

Notes for Guidance - Taxes Consolidation Act 1997

Finance Act 2021 edition

Part 31

Taxation of Settlers, etc in Respect of Settled or Transferred Income

December 2021



The information in this document is provided as a guide only and is not professional advice, including legal advice. It should not be assumed that the guidance is comprehensive or that it provides a definitive answer in every case.

Notes for Guidance - Taxes Consolidation Act 1997

Finance Act 2021 edition

Part 31 Taxation of Settlers, etc in Respect of Settled or Transferred Income

CHAPTER 1 *Revocable dispositions for short periods and certain dispositions in favour of children*

791 Income under revocable dispositions

792 Income under dispositions for short periods

793 Recovery of tax from trustee and payment to trustee of excess tax recoupment

CHAPTER 2 *Settlements on children generally*

794 Interpretation and application (*Chapter 2*)

795 Income settled on children

796 Irrevocable instruments

797 Recovery of tax from trustee and payment to trustee of excess tax recoupment

798 Transfer of interest in trade to children

PART 31
TAXATION OF SETTLORS, ETC IN RESPECT OF SETTLED OR TRANSFERRED
INCOME

CHAPTER 1
Revocable dispositions for short periods and
certain dispositions in favour of children

Overview

This Chapter provides generally that income which is disposed of by a person under revocable dispositions or irrevocable dispositions which operate for short periods is to remain, for income tax purposes, the income of that person.

791 Income under revocable dispositions

For the purposes of the Chapter, “disposition” includes any trust, covenant, agreement or arrangement. (1)

This section provides that where any person makes a disposition of income by virtue of which that person may, by power of appointment, power of revocation or any other means and without the consent of another person, retain the beneficial enjoyment of that income, the income is to be treated, for income tax purposes, as the income of that person and not of any other person. (2)

Where any power of appointment or revocation, etc may be exercised with the consent of a person’s spouse, the power is deemed to be exercisable without the consent of another person unless the couple are living apart either by agreement or under an order of Court. (3)

In addition, where the power may be exercised by the spouse of the disponer, the power is deemed to be exercisable by the disponer. (4)

792 Income under dispositions for short periods

Summary

This section provides that where a person makes a disposition of income to, or for the benefit of, another person, then, subject to certain exceptions, that income is to remain the income of the disponer for income tax purposes.

Details

A “relevant individual” is a person who is permanently incapacitated by mental or physical infirmity or who is aged 65 years or over. (1)(a)

Subject to specified exceptions, any income which, by virtue or in consequence of any disposition made directly or indirectly by a person (other than a disposition for valuable and sufficient consideration), is payable to or applicable for the benefit of any other person, is deemed for income tax purposes to be the income of the person, if living, who made the disposition and not of any other person. The specified exceptions are — (1)(b)

- income arising from capital which the disponer has divested himself or herself absolutely, (1)(b)(i)
- income payable, for a period which exceeds or may exceed 6 years, to a relevant individual for his/her own use, and (1)(b)(iv)

- income payable, for a period which exceeds or may exceed 6 years, for the benefit of a relevant individual. (1)(b)(v)

Except in the case of dispositions made in favour of individuals who are permanently incapacitated by mental or physical infirmity, the recognition for tax purposes of a disposition(s) within *subparagraphs (iv) and (v) of subsection (1)(b)* made by an individual in a year of assessment is limited to 5 per cent of the individual's total income for the year of assessment. (2)(a) & (b)

Where the 5 per cent limit applies and there is more than one donee, the income which is not to be treated as income of the donor for tax purposes is apportioned between the donees in proportion to their entitlements under the disposition(s). (2)(c)

Certain transitional arrangements (see *paragraph 27 of Schedule 32*) apply in regard to the application of this section for the tax year 1997–98 in relation to certain dispositions to certain individuals residing with, and sharing normal household expenses with, the donor. (4)

793 Recovery of tax from trustee and payment to trustee of excess tax recoupment

A person who has been charged to, and has paid, income tax on any income treated as his/her income by virtue of *section 792* is entitled to recover that tax from the trustee or other person to whom the income is payable and, for this purpose, the person is also entitled to require the Revenue Commissioners to furnish him/her with a certificate specifying the amount of income so treated as his/hers and the amount of the tax so paid. Any such certificate is evidence of those facts until the contrary is proved. (1)

Conversely, if a donor obtains a refund of tax as a result of income under a disposition being treated as his/hers, he/she must pay over the tax repaid to the trustee or other person to whom the income is payable. Where there is more than one donee, the tax repaid must be apportioned among them. (2)

If any question arises as to the amount of any payment or apportionment to be so made, that question is to be decided by the Appeal Commissioners whose decision on the matter is final. (3)

In determining the amount recoverable from, or payable to, the trustee or other person by the donor, the income deemed to the donor's income by virtue of *section 792* is treated as the highest part of his/her income. (4)

CHAPTER 2

Settlements on children generally

Overview

This Chapter provides that income settled on a person who is a minor is, during the lifetime of the settlor, to be treated as income of the settlor and not that of the minor. The provisions of the Chapter are not affected by those contained in *section 792* concerning dispositions of income for short periods.

794 Interpretation and application (Chapter 2)

Summary

This section provides the interpretation for the Chapter. It also contains provisions regarding the application of the Chapter.

Details

Definitions

“income” is given an extended definition to include any income chargeable to income tax by deduction or otherwise and any income which would have been so chargeable if it had been received in the State by a person resident or ordinarily resident in the State. (1)

“settlement” includes any disposition, trust, covenant, agreement or arrangement and any transfer of money or other property or of any right to money or other property.

Application

The Chapter is to apply to every settlement whenever or wherever made or entered into. (2)

However, the Chapter does not apply to income arising under a settlement in any year of assessment in which the settlor is non-resident in the State. (3)

Neither does the Chapter apply to income paid in any year of assessment to or for the benefit of a minor, not being a child of the settlor, or a child or the settlor’s civil partner, who is permanently incapacitated by mental or physical infirmity. (4)

Irrevocable instruments

An instrument is not to be an irrevocable instrument if the trusts of the instrument provide for one or more of the following — (5)(a)

- the settlor is to be a beneficiary during the life of any person who is or may be entitled to benefit from any income or accumulations of income from the settlement,
- the spouse or civil partner of the settlor is to be a beneficiary during the joint lives of the settlor and the person for whom the settlement is made,
- the trust may be terminated by the act or default of any person, and
- the settlor can avoid complying with the terms of the instrument by paying a penalty.

An instrument is not, however, to be prevented from being an irrevocable instrument by reason only of provisions that provide for — (5)(b)

- any capital, income or accumulations of income to be payable to or for the benefit of the settlor or his/her spouse or civil partner if the person for whose benefit income or accumulations of income may become payable under the trusts (the beneficiary) should become bankrupt,
- any capital, income or accumulations of income to be payable to or for the benefit of the settlor or his/her spouse or civil partner if any beneficiary should make any assignment of or a charge on that capital, income or accumulations of income, or
- the termination of the trusts in such circumstances that the termination would not, during the life of the beneficiary, benefit any person other than the beneficiary or his/her spouse, civil partner, children or children of his/her civil partner

795 Income settled on children

Summary

This section provides that income settled on minors (that is, persons aged under 18 years who are not or have not been married) is to remain, for income tax purposes, the income of the settlor, if living.

Details

Income which, during the life of the settlor, is paid under a settlement in a year of assessment to or for the benefit of a person is to be treated for income tax purposes as (1)

income of the settlor (and not of any other person) for that year if at the time of the payment the person to or for whom the income is paid is a minor.

Except in the case of an irrevocable instrument (see *section 796*), income which is accumulated under a settlement so that it, or assets which it represents, will or may be paid to or for the benefit of a person in the future – whether on the fulfilment of a condition, the happening of a contingency, the exercise of a power or discretion or for any other reason – is deemed to be paid to or for the benefit of the person (at the time it is accumulated). If a settlement does not require income to be allocated to any particular person or persons at the time it is accumulated, the income is deemed to be paid in equal shares to each of the persons to or for the benefit of whom or any of whom it, or assets representing it, will or may become payable or applicable. (2)

796 Irrevocable instruments

Summary

This section provides that income accumulated in any tax year for the benefit of a minor is not to be treated (under *section 795*) as the settlor’s income if it arises from property vested in or held by the trustees of a settlement made by an irrevocable instrument. However, where any sum whatever is actually paid out by the trustees of an irrevocable settlement for the benefit of a person who, at the time of payment, is a minor, the sum is deemed to be paid as income and, by virtue of *section 795*, is treated as income of the settlor for the tax year in which it is paid.

Details

For the purposes of the section, “property” does not include any annual or periodical payment secured by the covenant of the settlor or by a charge made by him/her on any part of his/her property or any part of his/her future income. (1)

Section 795 is not to apply for a year of assessment to income arising from property vested in or held by trustees under an irrevocable instrument which in that year is accumulated for the benefit of a person. Neither is that section to apply to income arising from accumulations of such income. (2)(a)

However, subject to the limitation set out in the next paragraph, any sum whatever paid out in a year of assessment under an irrevocable settlement to or for the benefit of a person who at the time of payment is a minor is deemed to be paid out as income (and accordingly chargeable to tax in the hands of the settlor). This rule applies irrespective of whether the payment is out of income or accumulations of income or out of capital of the trust fund. (2)(b)

The foregoing rule is not to apply to any sum to the extent that the aggregate of it and all other sums (if any) paid under the settlement to or for the benefit of the person, or any other person who at the time of payment was a minor, exceeds the aggregate of all income that has accrued to the trustees since the settlement was made. (2)(c)

In relation to a payment — (2)(d)
& (e)

- made before 6 April, 1971, or
- in the case of a payment made to or for the benefit of a child born after 6 April, 1971, made in the tax year 1971–72 under a settlement made before 28 April, 1971,

the reference in the previous paragraph to other sums paid to or for the benefit of a person who at the time of the payment was a minor is to be taken as a reference to a sum so paid to or for the benefit of a person who at the start of the tax year in which the payment was made was a minor.

References to a person being a minor at any particular time are, where that time is before 6 April, 1986, to be construed as references to a person who was at that time under 21 years of age and was not or had not been married. [By virtue of *section 7* (application to certain taxation statutes of Age of Majority Act, 1985) with effect from 6 April, 1986, a person is a minor if he/she is under 18 years of age and is not or has not been married.] (2)(f)

797 Recovery of tax from trustee and payment to trustee of excess tax recoupment

A person who has been charged to, and has paid, income tax on any income treated as his/her income by virtue of *section 795* is entitled to recover that tax from the trustee or other person to whom the income is payable and, for this purpose, the person is also entitled to require the Revenue Commissioners to furnish him/her with a certificate specifying the amount of income so treated as his/hers and the amount of the tax so paid. Any such certificate will be evidence of those facts until the contrary is proved. (1)

Conversely, if a settlor obtains a refund of tax as a result of settlement income being treated as his/hers, he/she must pay over the tax so repaid to the trustee or other person entitled to the income. Where there are 2 or more trustees or other persons, the tax repaid must be apportioned among them. (2)

If a question arises as to the amount of any payment or apportionment to be so made, the question is to be decided by the Appeal Commissioners whose decision on the matter is final. (3)

In determining the amount recoverable from, or payable to, the trustee or other person by the settlor, the income deemed to the settlor's income by virtue of *section 795* is treated as the highest part of his/her income. (4)

Where tax is paid in respect of any income which, by virtue of this Chapter, has been treated as income of a settlor, no repayment is to be made under *paragraph 21* of *Schedule 32* (income tax: relief for income accumulated under trusts) on account of that tax. (5)

798 Transfer of interest in trade to children

Summary

This section deems the transfer of a trade or of an interest in a trade by an individual to one or more of his/her children or one or more children of his/her civil partner to constitute a settlement for the purposes of this Chapter.

Details

If a trade, which was formerly carried on by a person solely or in partnership, becomes a trade carried on by one or more children of that person or one or more children of that person's civil partner or is carried on in a partnership between that person and one or more of his/her children, or one or more children of his/her civil partner then, for the purposes of the Chapter — (1)

- the means by which the change took place is regarded as a settlement of which the person is the settlor, and
- the children's, or children of the civil partner's, share of the profits are deemed to be that of the parent or the parent's civil partner.

If the child or children, or child or children of the civil partner, whose profits are deemed to be the income of the parent work in the business, the amount of that income is reduced by the amount which would have been paid to the child, or child of the civil partner, if he/she had been an employee of the business instead of an owner or partner. (2)