nominees.

“non-liable person” is a person beneficially entitled to a relevant distribution who is either an excluded person or a qualifying non-resident person.

“relevant distribution” includes all payments normally treated as distributions for income tax and corporation tax purposes except where made to a Minister of the Government in his or her capacity as such Minister, to the National Pensions Reserve Fund Commission, to a Commission investment vehicle, to the National Asset Management Agency or to a company referred to in **section 616(1)(g)** and also additional share capital issued by an unquoted company in place of cash dividends.

“relevant person” is the person to whom declarations under the Chapter are to be made by persons seeking exemption from DWT. Where a relevant distribution is made by a company directly to the beneficial owner of the distribution, the company is the relevant person. Where, however, the distribution is made to the beneficial owner through an authorised withholding agent or through one or more qualifying intermediaries, the relevant person is the authorised withholding agent or the qualifying intermediary from whom the distribution is receivable by the beneficial owner.

“relevant territory” is a Member State of the EU (other than Ireland), a country with which Ireland has a double taxation treaty in force or a country with which Ireland has signed a double taxation treaty which has yet to come into force.

“specified person” is the person to whom a relevant distribution is actually made whether or not that person is beneficially entitled to the distribution.

“ultimate payer” is the company, authorised withholding agent, qualifying intermediary or other person from whom a relevant distribution is receivable by the person beneficially entitled to the distribution.

### ***Exemption for relevant distributions made by collective investment funds***

Relevant distributions made by a collective investment undertaking are not subject to DWT. (1)(b)

### ***Amount of relevant distribution for DWT purposes***

The amount of a relevant distribution for DWT purposes is set out. The amount is — (2)

- where the relevant distribution consists of a cash payment, the amount of the payment,
- where the relevant distribution is additional share capital issued by a quoted company in place of a cash dividend, the amount treated as a distribution under **section 816**,
- where the relevant distribution is additional share capital issued by an unquoted company in place of a cash dividend, the amount treated as assessable and chargeable to tax under Case IV of Schedule D under **section 816**, and
- where the relevant distribution is a non-cash distribution (not being additional share capital issued in place of a cash dividend), the amount equal to the value of the distribution.

References to the amount of a relevant distribution are to be taken as references to the amount of the relevant distribution before any deduction of DWT.

### ***Application of Schedule 2A***

**Schedule 2A**, which sets out the form of the declarations to be made by persons seeking exemption from DWT, applies for the purposes of supplementing the Chapter. (3)

## **172B Dividend withholding tax on relevant distributions**

### **Summary**

In general, unless otherwise provided for, DWT must be deducted from all relevant distributions made by Irish resident companies on or after 6 April, 1999.

This general rule does not apply in the case of scrip dividends, that is, where additional share capital is issued in place of a cash distribution. Instead, the company must reduce the amount of additional share capital to be issued to the person to whom the distribution

is to be made. The reduction is to be such an amount as secures that the value of the additional share capital issued to that person does not exceed an amount equal to the amount that person would have received, after deduction of DWT, if that person had received the distribution in cash instead of in the form of additional share capital. The company is then liable to pay to the Collector-General an amount (which is treated as a deduction of DWT) equal to the DWT which would have been required to be deducted had the general rule applied.

Similarly, the general rule does not apply in the case of other non-cash distributions made by companies. In such cases, the recipient receives the “gross” distribution but the company must pay to the Collector-General an amount (which is treated as a deduction of DWT) equal to the DWT which would have been required to be deducted from the distribution had the general rule applied. The company is entitled to recover that amount from the recipient of the distribution as a simple contract debt in a court of competent jurisdiction.

Provision is also made as to the retention period for documentation used for DWT purposes and for the examination of this documentation by Revenue.

Certain exemptions are also provided for.

### Details

#### ***General rule – DWT must be deducted from all relevant distributions***

Subject to any exceptions, an Irish resident company which makes a relevant distribution (1) to a specified person on or after 6 April, 1999 must deduct DWT from the amount of the distribution. The specified person must allow the deduction of DWT and the company is acquitted and discharged of the money represented by the deduction of DWT as if that money had actually been paid to the specified person.

#### ***Special rule – scrip dividends***

Where on or after 6 April, 1999 an Irish resident company makes a relevant distribution (2) to a specified person which consists of additional share capital instead of a cash distribution, **subsection (1)** does not apply. Instead, subject to any exceptions, the company must reduce the amount of share capital issued to the specified person by a certain amount. The amount in question is such amount as secures that the value (at the time of making the relevant distribution) of the additional share capital issued to the specified person does not exceed what the specified person would have received, after deduction of DWT, if that person had received a cash distribution instead of additional share capital. In similar vein to **subsection (1)**, the specified person must allow the reduction of the additional share capital and the company is acquitted and discharged of the money represented by the reduction as if that money had actually been paid to the specified person. The company is then liable to pay the Collector-General an amount (which is to be treated as if it were a deduction of DWT) equal to the DWT which would have been required to be deducted from the relevant distribution if **subsection (1)** had in fact applied to that distribution. The company is liable to pay the amount in question in the same manner in all respects as if it were the DWT which would have been so required to be deducted from the relevant distribution.

#### ***Special rule – other non-cash distributions***

Neither does **subsection (1)** apply where on or after 6 April, 1999 an Irish resident (3) company makes a relevant distribution to a specified person and the distribution is a non-cash distribution other than the issue of additional share capital in place of a cash

distribution. Instead, subject to any exceptions, the company is liable to pay to the Collector-General an amount (which is to be treated as if it were a deduction of DWT) equal to the DWT which would have been required to be deducted from the relevant distribution if **subsection (1)** had in fact applied to the relevant distribution. The company is liable to pay that amount in the same manner in all respects as if it were the DWT which would have been so required to be deducted from the relevant distribution. The company is empowered to recover a sum equal to that amount from the specified person as a simple contract debt in any court of competent jurisdiction.

***All relevant distributions liable to DWT unless paying company satisfied that DWT does not apply***

An Irish resident company must, in general, treat every relevant distribution to be made by it on or after 6 April, 1999 as a distribution to which DWT applies. However, where as a result of any exception the company is satisfied that a relevant distribution to be made to a specified person is not a relevant distribution to which DWT applies, the company is, subject to the terms of that exception, entitled to so treat relevant distributions to be made by it to the specified person until such time as it is in possession of information which can reasonably be taken to indicate that a relevant distribution to be made to the specified person is or may be a relevant distribution to which DWT applies. (4)

***Retention and examination of documentation***

A resident company must keep and retain all declarations (and accompanying certificates) and notifications (other than notices from Revenue) made or given to the company under the Chapter. Such documents must be kept and retained by the company for the longer of 6 years or the period which, in relation to the relevant distributions in respect of which the declaration or notification is made or given, ends not earlier than 3 years after the date on which the company has ceased to make relevant distributions to the person who made the declaration or gave the notification to the company. (4A)(a)

When requested to do so by notice in writing from Revenue, a resident company must make available to Revenue, within the time specified in the notice, all such declarations, certificates or notifications or such class or classes of such declarations, certificates or notifications as may be specified in the notice. (4A)(b)

Revenue may examine, or take extracts from or copies of, any such declarations, certificates or notifications. (4A)(c)

***Computation of profits or gains not affected by DWT***

The law relating to the computation of profits or gains for tax purposes is not to be affected by deduction of DWT from relevant distributions. Accordingly, subject to **section 129**, the amounts of relevant distributions are to be taken into account in computing profits or gains of persons beneficially entitled to such distributions. The reference to “subject to **section 129**” maintains the existing exemption from corporation tax for dividends and other distributions of an Irish resident company which are received by other Irish resident companies. (5)

***Distributions covered by Parent Subsidiaries Directive and by certain unlimited companies exempt***

Excluded from the charge to DWT are relevant distributions made to a non-resident parent company (as defined in **section 831**) by its Irish resident subsidiary (with the meaning of that section) and which are covered by **section 831**. That section implements the European Council Directive concerning the common system of taxation applicable (6)

in the case of parent companies and subsidiaries of different Member States, commonly referred to as the Parent Subsidiaries Directive. However, the Directive does not extend to Irish unlimited companies. Accordingly, provision is made to extend this exclusion to distributions made by an Irish unlimited company to its parent company in other EU Member States in the same circumstances as limited companies may do so. While limited companies can in general pay dividends free of DWT, if the parent company is controlled by non-EU residents the paying company must be able to show that the parent company exists for bona fide commercial purposes and does not form part of a tax avoidance arrangement. Similar considerations apply in relation to unlimited companies.

### ***Exemption of certain distributions***

The following distributions are, subject to outbound payments defensive measures (7) contained in **Chapter 5** of **Part 33** of the Act, exempt from DWT, namely, distributions made out of profits or gains from stallion fees, the occupation of certain woodlands or stud greyhound service fees; distributions made out of income of certain patents and which are exempt from income tax; and distributions made out of the profits of certain mines.

DWT also does not apply in the case of a relevant distribution made by an Irish resident (8) company to another Irish resident company of which it is a 51 per cent subsidiary. The term “51 per cent subsidiary” is defined generally for the purposes of the Tax Acts in **section 9** as a company more than 50 per cent of the ordinary share capital of which is owned directly or indirectly by that other company.

## **172BA Obligation on certain persons to obtain tax reference numbers of persons beneficially entitled to relevant distributions**

### **Summary**

This section obliges Irish resident companies and intermediaries involved in the operation of dividend withholding tax (DWT), in advance of making a relevant distribution, to take all reasonable steps to obtain and keep a record of the tax reference number for each person beneficially entitled to receive distributions from 1 January 2021.

### **Details**

Where a distribution is made by a company directly to the person beneficially entitled to (1)(a) the relevant distribution, the obligation is on that company.

Where a distribution is made through an authorised withholding agent, the obligation is (1)(b) on the authorised withholding agent from whom the relevant distribution is receivable by the person beneficially entitled to the distribution.

Where a distribution is made through one or more qualifying intermediaries, the (1)(c) obligation is on that qualifying intermediary from whom the relevant distribution is receivable by the person beneficially entitled to the distribution.

Where a distribution is made through one or more persons who is not, or not all of, or (1)(d) none of whom are, a qualifying intermediary, the obligation is on the person from whom the relevant distribution is receivable by the person beneficially entitled to the distribution.

The ultimate payer (as defined in *section 172A*) shall ensure that Article 5 of Regulation (2) (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the

free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) is complied with when it is fulfilling the requirements of *subsection (1)*.

## **172C Exemption from dividend withholding tax for certain persons**

### **Summary**

This section provides for an exemption from DWT for relevant distributions made by a company resident in the State to a person who is beneficially entitled to the distributions and is within one of the following categories —

- an Irish resident company,
- a pension scheme,
- managers of approved retirement funds, approved minimum retirement funds and special savings incentive accounts,
- a PRSA administrator,
- a qualifying employee share ownership trust,
- a PEPP provider,
- a collective investment undertaking,
- an exempt unit trust,
- a charity,
- a sports body which is exempt from income tax by virtue of the income concerned being applied for the sole purpose of promoting athletic or amateur games or sports
- a designated stockbroker who is receiving relevant distributions as part of the income of a special portfolio investment account,
- a permanently incapacitated individual who is exempt from income tax in respect of income from the investment of compensation payments made by the courts or under an “out of court” settlement for personal injuries,
- the trustees of a trust fund raised by public subscriptions for an individual who is permanently incapacitated from maintaining himself or herself where the trust is exempt from income tax in respect of income from the investment of trust funds,
- a permanently incapacitated individual who is exempt from income tax in respect of payments from a trust referred to in the preceding indent and in respect of income arising to such an individual from the investment of such payments, or
- a thalidomide victim who is exempt from income tax in respect of income arising from the investment of compensation payments made by the Minister for Health and Children or the “thalidomide victims foundation”

To qualify for exemption, the person must have made the appropriate declaration of entitlement to exemption as set out in **Schedule 2A**. The declaration must be made to the company making the distribution in the case where the person receives the distribution directly from the company. Where, however, the person receives the distribution through one or more than one qualifying intermediary, or through an authorised withholding agent, the declaration must be made to the qualifying intermediary or the authorised withholding agent from whom the person receives the distribution made by the company.

## Details

### ***Exemption from DWT for excluded persons***

The charge to DWT does not apply where an Irish resident company makes a relevant distribution to an excluded person. (1)

### ***Excluded persons***

An excluded person is a person beneficially entitled to the relevant distribution, being one of the persons listed in the summary, who or which has made to the relevant person (the company making the distribution or the qualifying intermediary or authorised withholding agent from whom that distribution is received) the appropriate declaration referred to in *Schedule 2A*. (2)

### ***Certain persons deemed to be beneficially entitled***

The exemptions provided by this section are predicated on the recipient of the relevant distribution being beneficially entitled to the distribution. The exemption provided to designated stockbrokers is intended to apply to stockbrokers operating special portfolio accounts. Such brokers are not themselves beneficially entitled to relevant distributions received in respect of such accounts; rather the beneficial owner of the distributions is the individual on whose behalf the broker is operating the account. Similar considerations apply in the case of a distributions received by a collective investment undertaking, a qualifying fund manager, a qualifying savings manager, a PRSA administrator, a PEPP provider, an exempt unit trust and the trustees of a qualifying trust. Accordingly, in order to allow such persons to make the appropriate declaration of exemption to the relevant person and thus receive relevant distributions without deduction of DWT, such persons are treated as being beneficially entitled to the relevant distributions. (3)

## **172D Exemption from dividend withholding tax for certain non-resident persons**

### **Summary**

This section provides that from 6 April, 2000 exemption from DWT, subject to outbound payments defensive measures contained in *Chapter 5* of *Part 33* of the Act, applies only in the case of relevant distributions made to a non-resident person who is beneficially entitled to the distributions and who is within the following category —

- a person (other than a company) who is neither resident nor ordinarily resident in the State but is resident for tax purposes in a relevant territory and has made a relevant declaration and provided a current certificate to the relevant person.

Arrangements for non-resident companies:

- with regard to relevant distributions received by non-resident companies from Irish resident companies on or after 3 April 2010 the requirement to include a non-resident and/or an auditor's certificate with an appropriate declaration of entitlement to exemption is removed. Instead non-resident companies need only provide a current declaration and certain information to the dividend paying company or intermediary to claim exemption from DWT in accordance with *paragraph 9* of *Schedule 2A*. The declaration must be a current declaration within the meaning of *paragraph 2A* of *Schedule 2A* at the time of the making of the relevant distribution. Declarations/certificates provided by qualifying non-resident

companies before 3 April 2010 for the purposes of claiming exemption from DWT will remain valid until their current expiry date has passed.

## Details

### *Exemption from DWT for qualifying non-resident persons*

DWT does not apply, subject to outbound payments defensive measures contained in **Chapter 5 of Part 33** of the Act, in respect of relevant distributions made by an Irish resident company to a qualifying non-resident person on or after 6 April, 2000. (2)

### *Qualifying non-resident persons*

A qualifying non-resident person is a person who is beneficially entitled to the distributions and is within the following category — (3)

- a person (other than a company) who is neither resident nor ordinarily resident in the State and who is by virtue of the law of a relevant territory, resident for tax purposes in the relevant territory. To qualify for exemption, the person must make to the company making the distribution the appropriate declaration of entitlement to exemption as set out in **paragraph 8 of Schedule 2A** accompanied by a certificate (within the meaning of **subparagraph (f)** of the paragraph) which is a current certificate (within the meaning of **paragraph 2 of Schedule 2A**). (a)(i), (ii), (iii)

Arrangements for non-resident companies (Distributions received on or after 3 April 2010):

- a non-resident company which by virtue of the law of a relevant territory is resident for the purposes of tax in the relevant territory and which is not controlled by Irish residents, (b)(i)
- a non-resident company which is controlled by a person or persons who by virtue of the law of a relevant territory is or are resident for the purposes of tax in the relevant territory who is or are not under the control of a person or persons not so resident, (b)(ii)
- a non-resident company the principal class of shares of which, or of a company of which it is a 75 per cent subsidiary, or where the company is wholly owned by two or more companies each of whose principal class of shares, is substantially and regularly traded on a recognised stock exchange in a relevant territory or territories, in the State (in respect of distributions made on or after 1 February 2007), or on or on such other stock exchange as may be approved of by the Minister for Finance. (b)(iii)

To claim exemption from DWT, a non-resident company must provide a current declaration and certain information to the dividend paying company or intermediary in accordance with **paragraph 9 of Schedule 2A**. The declaration must be a current declaration within the meaning of **paragraph 2A of Schedule 2A** at the time of the making of the relevant distribution. Declarations/certificates provided by qualifying non-resident companies before 3 April 2010 for the purposes of claiming exemption from DWT will remain valid until their current expiry date has passed.

Revenue eBrief No. 26/2010 of 14 April 2010 provides further information with regard to self-certification for non-resident companies.

It should also be noted that if the qualifying non-resident person is a trust, the declaration must (see **paragraph 8(g) of Schedule 2A**) be accompanied by two documents, namely, a certificate signed by the trustee or trustees of the trust showing the names and addresses of the beneficiaries and settlors of the trust and a notice by Revenue stating that it has noted the contents of that certificate.

**Meaning of “control” in subsection (3)(b)(i)**

The word “control” is to be construed in accordance with *subsections (2) to (6) of section 432* (which define the meaning of “control” in the context of close companies) as if in *subsection (6)* of that section for “5 or fewer participators” there were substituted “persons resident in the State”. In effect, this means that if the rules for determining who “controls” a company as set out in those subsections can be applied in such a way as to enable control of the company to be exercised by a person or persons (however many in number) resident in the State, then those rules are to be so applied. (3A)

The exemptions in *subsections (2) and (3)* do not apply to a distribution which is a property income dividend paid by a Real Estate Investment Trust (REIT) within the meaning of *section 705A*. (3B)

**Meaning of “control” in subsection (3)(b)(ii)**

The word “control” is to be construed in accordance with *subsections (2) to (6) of section 432*, but as if in *subsection (6)* of that section new wording were substituted for the phrase “5 or fewer participators”. The new wording is — (4)

- in so far as the first mention of “control” in *subsection (3)(b)(ii)* is concerned, “persons who, by virtue of the law of a relevant territory, are resident for the purposes of tax in such a relevant territory”, and
- in so far as the second mention of “control” in that subsection is concerned, “persons who are not resident for the purposes of tax in a relevant territory”.

The effect of this is that for the purposes of *subsection (3)(b)(ii)* if the rules of *subsections (2) to (6) of section 432* for determining who “controls” a company can be applied in such a way as to enable control of the company to be exercised by persons (however many in number) resident for tax purposes in a relevant territory, then those rules are to be so applied. Similarly, if those rules can be applied in such a way as to enable those persons in turn to be controlled by other persons who are not resident for tax purposes in a relevant territory, then the rules are to be so applied.

**Meaning of “75 per cent subsidiary”**

In so far as *subsection (3)(b)(iii)(I)* is concerned, the provisions of *sections 412 to 418* apply for the purposes of determining whether a company is a 75 per cent subsidiary of another company. This ensures that a company may only be treated as a 75 per cent subsidiary of another company if that other company has a 75 per cent entitlement in the company in regard to the holding of shares, profits on a distribution and a share of assets on a winding-up. In so applying the provisions in question, *section 411(1)(c)* is treated as deleted. This deemed deletion is necessary as otherwise a company resident outside of the EU would not be treated as owning any share capital which it owned directly or indirectly in a company which is not resident in the State. (5)

**Company wholly owned by two or more other companies**

This provision is supplementary to *subsection (3)(b)(iii)(II)* It provides that a company (an “aggregated 100 per cent subsidiary”) is to be treated as being wholly-owned by 2 or more companies (the “joint parent companies”) if and so long as 100 per cent of the ordinary share capital of the aggregated 100 per cent subsidiary is owned, directly or indirectly, by the joint parent companies. (6)

For this purpose, *subsections (2) to (10) of section 9* apply as they apply for the purposes of that section. The subsections in question set out rules for the determination of the

ownership of the ordinary share capital of one company by another company, whether that ownership is held directly or indirectly through one or more other companies.

For this purpose too, *sections 412 to 418* apply with any necessary modifications as those *sections* apply for the purposes of *Chapter 5* (group relief) of *Part 12*. This ensures that a company may only be treated as an aggregated 100 per cent subsidiary of the joint parent companies if, in addition to owning 100 per cent of the ordinary share capital of that company, the joint parent companies between them also have a 100 per cent entitlement in the company in regard to profits on a distribution and a share of assets on a winding up. However, in so applying the provisions of these *sections*, two specific modifications are treated as having been made. Firstly, *section 411(1)(c)* is treated as deleted. This deemed deletion is necessary as otherwise companies outside the EU would not be taken into account in establishing ownership of a company. Secondly, a new subsection is treated as replacing the existing *subsection (1)* of *section 412*. This is considered necessary to more accurately reflect the concept of an aggregated 100 per cent subsidiary of joint parent companies – the real *subsection (1)* of *section 412* deals with the concept of 75 per cent or 90 per cent ownership of a company by one other company.

## 172E Qualifying intermediaries

### Summary

This section provides special measures to deal with the common situation where distributions are made through intermediaries such as nominees and custodians. DWT does not apply to distributions made through one or more qualifying intermediaries for the benefit of persons beneficially entitled to the distributions who are non-liable persons.

To be a qualifying intermediary, an intermediary must —

- be resident for tax purposes in the EU or in a tax treaty country,
- enter into a qualifying intermediary agreement with Revenue, and
- be authorised by Revenue as a qualifying intermediary.

In addition, the intermediary must —

- hold (or be wholly owned by a person who holds) a banking licence in an EU Member State or a tax treaty country,
- be a member of a recognised stock exchange in the EU or in a tax treaty country, or
- be a person whom Revenue considers suitable to be a qualifying intermediary.

An authorisation of a person as a qualifying intermediary expires after 7 years subject to renewal of the, or the entering into of a new, qualifying intermediary agreement.

Under a qualifying intermediary agreement, an intermediary must undertake to accept, retain and make available for inspection, all declarations of exemption and notifications made to the intermediary in connection with the DWT scheme. The intermediary must also undertake to exercise a duty of care in relation to the veracity of such declarations and notifications, to operate the DWT scheme (including the making of returns to Revenue) correctly and efficiently, to provide to Revenue an auditor's report on the intermediary's compliance with the agreement for its first year of operation and further such reports on request by Revenue, and to allow for the verification of such compliance by Revenue in any manner considered necessary by Revenue. The agreement may also

require the provision of a bond or guarantee by the intermediary to protect the Exchequer against fraud or negligence in the operation of the agreement and the DWT scheme.

Provision is also made for the maintenance by Revenue of a list of qualifying intermediaries which can be made available to any person, and for the revocation of an authorisation of a person as a qualifying intermediary.

## Details

### ***Exemption from DWT for relevant distributions made through qualifying intermediaries for the benefit of non-liable persons***

DWT does not apply where an Irish resident company makes a relevant distribution through one or more than one qualifying intermediary for the benefit of a person who is beneficially entitled to the distribution and is a non-liable person in relation to the distribution. This rule is, however, subject to **section 172F(6)** and outbound payments defensive measures contained in **Chapter 5 of Part 33** of the Act. **Section 172F(6)** provides that the company must apply DWT to a distribution made to a qualifying intermediary unless it has been notified by the qualifying intermediary that the distribution is to be received by the qualifying intermediary for the benefit of a person in its Exempt Fund. (1)

### ***Qualifying intermediary – conditions***

A number of conditions must be satisfied if a person is to be a qualifying intermediary. The person must first of all be an intermediary, that is, a person whose trade consists of or includes the receipt, on behalf of other persons, of relevant distributions from Irish resident companies or of amounts or other assets representing such distributions from other qualifying intermediaries. In addition, the person must be resident for tax purposes in the EU or in a tax treaty country, must enter into a qualifying intermediary agreement with Revenue, and must be authorised by Revenue as a qualifying intermediary. (2)

### ***Qualifying intermediary – agreement***

A qualifying intermediary agreement is an agreement entered into between Revenue and an intermediary under which the intermediary undertakes certain obligations, namely — (3)

- to keep and retain all declarations (and accompanying certificates) and notifications (other than notices from Revenue) made or given to the intermediary in accordance with the DWT scheme. Such documents must be kept and retained by the intermediary for the longer of 6 years or the period which, in relation to the relevant distributions in respect of which the declaration or notification is made or given, ends not earlier than 3 years after the date on which the intermediary has ceased to receive relevant distributions on behalf of the person who made the declaration or gave the notification to the intermediary,
- must make available to Revenue, within the time specified in the notice, all such declarations, certificates or notifications or such class or classes of such declarations, certificates or notifications as may be specified in the notice,
- to inform Revenue if the intermediary has reasonable grounds to believe that a declaration or notification made or given to the intermediary was not, or may not have been, a true and correct declaration or notification at the time it was made or given to the intermediary,
- to inform Revenue if at any time the intermediary has reasonable grounds to believe that a declaration made to the intermediary would not, or might not, be a true and correct declaration if made to the intermediary at that time,

- to operate the provisions of **section 172F** (which sets out the obligations of a qualifying intermediary in relation to the DWT scheme) in a correct and efficient manner and to make a timely return of the information required under **subsection (7)** of that section,
- to produce an auditor’s report on its compliance with the DWT scheme after it has been operating the agreement for one year. The report must be furnished to Revenue within 3 months after the end of that year. Further such reports have to be provided by the intermediary only on written notice from Revenue and in relation to such other period of its operation of the agreement as is specified by Revenue in that notice,
- if required, to give a bond or guarantee to Revenue which is sufficient to indemnify Revenue against any loss arising by virtue of the fraud or negligence of the intermediary in relation to the operation of the agreement and the DWT scheme,
- where the intermediary is a depository bank holding shares in trust for, or on behalf of, the holders of American depository receipts (ADRs) and if authorised by Revenue to do so, to operate the special provisions of **section 172F** dealing with DWT and ADRs and to comply with any conditions relating to such operation as are specified in the agreement, and
- to allow for the verification by Revenue of the intermediary’s compliance with the agreement and the DWT scheme in any manner considered necessary by Revenue.

#### ***Examination of documentation***

Revenue may examine, or take extracts from or copies of, any declarations, certificates or notifications made available to it under **subsection (3)(b)**. (3A)

#### ***Authorisation as a qualifying intermediary***

Revenue are restricted as to whom they may authorise as a qualifying intermediary. Revenue may only authorise as a qualifying intermediary —

- a holder (or a person who is wholly owned by a holder) of a banking licence or other similar authorisation under the law of any relevant territory or of an EEA state,
- a member of a recognised stock exchange in the EU or in a tax treaty country, or
- a person whom they consider suitable to be a qualifying intermediary.

#### ***Maintenance of list of qualifying intermediaries***

Revenue are required to maintain a list of qualifying intermediaries whose authorisation as a qualifying intermediary has not been revoked. Notwithstanding their confidentiality and secrecy obligations, Revenue may make available to any person the name and address of any qualifying intermediary. (5)

#### ***Revocation of authorisation as qualifying intermediary***

Revenue are empowered to revoke a person’s authorisation as a qualifying intermediary where Revenue is satisfied that the person has failed to comply with the qualifying intermediary agreement or the DWT scheme in general or that the person is otherwise unsuitable to be a qualifying intermediary. Notice of a revocation must be served in writing by registered post, and the revocation takes effect from the date specified in the notice. (6)

Notice of a revocation of an authorisation as a qualifying intermediary must be published in Iris Oifigiúil. (7)

### ***Cessation of authorisation as qualifying intermediary***

Without prejudice to **subsection (6)** which allows Revenue to revoke an intermediary's (8) authorisation as a qualifying intermediary in certain circumstances, such an authorisation ceases to have effect after 7 years. This, however, does not prevent Revenue and the intermediary from agreeing to renew the qualifying intermediary agreement or to enter into a further such agreement. Nor does it to prevent a further authorisation by Revenue of the intermediary as a qualifying intermediary for the purposes of the DWT scheme

### **172F Obligations of qualifying intermediary in relation to relevant distributions**

#### **Summary**

This section sets out the obligations of a qualifying intermediary in relation to relevant distributions made to it by a company resident in the State, or amounts representing such distributions paid on to it by another qualifying intermediary. The qualifying intermediary must create and maintain an Exempt Fund and a Liable Fund in relation to such distributions and amounts. The Exempt Fund is to include only those clients of the qualifying intermediary who are —

- non-liable persons who have made to the qualifying intermediary the appropriate declaration of exemption referred to in **Schedule 2A**, and
- other qualifying intermediaries who have advised the qualifying intermediary that the distributions, or amounts representing such distributions, to be paid on to them by the qualifying intermediary are to be received by them on behalf of persons in their Exempt Funds.

In the case where the qualifying intermediary is a depositary bank holding shares in trust for, or on behalf of, the holders of American depositary receipts (ADRs), the qualifying intermediary is to include in its Exempt Fund the ADR holders on whose behalf it is to receive distributions from Irish resident companies and who have United States of America addresses on its ADR register. It is also to include in its Exempt Fund any further intermediary to whom it is to pass on such distributions where those distributions are to be received by that further intermediary for the benefit of that further intermediary's ADR holders whose address in that further intermediary's ADR register is located in the United States of America.

The Liable Fund is to include the remainder of the qualifying intermediary's clients.

The qualifying intermediary must notify the company making the distributions and other qualifying intermediaries who are paying on the distributions to it as to whether the distributions to be received by it are to be received for the benefit of persons in its Exempt Fund or Liable Fund. The company is to apply DWT only to the distributions which relate to the Liable Fund. The qualifying intermediary must also update its Exempt Fund and Liable Funds as often as may be necessary and must notify the company and the other qualifying intermediaries of all such updates. The company must apply DWT to a distribution unless it has been notified by the qualifying intermediary that the distribution is to be received by the qualifying intermediary for the benefit of a person in its Exempt Fund.

The qualifying intermediary is obliged to make an annual return to Revenue where Revenue so request. Revenue may modify this request so that only details of a particular class or classes of distributions (e.g. a return could require details of all payments over €1,000 or all distributions relating to a particular company). The return is to include details showing —

- the name and address of each company from which it receives distributions on behalf of its clients and of each other qualifying intermediary from which it receives amounts representing such distributions on behalf of its clients,
- the amount of each such distribution,
- the name and address of the clients to whom the distributions or amounts representing the distributions were given by the qualifying intermediary, and
- whether those clients were non-liable persons.

The return must be made in an electronic format approved by Revenue. If Revenue is satisfied that the qualifying intermediary has not got the facilities to make the return electronically, the return may be made in writing in a form prescribed or authorised for that purpose by Revenue.

## Details

### ***Creation and maintenance of Exempt Fund and Liable Fund***

A qualifying intermediary who is to receive, on behalf of its clients, relevant distributions made by an Irish resident company or payments representing such distributions paid to it by another qualifying intermediary must create and maintain 2 separate categories in relation to such distributions and payments, namely, an Exempt Fund and a Liable Fund. (1)

The qualifying intermediary must also notify the company making the distributions or the other qualifying intermediary, as appropriate, as to whether the distributions or the payments representing the distributions are to be received by it for the benefit of a person included in the Exempt Fund or a person included in the Liable Fund.

### ***Exempt Fund***

Subject to ***subsections (3) and (5)***, a qualifying intermediary is to include in the Exempt Fund only — (2)

- persons beneficially entitled to the distributions or payments who are non-liable persons, and
- any further qualifying intermediary to whom the distributions or payments are to be paid on by the qualifying intermediary and are to be received by that further qualifying intermediary for the benefit of persons included in that further qualifying intermediary's Exempt Fund.

A qualifying intermediary must not include a person beneficially entitled to the relevant distribution in its Exempt Fund unless it has received from that person the appropriate declaration of exemption (see ***Schedule 2A***). In this context, it should be noted (see ***paragraph 8(f)*** of ***Schedule 2A***) that a declaration of exemption made by a qualifying non-resident person, not being a company, must be accompanied by a certificate of tax residence from the tax authority in the country of the person's residence. (3)(a)

With regard to relevant distributions received by non-resident companies from Irish resident companies on or after 3 April 2010, ***subsection (3)(a)(ii)(II)*** requires that an intermediary must include in its Exempt Fund only those non-liable non-resident companies who have provided a current declaration in accordance with ***paragraph 9*** of ***Schedule 2A***, being a current declaration within the meaning of ***paragraph 2A*** of ***Schedule 2A***.

The certificate of tax residence given in accordance with ***paragraph 8(f)*** of ***Schedule 2A*** is effective only for the period from the date of issue until 31 December in the fifth year following the year in which the certificate was issued. Consequently, if the non-resident

person is to continue to be eligible for inclusion in the Exempt Fund the certificates have to be renewed at the end of such period.

It should also be noted that if the qualifying non-resident person is a trust, the declaration must (see paragraph 8(g) of *Schedule 2A*) be accompanied by two documents, namely, a certificate signed by the trustee or trustees of the trust showing the names and addresses of the beneficiaries and settlors of the trust and a notice by Revenue stating that it has noted the contents of the certificate.

The qualifying intermediary must not include a further qualifying intermediary in its Exempt Fund unless it has received the notification from the further qualifying intermediary made under *subsection (1)*. This is the notice to the effect that the distributions or payments representing such distributions which are to be paid on to the further qualifying intermediary by the qualifying intermediary are to be received by the further intermediary for the benefit of persons included in its Exempt Fund. (3)(b)

### ***Exempt Fund – special arrangements for American depositary receipts***

#### *General Note*

Special arrangements are made to cater for investment instruments known as American Depositary Receipts or ADRs. ADRs are US dollar denominated negotiable instruments which allow US investors to trade in non-US securities without the costs and difficulties normally presented by overseas equity investment. ADRs are traded in the main US Stock Exchanges, New York, AMEX and NASDAQ. They provide non-US companies easy access to the US capital markets – the largest investor base in the world – and are widely recognised as the optimal method for domestic US investors to invest internationally. In recent years many large Irish quoted companies as well as emerging new companies have raised substantial capital in the US via ADRs.

The DWT legislation generally requires a “chain” of certification, from the individual shareholder through any qualifying intermediaries (including depositary banks) up to the Irish dividend-paying company, before the dividend can be paid gross. This is in line with the normal practice internationally and was put in place following consultations with representatives of company registrars and the main intermediaries. Its purpose is to ensure that only genuine residents of tax treaty countries can avail of the exemption.

However, the volume of US investment in Irish companies via ADRs is so great that the burden of the certification “chain”, and the associated paperwork, in an ADR context was considered overly onerous. Consequently, the DWT legislation allows the American depositary banks who receive dividends from Irish companies and pass them on to the US ADR holders a less rigorous certification procedure. In essence, the depositary bank is allowed to receive, and pass on, the dividend from the Irish company gross —

- where the depositary bank’s register shows that the direct beneficial owner has a US address on the register, but without being supported by a certificate of US tax residence, and
- if there is a further intermediary such as a mutual fund between the depositary bank and the beneficial shareholder, where the depositary bank receives confirmation from the intermediary that the beneficial shareholder’s address in the intermediary’s records is in the US, but again, without being backed up by a certificate of US tax residence.

In effect, the procedures for exemption from DWT in the case of ADRs operate on an “address system” for that part of the chain of ownership which is below a depositary bank but only where the ultimate individual owner’s recorded address is in the US.

*Detailed Note*

If provided for in the qualifying intermediary agreement, a qualifying intermediary which is a depository bank holding shares in trust for, or on behalf of, the holders of American depository receipts (ADRs) must operate the provisions of **subsection (3)(d)** subject to any conditions that may be specified in the qualifying intermediary agreement. (3)(c)

Where **subsection (3)(d)** applies, such a qualifying intermediary must include certain persons in its Exempt Fund, notwithstanding the requirements of **subsections (3)(a)** and **(b)**. These persons are — (3)(d)

- its ADR holders who are beneficially entitled to distributions to be received by it on their behalf from Irish resident companies (or to payments representing such distributions to be received by it on their behalf from another qualifying intermediary) and whose address on its ADR register is located in the United States of America, and
- any specified intermediary to whom it is to pay on those distributions or payments (or amounts or other assets representing such distributions or payments) which are to be received by that specified intermediary for the benefit of —
  - its ADR holders who are beneficially entitled to the distributions or payments and whose address in the specified intermediary’s ADR register is located in the United States of America and who, in accordance with **subsection (3)(e)(iii)(I)**, are to be included in that specified intermediary’s Exempt Fund, or
  - any further specified intermediary to which the distributions or payments (or amounts or other assets representing such distributions or payments) are to be given by the specified intermediary and are to be received by that further specified intermediary for the benefit of persons who, in accordance with **clauses (I)** and **(II)** of **subsection (3)(e)(iii)**, are to be included in that further specified intermediary’s Exempt Fund.

The circumstances in which an intermediary is to be treated as a specified intermediary for the purposes of this section are set out. (3)(e)

The intermediary must not be a qualifying intermediary but must be a person within **paragraph (a), (b), (c)** or **(d)** of **section 172E(4)** who is operating as an intermediary in an establishment situated in the United States of America. (3)(e)(i)

The intermediary must create and maintain an Exempt Fund and a Liable Fund for the distributions or payments representing distributions which it is to receive, on behalf of other persons, from a qualifying intermediary or another specified intermediary. These Funds must be created and maintained in accordance with **subsections (1)** and **(5)** as if the intermediary were a qualifying intermediary, but this requirement is subject to the rules of **subparagraphs (iii)** and **(iv)**. (3)(e)(ii)

The intermediary must include in its Exempt Fund only — (3)(e)(iii)

- those persons who are beneficially entitled to the distributions or payments in question and who are ADR holders whose address on the intermediary’s ADR register is located in the United States of America, and
- any further specified intermediary to which the distributions or payments are to be given by the intermediary and are to be received by that further specified intermediary for the benefit of persons included in that further specified intermediary’s Exempt Fund.

The intermediary must include in its Liable Fund all its ADR holders except those included in its Exempt Fund. (3)(e)(iv)

The intermediary must notify, in writing or by electronic means, the qualifying intermediary or the further specified intermediary from which it is to receive the distributions or payments as to whether the distributions or payments to be received by it are for the benefit of persons included in its Exempt Fund or persons included in its Liable Fund. (3)(e)(v)

The intermediary must enter into an agreement with the qualifying intermediary or the further specified intermediary from whom it is to receive relevant distributions for its American depositary receipt holders. Under the terms of this agreement it must agree that if and when required to comply with **subsection (7A)** it will do so. (3)(e)(vi)

Where under the special arrangements for ADRs, a person is included in the qualifying intermediary’s or specified intermediary’s Exempt Fund and, apart from those arrangements, that person would not be a non-liable person in relation to distributions or payments representing distributions to be received on the person’s behalf by a qualifying intermediary or a specified intermediary, then, the person is to be treated as a non-liable person in relation to those distributions. In effect, this dispenses with the need for the person to make a declaration of exemption as set out in **Schedule 2A**. (3)(f)

Notwithstanding **paragraph (e)** (which sets out the conditions for qualification as a specified intermediary), where Revenue is satisfied that a specified intermediary or other specified intermediary referred to in **subsection (7A)** has failed to comply with that subsection — (3)(g)

- Revenue may, by written notice, notify it that it will cease to be treated as a specified intermediary from such date as is specified in the notice, and
- notwithstanding “confidentiality obligations”, Revenue may make available to any qualifying intermediary (being a depositary bank holding shares in trust for, or on behalf of, the holders of American depositary receipts) or specified intermediary a copy of such notice.

Where subsequently Revenue is satisfied that the intermediary has furnished the information required under **subsection (7A)** and will in future comply with that subsection if and when requested to do so, Revenue may, by further written notice, revoke the notice given to the intermediary under **paragraph (g)** from such date as may be specified in the further notice, and a copy of that further notice must be given by Revenue to any person to whom a copy of the notice under **paragraph (g)** was given. (3)(h)

### ***Liable Fund***

The qualifying intermediary must include in its Liable Fund all persons on whose behalf it is to receive the distributions or payments representing the distributions other than such of those persons as are included in its Exempt Fund. (4)

### ***Updating of Exempt Fund and Liable Fund***

The qualifying intermediary must update its Exempt Fund and Liable Fund as often as may be necessary so as to ensure that the provisions of **subsections (2) to (4)** are complied with and that **section 172E(1)** is also complied with, that is, that DWT is not applied where an Irish resident company makes a relevant distribution, through one or a chain of qualifying intermediaries, to a person beneficially entitled to the distribution who is a non-liable person. The qualifying intermediary must notify the Irish resident company or other qualifying intermediaries, as appropriate, of all such updates. (5)

***Relevant distributions through qualifying intermediary liable to DWT unless paying company notified that distribution is to be received by qualifying intermediary for the benefit of person included in its Exempt Fund***

A company making a relevant distribution through a qualifying intermediary cannot treat the distribution as being made for the benefit of a person beneficially entitled to the distribution who is a non-liable person unless, before the making of the distribution, the qualifying intermediary has notified the company that the distribution is to be received by it for the benefit of a person included in its Exempt Fund. In the absence of such a notification, the company must deduct DWT from the distribution. (6)

***Annual return by qualifying intermediary on request from Revenue***

For each tax year beginning with the year 1999–2000 the qualifying intermediary, on being requested by written notice from Revenue, must make a return to Revenue within the time specified in the notice. The return must show — (7)

- the name and address of each resident company from which it received, on behalf of other persons, relevant distributions in the year concerned,
- the name of each other person from whom it received, on behalf of other persons, payments representing distributions made by resident companies in the year concerned,
- the amount of each such distribution,
- the name and address of each person to whom such a distribution, or a payment representing such a distribution, was given by the qualifying intermediary, and
- the name and address of each such person in respect of whom the qualifying intermediary has received a declaration of exemption from DWT.

A return which is required to be so made by a qualifying intermediary may be confined to such class or classes of relevant distributions as may be specified in the notice given to the qualifying intermediary by Revenue.

***Information on recipients to be provided by qualifying intermediaries where distributions made through specified intermediaries***

Special arrangements apply where a qualifying intermediary has been required by Revenue notice to make a return to Revenue under **subsection (7)(a)** and a relevant distribution, the details of which are required to be included in that return, has been given by the qualifying intermediary to a specified intermediary. (7A)(a)

In such circumstances, the qualifying intermediary must, immediately on receiving the notice under **subsection (7)(a)**, request the specified intermediary, by way of written notice or in electronic format, to notify the qualifying intermediary or Revenue of the name and address of each person to whom the specified intermediary gave such a distribution and of the amount of each such distribution. (7A)(b)

The specified intermediary is required to furnish, within 21 days of the receipt of such notice, to the qualifying intermediary or, at the discretion of the specified intermediary, to Revenue, by way of notice in writing or in electronic format, the information so required. (7A)(c)

Where the specified intermediary furnishes the information so required to the qualifying intermediary, the qualifying intermediary is to include that information in the return required to be made by it under **subsection (7)(a)**. If the information is furnished direct to Revenue by the specified intermediary, the specified intermediary must, by way of written notice or in electronic format, immediately advise the qualifying intermediary of (7A)(d)

that fact and the qualifying intermediary must then include in its return under **subsection (7)(a)** a statement to the effect that it has been so advised by the specified intermediary.

If any person to whom a specified intermediary gave such a distribution is another specified intermediary, the specified intermediary must, immediately on the receipt of such notice, request the other specified intermediary, by way of written notice or in electronic format, to notify the specified intermediary or Revenue of the name and address of each person to whom the other specified intermediary gave such a distribution and of the amount of each such distribution. (7A)(e)

Where this happens, the other specified intermediary must, within 21 days of the receipt of such notice, furnish to the specified intermediary or, at the discretion of the other specified intermediary, to Revenue, by way of written notice or in electronic format, the information so required. (7A)(f)

Where the other specified intermediary furnishes the information so required to the specified intermediary, the specified intermediary must immediately transmit that information to the person (being the qualifying intermediary or Revenue) to whom it furnishes the information required to be furnished by it under **paragraph (b)** of this subsection. (7A)(g)

If that person is the qualifying intermediary, the qualifying intermediary must include that information in the return required to be made by it under **subsection (7)(a)**. If that person is Revenue, the specified intermediary must immediately notify the qualifying intermediary, in writing or in electronic format, of the fact that the information required to be furnished by the other specified intermediary under **paragraph (e)** of this subsection has been furnished to the specified intermediary and transmitted by the specified intermediary to Revenue. The qualifying intermediary must then include in its return under **subsection (7)(a)** a statement that it has been so advised by the specified intermediary.

If the other specified intermediary furnishes the information directly to Revenue, it must, by way of written notice or in electronic format, immediately advise the specified intermediary of that fact, the specified intermediary must in turn, by way of similar notice or in similar format, immediately advise the qualifying intermediary of that fact and the qualifying intermediary must then include in the return required to be made by it under **subsection (7)(a)** a statement to the effect that it has been so advised by the specified intermediary.

Where the specified intermediary or the other specified intermediary furnishes information to Revenue in an electronic format, that format must be agreed in advance with Revenue. (7A)(h)

### ***Electronic returns and return filing date***

The return must be made in an electronic format approved by Revenue and must be accompanied by a declaration made by the qualifying intermediary, on the prescribed or authorised form, to the effect that the return is correct and complete. (8)

### ***Written return acceptable in certain circumstances***

The return can be made in writing where Revenue are satisfied that the qualifying intermediary does not have the facilities to make the return in the required electronic format. A written return must be in a form prescribed or authorised by Revenue and must be accompanied by a declaration made by the qualifying intermediary, on the prescribed or authorised form, to the effect that the return is correct and complete. (9)

## 172FA Recognised Qualifying Intermediaries

### Summary

This section provides special measures to deal with the common situation where distributions are made through a qualifying intermediary who is also a recognised clearing system.

To be a recognised qualifying intermediary, a person must be a qualifying intermediary that is also a recognised clearing system within the meaning in *section 246A(2)(a)* or a person wholly owned by a recognised clearing system, within the meaning in *section 246A(2)(a)*.

Since a recognised qualifying intermediary, must be a qualifying intermediary it must —

- be resident for tax purposes in the EU or in a tax treaty country,
- enter into a qualifying intermediary agreement with Revenue, and
- be authorised by Revenue as a qualifying intermediary.

In addition, the intermediary must —

- hold (or be wholly owned by a person who holds) a banking licence in an EU Member State or a tax treaty country,
- be a member of a recognised stock exchange in the EU or in a tax treaty country, or
- be a person whom Revenue considers suitable to be a qualifying intermediary.

A recognised qualifying intermediary is subject to the obligations of a qualifying intermediary as set out in the guidance notes to section 172F.

### Details

#### ***Recognised qualifying intermediary – conditions***

A number of conditions must be satisfied if a person is to be a recognised qualifying intermediary. Firstly, the person must be a qualifying intermediary and must therefore satisfy the conditions to be a qualifying intermediary as set out in the guidance notes to section 172E. Secondly, the person must also be a recognised clearing system, within the meaning of *section 246A(2)(a)* or a person who is wholly owner by a recognised clearing system, within the meaning in *section 246A(2)(a)*. These systems are listed in the definition in *section 246A*. (1)

#### ***Exemption from DWT for relevant distributions received by recognised qualifying intermediaries***

DWT does not apply where relevant distributions are received by a recognised qualifying intermediary and paid to an authorised withholding agent or another recognised qualifying intermediary, so long as the recognised qualifying intermediary has obtained a notice in writing from the authorised withholding agent or the other recognised qualifying intermediary that it is an authorised withholding agent or a recognised qualifying intermediary in relation to those distributions. (2)

## 172G Authorised withholding agent

### Summary

This section provides that a company which makes a relevant distribution to an authorised withholding agent, who is to receive the distribution on behalf of another person, must make the distribution without operating DWT. The authorised withholding agent then, effectively, steps into the shoes of the company and must operate the DWT scheme when it pays on the distributions, or amounts representing such distributions, to its clients.

To be an authorised withholding agent, a person must be an intermediary and must —

- be resident in the State for tax purposes,
- enter into an authorised withholding agent agreement with Revenue, and
- be authorised by Revenue as an authorised withholding agent.

In addition, the intermediary must —

- hold (or be wholly owned by a person who holds) a banking licence in an EU Member State or a tax treaty country,
- be a member of a recognised stock exchange in the EU or in a tax treaty country, or
- otherwise be suitable to be an authorised withholding agent.

An authorisation of a person as an authorised withholding agent expires after 7 years subject to renewal of the, or the entering into of a new, authorised withholding agent agreement.

Under an authorised withholding agent agreement, an intermediary must undertake to accept, retain and make available for inspection, all declarations of exemption and notifications made to the intermediary in connection with the DWT scheme. The intermediary must also undertake to exercise a duty of care in relation to the veracity of such declarations and notifications, to operate the DWT scheme, including the making of returns to the Collector-General, correctly and efficiently, to pay to the Collector-General any DWT required to be included in such returns, to provide to Revenue an auditor's report on the intermediary's compliance with the agreement for its first year of operation and further such reports on request by Revenue, and to allow for the verification of such compliance by Revenue in any manner considered necessary by Revenue.

Provision is also made for the maintenance by Revenue of a list of authorised withholding agents which can be made available to any person, and for the revocation of an authorisation of a person as an authorised withholding agent.

### Details

#### ***Exemption from DWT for relevant distributions made to authorised withholding agent where that agent then operates DWT scheme***

DWT does not apply where an Irish resident company makes a relevant distribution, (1) either directly or through one or more than one recognised qualifying intermediary, to an authorised withholding agent for the benefit of a person who is beneficially entitled to the distribution, not being the authorised withholding agent itself. This rule, however, is subject to **section 172H** which provides that the authorised withholding agent must

effectively step into the shoes of the company and operate the DWT scheme when it is paying on the distribution.

### ***Authorised withholding agent – conditions***

There are a number of conditions which must be satisfied if a person is to be an authorised withholding agent. The person must first of all be an intermediary, that is, a person whose trade consists of or includes the receipt, on behalf of other persons, of relevant distributions from Irish resident companies or amounts or other assets representing such distributions from qualifying intermediaries. In addition, the person must be resident in the State or, if not resident in the State, must be resident for tax purposes in another EU country or in a tax treaty country and must carry on through a branch or agency in the State a trade which consists of or includes the receipt, on behalf of other persons, of relevant distributions from a company or companies resident in the State. Moreover, the person must enter into an authorised withholding agent agreement with Revenue, and must be authorised by Revenue as an authorised withholding agent. (2)

### ***Authorised withholding agent agreement***

An authorised withholding agent agreement is an agreement entered into between Revenue and an intermediary under which the intermediary undertakes certain obligations, namely — (3)

- to keep and retain all declarations (and accompanying certificates) and notifications (other than notices from Revenue) made or given to the intermediary in accordance with the DWT scheme. Such documents must be kept and retained by the intermediary for the longer of 6 years or the period which, in relation to the relevant distributions in respect of which the declaration or notification is made or given, ends not earlier than 3 years after the date on which the intermediary has ceased to receive relevant distributions on behalf of the person who made the declaration or gave the notification to the intermediary,
- when requested to do so by notice in writing from Revenue, an intermediary must make available to Revenue, within the time specified in the notice, all such declarations, certificates or notifications or such class or classes of such declarations, certificates or notifications as may be specified in the notice,
- to inform Revenue if the intermediary has reasonable grounds to believe that a declaration or notification made or given to the intermediary was not, or may not have been, a true and correct declaration or notification at the time it was made or given to the intermediary,
- to inform Revenue if at any time the intermediary has reasonable grounds to believe that a declaration made to the intermediary would not, or might not, be a true and correct declaration if made to the intermediary at that time,
- to operate the provisions of **section 172H** (which sets out the obligations of an authorised withholding agent in relation to the DWT scheme) in a correct and efficient manner,
- to make to the Collector-General the return required under **section 172K(1)**, and to pay to the Collector-General any DWT required to be included in that return, within the prescribed time,
- as part of the qualifying intermediary agreement, the intermediary must undertake to produce an auditor's report on its compliance with the DWT scheme after it has been operating the agreement for one year. The report must be furnished to Revenue within 3 months after the end of that year. Further such reports have to

be provided by the intermediary only on written notice from Revenue and in relation to such other period of its operation of the agreement as is specified by Revenue in that notice, and

- to allow for the verification by Revenue of the intermediary’s compliance with the agreement and the DWT scheme in any manner considered necessary by Revenue.

#### ***Examination of documentation***

Revenue may examine, take extracts from, or copies of, documentation made available to Revenue under *subsection (3)(b)*. (3A)

#### ***Authorisation as an authorised withholding agent***

Revenue are restricted as to whom they may authorise as an authorised withholding agent. Revenue may only authorise as an authorised withholding agent — (4)

- a holder (or a person who is wholly owned by a holder) of a banking licence or other similar authorisation under the law of any relevant territory or of an EEA state,
- a member of a recognised stock exchange in the EU or in a tax treaty country, or
- a person whom Revenue consider suitable to be an authorised withholding agent.

#### ***Maintenance of list of authorised withholding agents***

Revenue are required to maintain a list of authorised withholding agents whose authorisations have not been revoked. Notwithstanding their confidentiality and secrecy obligations, Revenue may make available to any person the name and address of any authorised withholding agent. (5)

#### ***Revocation of authorisation as authorised withholding agent***

Revenue are empowered to revoke a person’s authorisation as an authorised withholding agent where Revenue is satisfied that the person has failed to comply with the authorised withholding agent agreement or the DWT scheme in general or that the person is otherwise unsuitable to be an authorised withholding agent. Notice of a revocation must be served in writing by registered post, and the revocation takes effect from the date specified in the notice. (6)

Notice of a revocation of an authorisation as an authorised withholding agent must be published in Iris Oifigiúil. (7)

#### ***Duration of authorisation as authorised withholding agent***

Without prejudice to *subsection (6)* which allows Revenue to revoke an intermediary’s authorisation as an authorised withholding agent in certain circumstances, such an authorisation ceases to have effect after 7 years. This, however, does not prevent Revenue and the intermediary from agreeing to renew the authorised withholding agent agreement or to enter into a further such agreement. Nor does it to prevent a further authorisation by Revenue of the intermediary as an authorised withholding agent for the purposes of the DWT scheme (8)

### **172H Obligations of authorised withholding agent in relation to relevant distributions**

#### **Summary**

This section provides that an authorised withholding agent must give notice in writing to all companies or recognised qualifying intermediaries, as the case may be, from which it

is to receive relevant distributions on behalf of other persons of the fact that it is an authorised withholding agent. This allows those companies or recognised qualifying intermediaries to make the distributions to the authorised withholding agent without applying DWT. In the absence of such notification, a company must apply DWT to the distributions.

On receiving the distributions, the authorised withholding agent effectively steps into the shoes of the company which made the distributions. It must operate the DWT scheme as if it were the company which had made the distributions and as if the paying on of the distributions, or amounts representing the distributions, to its clients were the making of the distributions by the authorised withholding agent at the time the distributions were actually made by the company. Thus, the authorised withholding agent must, if appropriate, deduct DWT when it pays on the distributions, or amounts representing the distributions, to its clients and must account for that tax to the Collector-General.

### Details

#### ***Authorised withholding agent must advise paying companies of its status as authorised withholding agent***

An authorised withholding agent must give written notice to every Irish resident (1) company or recognised qualifying intermediary from which it receives relevant distributions on behalf of other persons of the fact that it is an authorised withholding agent. This then allows those companies or recognised qualifying intermediaries to make the distributions to the authorised withholding agent without deducting DWT.

#### ***Authorised withholding agent must operate DWT scheme as if it were the company making the distributions***

When the authorised withholding agent pays on the relevant distributions, or amounts (2) representing such distributions, to its clients it steps into the shoes of the company in so far as the operation of the DWT scheme is concerned. The authorised withholding agent is treated as if it were the company which made the distributions and as if the paying on by it of the distributions, or amounts representing the distributions, were the making of the distributions by it at the time the distributions were actually made by the company. In essence, this requires the authorised withholding agent to operate the DWT scheme, to deduct DWT, if appropriate, when it is passing on the distributions and to account to the Collector-General for the DWT deducted.

#### ***Relevant distributions made to authorised withholding agent liable to DWT unless paying company notified that distribution is to be received by an authorised withholding agent***

An Irish resident company which makes a relevant distribution to an authorised (3) withholding agent for the benefit of another person cannot treat the distribution as having been so made unless it has received from the authorised withholding agent the written notice required under *subsection (1)*. This is the notice by the authorised withholding agent of the fact that it is such an agent. In the absence of this notice, the company must deduct DWT from the distribution.

### **172I Statement to be given to recipients of relevant distributions**

#### Summary

This section provides that every company which makes relevant distributions, and every authorised withholding agent which is treated as making relevant distributions, must give

each recipient of such a distribution a statement showing certain details in relation to the distribution. The statement can be provided either in writing or with regard to relevant distributions and declarations made on or after 3 April 2010 if the recipient or intermediary consents in an electronic format (“electronic communications”). Revenue eBrief No. 26/10 of 14 April 2010 provides further information with regard to this provision.

### Details

Every Irish resident company which makes a relevant distribution, and every authorised withholding agent which is treated as making a relevant distribution, is required to give each recipient of such a distribution a statement in writing, or with regard to relevant distributions and declarations made on or after 3 April 2010 by means of electronic communications, showing the following details in relation to the distribution — **(1)**

- the name and address of the company making the distribution,
- if an authorised withholding agent is involved, the name and address of that agent,
- the name and address of the person to whom the distribution is made,
- the date the distribution is made,
- the amount of the distribution, and
- the amount of the DWT (if any) deducted from the distribution.

The requirement to furnish the statement under **subsection (1)** can be satisfied in the case of a statement that is delivered electronically to an intermediary or the recipient of a relevant distribution, provided that the following conditions are met: **(1A)**

- the statement delivered to an intermediary must contain the codes and unique number, as defined in **section 172A(1)(a)** for electronic vouchers. It must also have the date the distribution is made, the amount of the distribution and the amount of DWT (if any) deducted from the distribution.
- the intermediary or the recipient of the relevant distribution has consented to the delivery of the statement by electronic delivery and has not withdrawn that consent, and
- the Revenue Commissioners have agreed to accept the statement for the purposes of this Chapter.

The requirement to furnish the statement under **subsection (1)** can also be satisfied by including the information required on the dividend counterfoil issued in accordance with **section 152(1)**. **(2)**

A person who fails to comply with **subsection (1)** is liable to a penalty of €200 for each offence, subject to a maximum penalty of €2000 in respect of offences connected with any one distribution of dividends. **(3)**

### 172J Credit for, or repayment of, dividend withholding tax borne

#### Summary

This section provides that where the person beneficially entitled to a relevant distribution has suffered DWT in a year of assessment, that person may claim to have the DWT set off against that person’s liability to income tax for that year and, if the DWT exceeds that liability, to have the excess refunded. If such a person is not within the charge to income tax, a claim may be made for a refund of the DWT deducted. If such a person has suffered DWT and is a non-liable person in relation to DWT, or would be such a

person if the requirement to make the necessary declaration of exemption had not been necessary, the person may claim a refund of DWT.

### Details

Where a person beneficially entitled to a relevant distribution is within the charge to income tax for a year of assessment and has suffered DWT referable to that year of assessment, the person may claim to have the DWT set off against the person's liability to income tax for that year and, if the DWT exceeds that liability, to have the excess refunded. (1)

If such a person is not within the charge to income tax, a claim may be made for a refund of the DWT deducted. (2)

If such a person has suffered DWT in a year of assessment (individual) or in an accounting period (company) and is a non-liable person in relation to DWT, or would be such a person if the requirement to make the necessary declaration of exemption set out in *Schedule 2A* had not been necessary, the person may claim a refund of DWT. (3)

Claims under this section must be supported by the statement given to the claimant in accordance with *section 172I(1)* by the company which made the relevant distributions or by the authorised withholding agent which is treated as having made the relevant distributions. (4)

Revenue does not authorise the set-off or a refund of DWT unless revenue receives such evidence as it considers necessary to establish the claimant's entitlement to the set-off or refund. (5)

### 172K Returns, payment and collection of dividend withholding tax

#### Summary

This section provides that persons charged with deducting DWT must make a return to the Collector-General for any month in which they make or are treated as making any relevant distributions. The return must be made within 14 days of the end of the month, and must show —

- the name and tax reference number of the company which actually made the distributions,
- if an authorised withholding agent is making the return, the name of that agent,
- the name and address of each person to whom a distribution was made in the month concerned,
- the date on which the distribution was made to each such person,
- the amount of each such distribution,
- the amount of the DWT, if any, deducted from each such distribution or, in the case of scrip dividends and other non-cash distributions, the amount, if any, to be paid to the Collector-General as it were a deduction of DWT in relation to each such distribution,
- the aggregate of all such amounts, and
- whether the distribution is a distribution out of profits or gains from stallion fees, the occupation of woodlands or stud greyhound fees, a distribution out of income of certain patents, or a distribution out of the profits of certain mines.

The DWT required to be included in the return is due at the same time as the return itself, that is, within 14 days of the end of the month and is payable to the Collector-General

without the making of an assessment. However, an inspector may raise an assessment where DWT or any part of it is due and has not been paid.

The return must be made in an electronic format approved by Revenue. Initially, it is envisaged that the returns will be made on computer diskette. If Revenue are satisfied that the company or authorised withholding agent concerned has not got the facilities to make the return electronically, the return may be made in writing in a form prescribed or authorised for that purpose by Revenue.

### Details

#### ***Return for each month in which relevant distributions are made***

Persons charged with deducting DWT, that is, companies and authorised withholding agents, must make a return to the Collector-General for any month in which they make or, in the case of an authorised withholding agent, are treated as making any relevant distributions. The return must be made within 14 days of the end of the month, and must show — (1)

- the name and tax reference number of the company which actually made the distributions,
- if an authorised withholding is making the return, the name of that agent,
- the name and address of each person to whom a distribution was made or treated as made in the month concerned,
- the date on which the distribution was made to each such person,
- the amount of each such distribution,
- the amount of the DWT, if any, deducted from each such distribution or, in the case of scrip dividends and other non-cash distributions, the amount, if any, to be paid to the Collector-General as it were a deduction of DWT in relation to each such distribution,
- the aggregate of all such amounts, and
- whether the distribution is a distribution out of profits or gains from stallion fees, the occupation of woodlands or stud greyhound fees, a distribution out of income of certain patents, or a distribution out of the profits of certain mines.

#### ***DWT payment date***

The DWT required to be included in the return is due at the same time as the return itself, that is, within 14 days of the end of the month, and is payable to the Collector-General without the making of an assessment. However, an assessment may be made on the company where DWT or any part of it is due and has not been paid. (2)

#### ***Estimated assessments***

An inspector may make an estimated assessment of DWT on a company or authorised withholding agent if it appears to him or her that a distribution has been omitted from the return or if he or she is otherwise dissatisfied with a return. The tax under such an assessment is, for the purpose of interest payable on unpaid tax, treated as having become payable at the time when it would have been payable had a correct return been made. (3)

#### ***Incorrect returns***

Where a distribution is incorrectly included in a DWT return, an inspector may make all necessary assessments, adjustments or set-offs so as to secure that the resultant liabilities to tax of the company or authorised withholding agent or of the person beneficially (4)

entitled to the distribution are the same as they would have been if the distribution had not been incorrectly included in the return.

### ***Due date for assessed DWT***

While, normally, DWT is due and payable without the making of an assessment, the due date for the payment of DWT in respect of which an assessment has issued is one month after the date of the assessment. However, that due date cannot displace an earlier due date which would have been applicable under **subsection (2)**. If the assessment is appealed, the appropriate earlier due date continues to apply. Any tax overpaid on determination of an appeal against such an assessment will be repaid. (5)

### ***Supplementary provisions***

The provisions of the Income Tax Acts relating to assessments, collection and recovery of income tax and interest thereon apply equally to the assessment of DWT. (6)(a)

Interest, at a rate of 0.0322 per cent per day or part of a day before 1 July 2009 and at a rate of 0.0274 per cent per day or part of a day thereafter, will apply from the due date on any outstanding DWT which is payable without the making of an assessment. (6)(b)

The payment and procedural provisions of **section 1080** which apply to interest on assessed taxes will apply to interest payable on DWT which is payable without the making of an assessment. **Subsection (4)** of that section provides for certification of an interest debt by an officer of the Revenue Commissioners in legal proceedings for the recovery of outstanding interest. (6)(c)

Where an assessment to DWT is made so that the normal interest charge would arise under **section 1080**, that section will apply with the omission of **subsection (1)(b)** which deals with the date as from which interest is payable in a case where there is an appeal against an income tax assessment. That provision is not required in the case of an assessment to DWT because the due date for payment of interest in such a case is set out in **subsection (5)** which applies whether or not there is an appeal against such an assessment. (6)(d)

### ***Electronic returns***

In general, the DWT return must be made in an electronic format approved by Revenue. It must also be accompanied by a declaration made by the company or authorised withholding agent concerned, on the prescribed or authorised form, to the effect that the return is correct and complete. (7)

### ***Written return acceptable in certain circumstances***

If Revenue is satisfied that the company or authorised withholding agent concerned has not got the facilities to make the return electronically, the return may be made in writing in a form prescribed or authorised for that purpose by Revenue. A written return must also be accompanied by a declaration made by the company or authorised withholding agent concerned, on the prescribed or authorised form, to the effect that the return is correct and complete. (8)

### ***Appealing DWT assessments***

Where a person is aggrieved by an assessment to DWT, they may appeal by way of notice in writing to the Appeal Commissioners. The appeal must be made within 30 days after the date of the notice of assessment. In order to appeal an assessment to DWT, a person must submit any outstanding return and pay any amount of DWT payable on the (9)

basis of that return. The appeal is heard and determined by the Appeal Commissioners in the manner provided for in Part 40A.

## **172L Reporting of distributions made under stapled stock arrangements**

### **Summary**

This section provides for the reporting of distributions made under stapled stock arrangements. A small number of Irish resident companies have arrangements with associated non-resident companies whereby shareholders can elect to take distributions either from the resident company or the non-resident company. These arrangements are generally referred to as “stapled stock arrangements”. Where under a stapled stock arrangement a non-resident company makes distributions in any month, the resident company will be required to make a return to Revenue within 14 days of the end of the month showing —

- the name and tax reference number of the resident company,
- the name and address of the non-resident company which made the distributions,
- the name and address of each person to whom a distribution was made in the month concerned,
- the date the distribution was made to that person, and
- the amount of that distribution.

### **Details**

#### ***Stapled stock arrangements***

The circumstances in which a distribution will be treated as being made under a stapled stock arrangement are set out. The circumstances are where a non-resident company makes a distribution to a person and the person has under any agreement, arrangement or understanding, whether made or entered into on, before or after 6 April, 1999, exercised (whether directly or indirectly) a right to receive distributions from the non-resident company instead of receiving relevant distributions from an Irish resident company and that right has not been revoked. (1)

#### ***Returns of distributions made under stapled stock arrangements***

Where a non-resident company makes distributions in any month under a stapled stock arrangement, the Irish resident company must make a return to Revenue within 14 days of the end of the month showing its name and tax reference number; the name and address of the non-resident company which made the distributions; the name and address of each person to whom a distribution was made in the month concerned; the date the distribution was made to that person; and the amount of that distribution. (2)

#### ***Electronic returns***

In general, the return must be made in an electronic format approved by Revenue. It must also be accompanied by a declaration made by the company concerned, on the prescribed or authorised form, to the effect that the return is correct and complete. (3)

#### ***Written return acceptable in certain circumstances***

If Revenue are satisfied that the company concerned has not got the facilities to make the return electronically, the return may be made in writing in a form prescribed or authorised for that purpose by Revenue. A written return must also be accompanied by (4)

a declaration made by the company concerned, on the prescribed or authorised form, to the effect that the return is correct and complete.

## **172LA Deduction of dividend withholding tax on settlement of market claims**

### **Summary**

This section gives statutory backing, from 10 February 2000, to the administrative arrangements for dealing with DWT in the case of market claims, i.e. where dividends are incorrectly paid to a person due to delays in updating share registers. Thus, brokers and other intermediaries who are settling market claims are legally obliged to deduct DWT in all such cases where DWT was not deducted when the distribution was originally made, pay all amounts so deducted to Revenue, and make an annual return containing details of DWT so deducted during the previous tax year.

### **Details**

#### ***Definitions***

“proper owner” is the person beneficially entitled to a relevant distribution as a result of the specified event.

“recorded owner” is the person beneficially entitled to a relevant distribution before the specified event.

“stockbroker” is a member firm of the Irish Stock Exchange plc trading as Euronext (1) Dublin or of a recognised stock exchange in another country.

#### ***When a market claim is treated as arising***

A market claim is deemed to arise where — (2)

- a resident company has made a relevant distribution, either directly or through an intermediary, to the recorded owner on the basis of the information on the share register of the company or on the basis of a securities account in the name of the recorded owner held by an intermediary at a particular date,
- it later transpires, as a result of an event (the “specified event”), being a sale or purchase of the shares or other securities in respect of which the relevant distribution was made, or another event or the failure to happen of another event in relation to those shares or securities, that the proper owner was actually entitled to receive the relevant distribution, and
- a person (an “accountable person”), being the relevant stockbroker or intermediary who has acted for the recorded owner is obliged to pay the relevant distribution to the proper owner or to an intermediary holding securities on behalf of the proper owner, which action is referred to as the “settlement of the market claim”.

#### ***Consequences of a market claim arising***

Where a market claim arises, then, if DWT has not already been deducted from the relevant distribution made by the resident company to the recorded owner — (3)

- the accountable person must, on the settlement of the market claim, deduct DWT out of the amount of the relevant distribution,
- the proper owner or, as may be appropriate, the stockbroker or intermediary who has acted for the proper owner in the specified event must allow this deduction on receiving the residue of the relevant distribution, and

- the accountable person is acquitted and discharged of so much money as is represented by the deduction as if that amount of money had actually been paid to the proper owner or, as may be appropriate, the stockbroker or intermediary who has acted for the proper owner in the specified event.

#### ***Settlement of market claims***

The accountable person must, on the settlement of the market claim, give the proper owner or, as may be appropriate, the stockbroker or intermediary who has acted for the proper owner in the specified event a statement in writing showing — (4)

- the name and address of the accountable person,
- the name and address of the company which made the relevant distribution,
- the amount of the relevant distribution, and
- the amount of DWT deducted from the relevant distribution.

#### ***Payment to Collector-General***

DWT so deducted by an accountable person must be paid by the accountable person to the Collector-General within 14 days of the end of the month in which that tax was required to be so deducted. DWT so due is payable without the making of an assessment, but DWT which has become so due may be assessed on the accountable person if that tax or any part of it is not paid on or before the due date (5)

#### ***Statement to accompany payment***

Any such DWT payment must be accompanied by a statement in writing from the accountable person showing the name and address of the accountable person, the name and address of the company or companies which made the relevant distribution or distributions to which the payment relates and the amount of the DWT payment. (6)

#### ***Returns***

An accountable person must make a return to Revenue for each year of assessment (being 1999–2000 or any subsequent year of assessment) in which a market claim arises. The return, which must be made not later than 15 February following the year of assessment, must show the following details in relation to each market claim arising in that year: (7)

- the name and address of the resident company which made the relevant distribution to which market claim relates
- the amount of that distribution, and
- the amount of DWT deducted from that distribution by the accountable person.

In general, the return must be made in an electronic format approved by Revenue. It must also be accompanied by a declaration made by the accountable person, on the prescribed or authorised form, to the effect that the return is correct and complete. (8)

If Revenue are satisfied that the accountable person has not got the facilities to make the return electronically, the return may be made in writing in a form prescribed or authorised for that purpose by Revenue. A written return must also be accompanied by a declaration made by the accountable person, on the prescribed or authorised form, to the effect that the return is correct and complete (9)

### **172M Delegation of powers and functions of Revenue Commissioners**

This section enables the Revenue Commissioners to delegate their powers and functions under the DWT scheme to nominated officers. The DWT scheme is administered by

DWT Section, Claims & Residence Division, Office of the Revenue Commissioners,  
Government Offices, Nenagh, Co. Tipperary.

## CHAPTER 9

### *Taxation of acquisition by a company of its own shares*

#### **Overview**

**Chapter 9** of **Part 6** sets out the tax treatment of an acquisition by a company of its own, or its holding company's, shares. Where the relevant conditions are satisfied, the sale of the shareholder's shares is treated as subject to capital gains tax treatment rather than income tax treatment. Most of the conditions necessary for this treatment to apply are, however, waived where the acquisition of the shares is to fund the payment of inheritance tax on an inheritance of the shares and the payment of the inheritance tax would otherwise cause undue hardship. In these notes the term "buy back" is used to refer to the redemption, repayment or purchase by a company of its own or its holding company's shares.

#### **173 Interpretation (Chapter 9)**

##### ***Definitions***

"chargeable period", in the case of a company, is an accounting period and, in the case (1) of other persons, is a year of assessment.

**Section 11** is applied to give the meaning of "control" for this Chapter.

"group" is a company and its 51 per cent subsidiaries.

"holding company" is a company most of whose business, apart from any trading activities, consists of holding shares in 51 per cent subsidiaries. A company has a 51 per cent subsidiary where it owns, either directly or indirectly, more than 50 per cent of the ordinary share capital of the subsidiary company.

"inspector" is an inspector of taxes including such other officer as the Revenue Commissioners may appoint in that behalf.

"personal representatives" has the meaning given it in **section 799**.

"shares" includes stock.

"quoted company" is a company listed on the official list of a stock exchange and also companies whose shares are dealt in on an unlisted securities market.

"trade" excludes dealings in investment assets.

The business of a "trading company" must consist wholly or mainly of the carrying on of a trade. However, every company in a "trading group" need not be a trading company so long as the overall business of the group of companies taken together consists wholly or mainly of the carrying on of a trade or trades.

##### ***Beneficial ownership***

References to the owner of shares is to be treated as meaning the beneficial owner. (2) However, references to the owner of shares held on trust, other than bare trusts, is treated as references to the trustees. In addition, references to the owners of shares comprised in the estate of a deceased person are treated as references to the deceased's personal representatives.

### ***Distributions***

References to a payment made by a company is to include anything else (for example, a payment in kind) which, but for *sections 175* and *176*, would be a distribution. For example, a transfer of assets by a company in redemption of its own shares would be treated as a distribution but is not to be so treated if the conditions set out in this Chapter apply. (3)

### ***Subsidiaries***

References to a company being unquoted are treated as references to a company which is neither a quoted company nor a 51 per cent subsidiary of a quoted company. (4)

## **174 Taxation of dealer’s receipts on purchase of shares by issuing company or by its subsidiary**

### **Summary**

This section addresses the special case where a company purchases its own shares or its holding company’s shares from a dealer in shares. The purchase price is taken into account as a trading receipt in calculating the dealer’s liability to tax. The dealer is charged to tax on the actual gain on the transaction. If the purchase is of fixed-rate preference shares, in certain instances, the company is treated as making and the dealer as receiving a distribution.

### **Details**

#### ***Definitions***

“fixed-rate preference shares” are shares issued in return for a full subscription of new funds to the issuing company. Such shares must not carry any rights of conversion into other shares or securities or to additional shares or securities or to any dividends other than such dividends which are of a fixed amount or at a fixed rate per cent on the nominal value of the shares. (1)

“new consideration” is defined by reference to *section 135* (distributions: supplemental).

#### ***Purchase of shares from a dealer in shares***

Where a company — (2)

- purchases its own shares, or
- a subsidiary company purchases its holding company’s shares,

from a dealer in shares, the payment is taken into account in computing the trading profits of the dealer chargeable to tax under Case I or II of Schedule D. This ensures that a dealer who makes such a sale is charged on the sale as a normal trading profit.

#### ***Share dealers***

A person is treated as a dealer in shares if he/she is chargeable on his/her profit from a sale of shares as part of his/her trading or professional income. (3)

#### ***Redemption, etc of shares***

The reference to the purchase of shares is extended to include the redemption and repayment of shares and the purchase of rights to acquire shares. The reference to the purchase price includes a reference to any sum payable on redemption or repayment. (4)

### **Exceptions**

There is an exception to the treatment of the proceeds of share sales by dealers in shares (5) (such as banks) as trading income in the hands of the dealers. Where the receipt arises on the redemption of fixed-rate preference shares which have been held from issue by the dealer, the normal distribution treatment applies. The effect of this is that where corporate dealers such as banks provide venture capital they will not be taxed on any premium they receive on the redemption. Thus, equity funding by corporate dealers is unaffected by this section.

### **175 Purchase of own shares by quoted company**

#### **Summary**

A buy-back (including the redemption, repayment and purchase) of its own shares by a quoted company (or of its own shares by a subsidiary of a quoted company) is not treated as a distribution provided that the redemption, repayment or purchase does not form part of a tax avoidance scheme.

Quoted companies are required to notify the Revenue Commissioners of any share buy-backs undertaken in an accounting period indicating whether the buy back is to be treated as not being a distribution and to include such notification in the company's annual corporation tax return or such other form as may be prescribed by the Revenue Commissioners.

#### **Details**

A buy-back (including the redemption, repayment and purchase) of its own shares by a quoted company is not treated as a distribution provided that the redemption, repayment or purchase does not form part of a scheme or arrangement the main purpose or one of the main purposes of which is to enable the owner or owners of the shares to participate in the profits of the company or of any of its 51 per cent subsidiaries without receiving a dividend. (1)

Quoted companies must notify the Revenue Commissioners of any payment on the redemption, repayment or purchase of its own shares undertaken in an accounting period indicating whether the buy-back is to be treated as a distribution or not. The notification must be made by the company not later than 12 months from the end of the accounting period in which the payment was made. (1A)(a)

Notifications under *subsection (1A)(a)* shall be given by the company in its annual corporation tax return for the accounting period of the company in which the payment is made or in such manner and form as may be prescribed by the Revenue Commissioners. (1A)(b)

References in *subsections (1)* and *(1A)* to a quoted company include references to a company which is a member of a group of which a quoted company is a member. (2)

#### **Commencement**

These arrangements apply to payments referred to in this section which are made on or after 4 February 2010.

## 176 Purchase of unquoted shares by issuing company or its subsidiary

### Summary

Where an unquoted company (that is, an unquoted trading company or an unquoted holding company of a trading group) buys back its own shares (or its holding company's shares) from a shareholder who is not a dealer in those shares, the payment made to the shareholder is, subject to certain conditions being satisfied, not to be treated as a distribution. As the payment is not to be treated as a distribution, capital gains tax treatment applies to the shareholder's disposal of the shares.

### Details

**Chapter 2** of this Part treats as a distribution so much of a payment made by an unquoted trading company or the unquoted holding company of a trading group in acquiring its own shares as exceeds the issue price of those shares. Where, however, the provisions of this section and the following sections of this Chapter are satisfied, such a buy back of shares is not to be treated as a distribution (other than for the purpose of the close company surcharge on investment and rental income provided for by **sections 440** and **441**). Where such a transaction is not treated as a distribution, it will be subject to capital gain tax treatment. (1)

The conditions which must be satisfied if such a purchase is not to be treated as a distribution are —

- the acquisition of the shares by the company must be wholly or mainly for the benefit of the trade of the company or any of its 51 per cent subsidiaries,
- the buy back must not be part of a scheme or arrangement the purpose of which is to enable the shareholder to participate in the profits of the company or any of its 51 per cent subsidiaries without receiving a dividend.

In addition, the conditions set out in **sections 177** to **181** must be satisfied in so far as they are applicable.

The various conditions necessary for a buy-back not to be treated as a distribution are waived where it can be shown that shares had to be disposed of back to the issuing company in order to discharge inheritance tax in respect of an inheritance by that shareholder of the company's shares or to repay borrowings used to pay the inheritance tax. All or almost all of the payment made by the company acquiring the shares (apart from any capital gains tax paid by the shareholder on the disposal of the shares) must be applied in paying the inheritance tax or to repaying borrowings used to pay inheritance tax. For the dispensation to apply the shareholder must not otherwise have been able to discharge the tax due without undue hardship. Where the shareholder has borrowed, it must be the case that there would have been hardship unless the shareholder had both borrowed to pay the inheritance tax and disposed of the shares to the issuing company to repay the money borrowed.

In order for this section to apply to a subsidiary company purchasing its holding company's shares, it is necessary to determine whether the section would apply if the holding company were to be treated as acquiring its own shares instead of the subsidiary company. If the section would so apply, then it applies in the case of the subsidiary company acquiring its holding company's shares. (2)

## 176A Purchase of own shares -supplementary.

### Summary

This section makes a technical amendment to *Chapter 9 of Part* which deals with taxation issues relating to the acquisition by a company of its own shares. These are usually referred to as “share buy-backs”. The section clarifies that, apart from the purchase of shares at arm’s length by a company for its employees, costs incurred by a company in buying back its own shares are not allowed as a deduction against profits for tax purposes.

### Details

Sums incurred by a company in purchasing its own shares are not allowed as a deduction under Case I or Case II in computing profits. *Section 175* (re purchase by quoted companies) and *section 176* (re purchase by unquoted companies) provide that share buy-backs are not treated as distributions. (1)

The section confirms that certain payments that are deductible under *section 81(2)(n)(i)* remain deductible. These payments include payments at market value made by a company to another company to issue shares to the first company’s employees, the purchase of shares at arms length by a company for its employees and the payment by a company to a connected company to issue share options to its employees. The latter deduction is subject to the rule that the expenditure must be uncured for genuine commercial reasons and not as part of any tax avoidance scheme. (2)

## 177 Conditions as to residence and period of ownership

### Summary

This section provides that for a buy back of shares by a company not to be treated as a distribution the shareholder or “vendor” must satisfy certain conditions as to residence and period of ownership.

### Details

#### *Residence criteria*

The vendor (that is, the owner of the shares – see *section 173(2)* – immediately before the purchase is made) must be resident and (except for a company) ordinarily resident for the chargeable period (that is, the accounting period for a company, otherwise the year of assessment) in which the shares are purchased (that is, the redemption, repayment or purchase referred to in *section 176(1)(a)*). This ensures that the vendor is within the charge to capital gains tax. If the shares are held through a nominee, the nominee must also be resident and ordinarily resident in the State. Part 34 provides the rules for determining the “residence” and “ordinary residence” of individuals for the purpose of the Tax Acts and the Capital Gains Tax Acts. (1) & (2)

***Trustees’ residence***

The residence and ordinary residence of trustees is determined under capital gains tax rules. These rules provide that trustees are treated as a single and continuing body of persons resident and ordinarily resident in the State unless the general administration of the trust is carried on outside the State and the trustees or a majority of them are not resident or not ordinarily resident in the State. (3)

A professional trustee is treated as not being resident in the State if the settlement funds were provided by a person who was not at the time of the settlement domiciled, resident or ordinarily resident in the State. If the majority of trustees of a professionally managed trust are, or are to be treated as, non-resident, the general administration of the trust is treated as ordinarily carried on outside the State.

***Personal representatives’ residence***

The residence and ordinary residence status of personal representatives is taken as that of the deceased immediately before his/her death. (4)

***Company’s residence***

If the vendor is a company only the company’s “residence” is relevant. A company is not required to be “ordinarily resident” in the State. (5)

***Period of ownership of shares***

The vendor must have owned the shares throughout a 5 year period ending with the date of the buy-back. However, where the shares have been appropriated to a participant by an Approved Profit Sharing Scheme (APSS) the 5 year period is reduced to 3 years. (6)

Where shares are transferred to the vendor by his/her spouse or civil partner at a time when they were living together, ownership by that spouse or civil partner counts as ownership by the vendor, unless the spouse or civil partner is still alive and is no longer the vendor’s spouse or civil partner living with the vendor at the time of the buy back. (7)

Where the vendor is the personal representative of a deceased person, then, for the purpose of determining the period of ownership of the shares by the vendor, the period of ownership by the deceased is treated as ownership by the personal representative. Similarly, if the vendor inherited the shares under a will or intestacy, the ownership by the deceased or his/her personal representative is treated as ownership by the vendor. In both these cases the period of minimum ownership (*subsection (6)*) is reduced from 5 to 3 years. (8)

***Shares of the same class***

When shares of the same class are acquired at different times, there are rules for matching disposals with acquisitions to determine whether the period of ownership criteria has been satisfied. A disposal by a vendor involving the buy back by a company of its own shares is matched with the vendor’s earliest acquisition and other previous disposals are matched with the vendor’s latest acquisitions. (9)

**Example**

K acquired €1 ordinary shares of Y Ltd as follows —

	Shares	Cost
1996	250	250

2000	500	500
2001	250	250

In 2002 K sold 350 shares to his son and in 2003 he sold 600 shares to Y Ltd. For the purpose of applying the 5 year ownership requirement to the 2002 disposal, shares disposed of in 2002 are matched with the latest acquisition that is, 250 shares acquired in 2001 and 100 of the 500 shares acquired in 2000. The shares sold to Y Ltd are matched with the earliest acquisitions, that is,

1996	250 (held for more than 5 years)
2000	350 (held for less than 5 years)

Provided the other conditions are satisfied, the sale of the shares acquired in 1996 is not treated as a distribution, but the sale of the shares acquired in 2000 is so treated.

### ***Bonus issues, etc***

Shares acquired by way of bonus issue or by way of exchange on a company reorganisation, reconstruction or amalgamation are treated as having been acquired at the same time as the original holding was acquired. However, rights issues are treated as acquired when they are actually issued and not when the original holding was acquired. **(10)**

## **178 Conditions as to reduction of vendor’s interest as shareholder**

### **Summary**

Where the vendor’s shareholding in a company is not fully purchased, redeemed or repaid, then, except for the special circumstances catered for in **section 181**, his/her interest must be substantially reduced. The reduction in the vendor’s interest in the company is calculated by reference to both the vendor’s shareholding and the vendor’s entitlement to share profits. Both shareholding and profit entitlement must, after the sale of the shares, be reduced by at least 25 per cent. In addition, the vendor and the vendor’s associates must not, after the sale of the shares, be entitled to more than 30 per cent of the capital, voting rights or assets on a winding up of the company. In calculating a vendor’s interest in a company, the interests of the associates of the vendor are also taken into account. Where a company is a member of a group, separate rules apply which are set out in **section 179**.

### **Details**

#### ***Vendor’s interest***

Where a company does not buy back all of a shareholder’s shares, the vendor’s interest in the company must be substantially reduced. **(1)**

#### ***Associates’ interest***

In calculating the interest of a vendor in a company, the interests of the vendor’s associates have to be taken into account. An associate’s interest in the company acquiring its own shares is only brought into the reckoning if, immediately after the acquisition by the company of its own shares, the associate owns shares in the company. **(2)**

### **Example**

O Ltd has an issued share capital of 2,000 €1 shares of which 400 are owned by P and 100 by P’s wife.

- (a) If O Ltd purchases 100 shares from each of them, Mrs P will own no shares after the purchase and the comparison to determine the reduction in P's interest will ignore Mrs P's former holding. Before the purchase, P's interest is 20% (400/2000) and after the purchase is 16.67% (300/1800), so that is less than the requisite 25%.

The comparison to determine the reduction in Mrs P's interest will need to include P's holding, because he still owns shares after the transaction. Mrs P's interest (including that of her associate) is reduced from 25% (500/2000) to 16.67% (300/1800) that is, by more than 25%.

- (b) If, instead, O Ltd purchased 200 shares from P and none from Mrs P, the comparison to determine the reduction in P's interest will include Mrs P's holding because she still owns shares after the transaction. His interest is reduced from 25% (500/2000) to 16.67% (300/1800), that is, by more than 25%.

For the purpose of determining whether a vendor's interest has been substantially reduced, the interest of the vendor's associates are treated as that of the vendor. (3)

### ***Reduction of vendor's interest***

To ascertain whether the required 25 per cent reduction in the vendor's interest in the company has been made it is necessary to compare, the total nominal value (that is, excluding premia paid) of all the shares (ordinary or preference) in the company held by the vendor immediately before the buy back of shares, expressed as a fraction of the company's issued share capital at that time, to the corresponding fraction immediately after the buy back. (4)

It should be noted that shares purchased by the company are deemed by **section 184** to be cancelled for all tax purposes. Therefore, the vendor's percentage holding after the purchase is based on a reduced issued share capital. This means that to qualify for capital gains tax treatment the vendor must sell more than 25 per cent of his/her original holding.

#### **Example**

D Ltd has an issued share capital of 100,000 €1 ordinary shares, of which E holds 20,000 (that is, 2/10ths or 20 per cent). If E sells 5,000 to D Ltd, D Ltd's issued share capital is reduced for tax purposes to 95,000 shares of which E holds 15,000, a fraction of 15/95ths or 15.79 per cent.

Thus, although E has sold 25 per cent of the original holding, E's percentage holding has been reduced by only 21 per cent, and the buy back will not qualify for capital gains tax treatment (that is, it will be treated as a distribution). To achieve a reduction of 25 per cent, E would need to sell 5,890 shares.

In addition to the above requirement concerning the reduction in the vendor's shareholding after the buy back of shares by the company, a substantial reduction is also required in the vendor's interest in the distributable profits of the company. The proportion of the company's profits available for distribution to which the vendor is entitled immediately before the company buys back its own shares is compared with the corresponding proportion immediately after the buy back. Both proportions are calculated on the basis that the company distributes all its available profits. The vendor's profit entitlement after the company's buy back of its shares must not exceed 75 per cent of the vendor's profit entitlement before the purchase. (5)

In dividing the profits of a company among those entitled to them, the maximum fixed dividends for a full year or other fixed rate distribution entitlements are attributed to shareholders entitled to them. This prevents the vendor from reducing his/her interest in distributable profits by waiving his/her right to a preference dividend or other entitlement to a fixed amount. (6)

A vendor's entitlement to a share in profits is based on the "profits of the company available for distribution". Such profits are the company's distributable profits within the meaning of Part IV of the Companies (Amendment) Act, 1983, (that is, accumulated realised profits less accumulated realised losses) increased by — (7)

- a notional addition of €100,
- an amount equal to the sum of the maximum fixed rate distributions payable, and
- the amount by which the sum paid by the company on the purchase (in respect of which capital gains tax treatment is claimed) and the sum paid on any other purchase or redemption by the company at the same time exceeds the company’s distributable profits immediately before the purchase.

**Example**

The issued share capital of X Ltd and the shares owned by Y are as follows —

	Issued	Owned by Y
€1 Ordinary	20,000	3,000
€1 8% redeemable preference	<u>12,000</u>	<u>5,000</u>
	32,000	8,000

X Ltd purchases 1,000 of Y’s ordinary shares for €2,000 and redeems 3,000 of Y’s preference shares at par. The issued share capital of X Ltd is then —

	Issued	Owned by Y
€1 ordinary	19,000	2,000
€1 8% redeemable preference	<u>9,000</u>	<u>2,000</u>
	28,000	4,000

The nominal value of Y’s shareholding as a percentage of the total shares in issue has been reduced from 25% (8,000/32,000) to 14.3% (4,000/28,000), so that the test prescribed in **subsection (4)** is satisfied.

The accumulated undistributed profits of X Ltd are €3,600.

The profits available for distribution, and the amounts to which Y is entitled, are as follows —

Before the reduction	Profits	Share of Y	
* Part IV (C(A)A 1983)	€3,600	€540	(3,600 x 3/20ths)
* €100	€100	€15	(100 x 3/20ths)
*Preference dividend	€960	€400	(€5,000 x 8%)
*Excess of costs of buy-back over profits available for distribution (€5,000 – €3,600)	€1,400	€210	
	€6,060 (19.2%)	€1,165	

After the reduction

*Part IV C(A)A 1983	NIL	NIL
*€100	€100	€11
*Preference dividend	€720	€160
	€820 (20.9%)	€171

The exhaustion of the distributable reserves results in an increase in Y’s entitlement to share in profits, so that the consideration will not qualify for relief from the distribution charge.

Except in the case of trustees or personal representatives, references to entitlement means (8) beneficial entitlement.

## 179 Conditions applicable where purchasing company is member of a group

### Summary

Where a company is a member of a group of companies, the vendor’s and his/ her associates’ interest in that group must, after the buy back of shares by a company within the group, be reduced by at least 25 per cent.

### Details

#### Groups

A “group” is a company which has one or more 51 per cent subsidiaries, but which is not (1) itself a 51 per cent subsidiary of any other company, together with all its 51 per cent subsidiaries.

The meaning of a group of companies is extended to include — (2)

- an unquoted company the whole or a significant part of whose business was previously carried on by the company buying back its own shares, or
- an unquoted company the whole or a significant part of whose business was previously carried on by a company which is a member of the same group as the buy back company.

In addition, any company of which the unquoted company referred to is a 51 per cent subsidiary is a member of the group. This provision is designed to prevent the profits of a group, or the vendor’s shares in those profits, being taken out of the reckoning by transferring some of the trading activity to an outside company shortly before the buy back of shares by a company in the group. If a trading company which is not a member of a group transfers some of its trading activity to a separate company (possibly under common control), this provision will treat the 2 companies as a group.

The provisions of *subsection (2)* do not apply where the part of the business previously (3) carried on was transferred more than 3 years before the buy back of shares.

Arrangements made to temporarily remove a company from a group before the buy back (4) of shares are countered. Where arrangements exist for the subsequent return of a company to a group, the company leaving the group is treated as never having left in the first place.

### ***Reduction in vendor's interest***

Where the buy back is by a company which is a member of a group, special rules apply to determine whether there has been a substantial reduction in the vendor's interest. These additional conditions have to be met where — (5)

- the company which buys back its shares is, immediately before it does so, a member of a 51 per cent group, and
- either immediately before or after the buy back the vendor owns shares in one or more of the companies in the group other than the company purchasing the shares.

If an associate(s) of the vendor owns shares in any group company immediately before the buy back of shares within that group, then, in determining whether there has been a substantial reduction in the vendor's interest with respect to the group, the vendor and his/her associate(s) interests are aggregated both before and after the buy back. (6)

In determining whether a vendor has substantially reduced his/her interests in a group after his/her shares have been bought back within that group, the following companies must be taken into account — (7)

- the company which has acquired its own shares, and
- any other group company in which the shareholder (or his/her associates) held shares either immediately before or immediately after the purchase.

Any such company is referred to as a “relevant company”.

In applying the “substantial reduction of interest” criteria to the combined interests of a vendor and his/her associates, the vendor is assumed to have the interests of his/her associates. (8)

To determine a vendor's interest as a shareholder in a group the following calculations must be made — (9)

- firstly, the nominal value of the vendor's shares in each relevant company (that is, in each company in the group) is expressed as a percentage of the nominal value of that company's share capital,
- secondly, these percentages are aggregated, and
- finally, the result so obtained is divided by the number of relevant companies (this means all relevant companies including any in which the vendor owns no shares after the buy-back. It is to be noted that it does not mean counting all group companies).

This procedure provides an “average” fraction for all relevant companies. The divisor used in computing the “average” fraction (that is, the number of relevant companies) will be the same for the calculation of this fraction both before and after the buy back. For example, where the vendor does not own any shares in a relevant company as a result of a buy back that company will still be counted (despite the vendor owning no shares) for the purposes of calculating the “average” fraction after the buy back. (10)

This calculation is made by reference to the situation of the vendor both immediately before and immediately after the buy-back. The 2 resultant “average” fractions are compared, and the buy back will not be treated as a distribution only where the fraction after the buy back is no more than 75 per cent of the fraction before the buy back.

#### **Example**

A is a shareholder in the members of a group of trading companies as follows —

	X Ltd	Y Ltd	Z Ltd
Issued share capital	10,000	10,000	10,000
Nominal value of shares held by A	2,000	500	0

A sells the shares in Y Ltd to that company, but retains the shares in X Ltd. A’s interest before the sale is —

$$\frac{2,000}{10,000} \times \frac{500}{10,000} + 0 + \frac{2,500}{10,000} / 2 = \frac{12.5}{100}$$

After the sale A’s interest is —

$$\frac{2,000}{10,000} + 0 + 0 / 2 = \frac{10}{100}$$

$$\frac{10}{100} \text{ is } 80\% \text{ of } \frac{12.5}{100}$$

Therefore A’s interest in the group has not been substantially reduced.

### ***Distributable profits***

In addition to the necessity for a substantial reduction in the vendor’s shareholding after the buy back of shares within a group of companies, it is necessary for a similar reduction to take place in the vendor’s interest in the distributable profits of the group. The proportion of the group’s profits available for distribution to which the vendor is entitled immediately before the buy back is compared with the corresponding proportion immediately after the buy back. Both proportions are calculated on the basis that the company distributes all its available profits. The vendor’s profit entitlement after the buy back must not exceed 75 per cent of his/her profit entitlement before the buy back. (11)

### ***Adjustments to distributable profits***

The same adjustments (set out in *subsections (6) and (7) of section 178*) in the computation of “profits available for distribution” apply in the case of a group as they apply in the case of a single company. (12)

#### **Example**

1. Reduction in vendor’s shareholding in a group of companies

Five trading companies each have an issued share capital of 100 €1 ordinary shares, owned as follows —

	M Ltd	N Ltd	O Ltd	P Ltd	Q Ltd
A	40	20	—	90	—
B	60	—	40	10	—
M Ltd	—	80	60	—	—
P Ltd	—	—	—	—	100

(a) On 1 December, 2002 N Ltd purchases from A the holding of 20 shares. N Ltd and O Ltd are 51% subsidiaries of M Ltd, so that those 3 companies are a group. On 1 January, 2001, N Ltd had

transferred one of its trades to Q Ltd, so that Q Ltd and its parent company P Ltd are also treated as members of the M Ltd group at 1 December, 2002 by virtue of **section 179(2)(b)**.

The shareholding interest of A in the M Ltd group on 1 December, 2002 is —

Before the share purchase —

$$M \frac{40}{100} + N \frac{20}{100} + P \frac{90}{100} + \frac{150/3}{100} = \frac{50}{100} = 50\%$$

After the share purchase —

$$M \frac{40}{100} + N \text{Nil} + P \frac{90}{100} = \frac{130/3}{100} = \frac{43.3}{100} = 43.3\%$$

O Ltd and Q Ltd are not included as A owned no shares in those companies.

The reduction in A's shareholding interest in the group from 50% to 43.3% is less than 25% so that the consideration received from N Ltd will be subject to the distribution charge.

- (b) If, instead, M Ltd purchased from A the holding of 40 shares on 1 December, 2002, the shareholding interest of A in the group would be —

Before the share purchase – 50% (as in (a))

After the share purchase —

$$M \text{Nil} + N \frac{20}{100} + P \frac{90}{100} = \frac{100/3}{100} = \frac{36.67}{100} = 36.67\%$$

This reduction is more than 25% but A will not have severed the connection with P Ltd (see **sections 180(2)** and **186(1)(a)**) so that the consideration will still not escape the distribution charge.

- (c) If P Ltd purchases from A 40 of A's shares, the group of which P Ltd is a member does not include M Ltd, N Ltd or O Ltd (because no business has been transferred to any of those companies by either P Ltd or Q Ltd). A does not own any shares in Q Ltd either immediately before or immediately after the share purchase, so that it is not necessary to consider A's interest in the group, only A's interest in P Ltd. A's interest in the shareholding in P Ltd is reduced from 90% to 50%, a reduction of more than 25%. However, as in (b) above, A will fall at another hurdle because A will not have severed A's connection with the company (see **sections 180(2)** and **186(1)(a)**). The consideration will therefore be subject to a distribution charge.

## 2. Reduction in vendor's profit share in a group of companies

The profits of each company available for distribution before any purchases of shares are as follows —

	M Ltd	N Ltd	O Ltd	P Ltd	Q Ltd
Undistributed profits	€1,100	€3,000	€2,000	€500	€5,500
Notional addition	€100	€100	€100	€100	€100
Available for distribution	€1,200	€3,100	€2,100	€600	€5,600
Notional distribution received by M Ltd from N Ltd (80%)	€2,480				
O Ltd (60%)	€1,260				
and by P Ltd from Q Ltd (100%)	€5,600				
	€4,940	€3,100	€2,100	€6,200	€5,600

Amount receivable by A	€1,976	€620	Nil	€5,580	Nil
	(40%)	(20%)		(90%)	

The total profits available for distribution of all the companies is €12,600 of which A is entitled to €8,176 (64.9%).

- (a) If N Ltd purchases A’s holding of 20 shares for €500, N Ltd’s distributable profits are reduced to €2,600 (that is, €3,100 less €500), all attributable to M Ltd (as M Ltd will then own 100% of N Ltd). M Ltd’s distributable profits are increased to €5,060 (that is, €1,200 plus €2,600 (from N Ltd) plus €1,260 (from O Ltd)) then and A’s entitlement to profits immediately after the purchase is €7,604 (€2,024 (from M Ltd) + €5,580 (from P Ltd)), that is, 62.8% of €12,100 (€12,600 – €500). This is more than 75% of 64.9% so that relief from the distribution charge is not available. Relief would in any case be refused because A has not severed A’s connection with M Ltd or P Ltd.
- (b) If alternatively M Ltd purchases A’s holding of 40 shares for €2,000, A’s entitlement to profits immediately after the purchase is €6,200 (€620 (from N Ltd) + 5,580 (from P Ltd)), that is, 58.5% of €10,600 (€12,600 – €2,000). This is still more than 75% of 64.9% so that relief from the distribution charge cannot be given.

## 180 Additional conditions

### Summary

The vendor selling the shares to the company which issued them must not after the sale be connected with the company acquiring the shares or with any other company which is a member of a group of companies which includes the company acquiring the shares. Also, in order to exclude reductions in shareholdings which are substantial but merely temporary, the buy back of shares must not be part of a scheme or arrangement which is designed or likely to result in the vendor or any associate having an interest in the company such that if he/she had that interest in the company immediately after the buy back any of the other conditions would not be satisfied. Transactions carried out within 1 year after the purchase are presumed to form part of such a scheme.

### Details

The non-application of the distribution treatment does not apply if, immediately after a buy back by a company, the vendor is connected (see **section 186**) with the company or any company which is a member of its group (within the meaning of **section 179**). Essentially, a person is connected with a company if that person has control of it or has a 30 per cent interest in the capital, assets or voting rights in the company. **(1) & (2)**

The buy back of shares by a company must not be part of a scheme or arrangement which is designed, or is likely, to result in the vendor or his/her associates having interests in any company which, if he/she had such interests immediately after the purchase, would have broken the conditions requiring that there be a substantial reduction in the shareholding and profit holding of the vendor and his/her associates, and that the vendor should not be connected with the purchasing company. **(3)**

A transaction carried out within 1 year after the buy back which has, or would contribute, to such a result is treated as part of the same scheme or arrangement of which the buy back is also a part. **(4)**

### Example

A owns the following shares in B Ltd

Total issued	Held by A
--------------	-----------

€1 ordinary	10,000	4,000	
€1 preference	5,000	1,000	
	15,000	5,000	(33.33%)

On 1 December, 2002, B Ltd purchases from A 2,000 ordinary shares and 1,000 preference shares, leaving A with 2,000 ordinary shares out of a total issued share capital of 12,000 (16.67%). The reduction qualifies for relief from the distribution charge.

On 1 March, 2003, B Ltd purchases from other shareholders the remaining preference shares and 2,000 ordinary shares. A then owns 2,000 ordinary shares out of a total issued share capital of 6,000 (that is, 33.33%). If A had held a 33.33% interest immediately after the purchase on 1 December, 2002, relief from the distribution charge would not have been due and will therefore be denied or withdrawn.

## 181 Relaxation of conditions in certain cases

Where the requirements —

- that there be a substantial reduction in the combined shareholding and profit entitlement of the vendor and the vendor's associates, and
- that the vendor should not be connected with the purchasing company,

are not satisfied in respect of a vendor, the vendor may nevertheless qualify for capital gains tax treatment in respect of the sale of so much of the shares as is necessary for a second vendor, being an associate of the first vendor, to satisfy the first requirement set out above. The first vendor must satisfy the residence and minimum period of ownership tests (see *section 177*).

### Example

H Ltd has an issued share capital of 10,000 ordinary shares of which J owns 500 and the trustees of a settlement (for which J provided the assets) owns 2,500. It is proposed that H Ltd buy back the 500 shares owned by J.

After the buy back, the trustees, who are associated with J, will continue to hold shares in H Ltd; their shareholding must be included in calculating the reduction in J's shareholding interest, which will be —

$$\text{Before the sale } \frac{500 + 2,500}{10,000} = 30 \text{ per cent}$$

$$\text{After the sale } \frac{2,500}{9,500} = 26.31 \text{ per cent}$$

Assuming that J complies with all the other requirements to qualify for capital gains tax treatment, J still fails to show a reduction of 25 per cent in J's shareholding interest. For J to satisfy the test of reduced shareholding, it is necessary to reduce the shareholding of the trustees to 22.5 per cent (that is, 75 per cent of 30 per cent). The trustees can therefore offer to sell 468 shares to H Ltd reducing their shareholding to —

$$\frac{2,500 - 468}{9,500 - 468} = \frac{2,032}{9,032} = 22.5 \text{ per cent}$$

Although the sale by the trustees does not itself satisfy the substantial reduction of shareholding tests, it qualifies for capital gains treatment as does the sale by J. If the trustees sold 500 shares to H Ltd, the proceeds of the excess 32 shares would be treated as a distribution.

## 182 Returns

A return, in a prescribed form, is required to be made to the appropriate inspector (as defined in *section 2*) by companies which buy back their own shares or acquire their

holding companies' shares, where such companies consider exemption from the distribution treatment applies to those acquisitions.

The time limit for making such a return is 9 months from the end of the accounting period in which the acquisition takes place. Although the company is obliged to make a return within the 9 month period without being requested to do so, the inspector may request the company to provide a return at an earlier date which must not, in any case, be earlier than 30 days after the inspector's request. There is provision for penalties for failure to make returns.

## 183 Information

### Summary

Persons connected with the company who have knowledge of schemes designed to restore the shareholding of vendors who have only temporarily reduced their shareholding in a company in order to take advantage of the capital gains tax treatment are obliged to notify the inspector within 60 days of their becoming aware of such a scheme. The inspector may also seek information about such schemes from the company or from persons connected with the company. The inspector may also seek disclosure of the beneficial recipient of payments made by a company acquiring its own or its holding company's shares. There is provision for penalties for failure to provide information.

### Details

Where a company treats a payment for the buy back of its shares as being relieved from the distribution treatment, any person connected with the company who is or may become aware of any scheme of the kind described in *section 180(3)* is required to notify the inspector within 60 days of their becoming aware of the existence of such a scheme. (1)

Where a company treats a payment for the buy back of its shares as being relieved from the distribution treatment, and the inspector has reason to believe that the payment forms part of a scheme of a kind described in *section 180(3)*, the inspector may serve notice on the company or on any person connected with the company requiring that there be supplied to him/her within such time not being less than 60 days — (2)

- a declaration in writing stating whether or not such a scheme or arrangement exists, and
- any other information which the inspector may reasonably require to establish whether such a scheme or arrangement exists.

The declaration and information must be based on matters which the person concerned has knowledge or which the person can reasonably be required to obtain.

Where a company treats a payment for the buy back of its own shares as being relieved from the distribution treatment, the inspector may require the recipient of the payment, or any person on whose behalf the payment was received, to state whether he/she was the beneficial owner of the shares and, if not, to supply the name and address of the beneficial owner. (3)

## 184 Treasury shares

This section addresses for tax purposes the power granted to companies under section 209 of the Companies Act, 1990 to hold their own shares, acquired from their shareholders, as “treasury shares” for subsequent reissue or cancellation.

For the purposes of the Tax Acts and the Capital Gains Tax Acts —

- treasury shares which are not cancelled by a company are treated as cancelled immediately they are acquired by the company,
- no allowable loss arises on cancellation of treasury or other shares by a company regardless of whether the shares are actually cancelled or are treated as cancelled for tax purposes, and
- reissues of treasury shares are treated as new issues of shares.

(1)

## 185 Associated persons

The following rules apply in determining whether a person is an associate of another person in relation to a company —

- a husband and wife living together are associated with one another and a child under the age of 18 is associated with his/her parents (no other relatives are treated as associated);
- Two civil partners living together are associated with one another and a child under the age of 18 of a civil partner is associated with those civil partners (no other relatives are treated as associated);
- a person who has control (see *section 173*) of a company and that company are associated;
- 2 companies which are controlled by the same person are associates;
- trustee shareholders (other than bare trustees) are associated with —
  - any person who directly or indirectly provided property to the trustees or who made reciprocal arrangements for some other person to do so;
  - the husband, wife or child of such a person;
  - any beneficiary who is or may become entitled to an interest in any shares worth more than 50 per cent of the value of the property in the trust (excluding property which that person can never have an interest);

[In considering the effect of the association of a trustee with another person, any interest of the trustee in some other capacity (for example, as a personal interest or as trustee of another trust) is ignored.]

- where shares in a company form part of a deceased person’s estate, personal representatives of the deceased shareholder are associated with any beneficiary who is or may become entitled to an interest in the shares worth more than 5 per cent of the value of the property comprised in the deceased’s estate;
- a person who is accustomed to act on the direction of another person in relation to a company’s affairs is associated with that person in relation to that company.

[This latter rule is not to be applied to the normal relationship between an employee and someone set over him/her in the company].

The association between trustees, settlors and beneficiaries does not apply to trustees of an exempt approved pension scheme or of trusts exclusively for the benefit of employees (2)

(which can include directors) of the company concerned or of a company in the same group (that is, a company and its 51 per cent subsidiaries) and of their dependants. It is to be noted that a trust wholly or mainly for the benefit of directors or their relatives is not excluded from the “association” rules by this provision.

A “material interest” is a 5 per cent interest by reference to the value of property held on trusts or comprised in an estate. If a person is excluded from benefiting from any part of the property in question then that part is ignored in this calculation. (3)

## 186 Connected persons

### Summary

This section sets out the circumstances in which a person is to be treated as connected with a company for the purposes of this Chapter. In general, a person is connected with a company if that person has more than a 30 per cent interest in the capital, the voting power or the assets of the company. In determining whether a person is connected with a company, the person is treated as having all the rights and powers of that person's associates. In addition, a person is treated as entitled to acquire anything which that person is entitled to acquire at a future date or will at a future date be entitled to acquire.

### Details

A person is connected with a company where any of the following conditions are satisfied as regards that person's own rights and interests or the combined rights and interests of that person and the associates of that person — (1)

- the person, directly or indirectly, owns or is entitled to acquire more than 30 per cent of —
  - the company's issued ordinary share capital,
  - the total of the company's issued share capital and loan capital, or
  - the voting power in the company.
- the person, directly or indirectly owns or is entitled to acquire the right to receive more than 30 per cent of the assets of the company available for distribution to equity holders on a winding up or otherwise. [“equity holder” and “assets available for distribution” have the same meaning as they have for the purposes of *Chapter 5 of Part 12* – group relief].
- the person has control of the company (that is, the person has the power to secure that the company's affairs are conducted in accordance with that person's wishes) either through the holding of shares or voting rights or by virtue of provisions in the company's articles of association.

In determining whether a person has a 30 per cent interest in the total of a company's issued share capital and loan capital, the person's interest in the loan capital of the company is ignored if the loan was acquired by that person in the ordinary course of a business which includes the lending of money. This applies provided the person takes no part in the management or conduct of the company. (2)

References to the loan capital of a company are references to any debt incurred by the company for — (3)

- money borrowed or capital assets acquired by it,
- any right to receive income created in the company's favour, or

- consideration which at the time the debt was incurred was substantially less than the amount of the debt (including any premium).

A person is entitled to acquire anything which — (4)

- that person is entitled to acquire at a future date, or
- that person will at a future date be entitled to acquire.

A person is treated as having the rights and powers of that person's associates in addition to that person's own rights and powers.