Chapter 10 - Approved Profit Sharing Schemes (APSS)

This document should be read in conjunction with sections 509 to 518 and Schedule 11 of the Taxes Consolidation Act 1997

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Revenue
Cáin agus Custaim na hÉireann
Irish Tax and Customs

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.

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10.1 Introduction

A Revenue Approved Profit Sharing Scheme provides a mechanism whereby a company may appropriate shares to its employees and the employee is, subject to certain conditions, exempt from the income tax charge on the share appropriation. Universal Social Charge (USC) and Pay Related Social Insurance (PRSI) will still be chargeable.

Under an approved scheme an employee may be allocated shares up to a maximum annual limit. Dividends received by the employees in respect of the allocated shares are assessable to income tax in the normal way.

After the shares are allocated to an individual, they must be held by a trust established for the purpose and a participant must agree to his/her shares remaining with the share scheme trustees for the period of retention.

The legislation on approved profit sharing schemes can be found in sections 509 to 518 TCA 1997 and Schedule 11 TCA 1997.

10.1.1 Conditions for Approval

The scheme must be approved by Revenue in accordance with Schedule 11, Taxes Consolidation Act, 1997.

There are certain conditions that must be satisfied by a scheme before Revenue will approve it. These can be classified under the following headings:

- general conditions (see section 10.5),
- conditions relating to the Trust (see section 10.6),
- conditions relating to the Shares (see section 10.7), and
- conditions relating to the Participants (see section 10.8).

The remainder of this manual discusses the following:

- Calculation of the basis of entitlement under a scheme and similar terms (see section 10.9),
- Salary forgone and contributory schemes (see section 10.10),
- Annual limit, excess and unauthorised shares (see section 10.11),
- Tax implications of appropriation, disposal and transfer of shares (see section 10.12),
- Capital receipts (see section 10.13), and
- Company reconstructions and amalgamations (see section 10.14).

10.1.2 Main Features of the Scheme

Establishing the scheme

- Prior Revenue approval is required in order to set up an approved profit sharing scheme (APSS).
- The costs of establishing an APSS and any amounts paid by the company to the trustees, subject to certain conditions, are deductible in computing the company's profits for corporation tax purposes.

Appropriation of shares

- Under an approved scheme an employee may be allocated shares up to a maximum **annual limit** of €12,700.
- Participants are not liable to income tax on the value of the shares at the time they are appropriated.
- Dividends received by the employees in respect of the appropriated shares are assessable to income tax in the normal way.
- After the shares are appropriated to an individual, they must be held by a trust established for the purpose of the share scheme and a participant must agree to his/her shares remaining with those trustees for the **period of retention**.

Period of retention

- If the shares are disposed of after the **period of retention** (generally two years from the date on which they were appropriated), but before the release date (generally three years from the date on which they were appropriated), an income tax charge will arise.
- The participant is liable to income tax under Schedule E on 100% of the locked in value of the shares at the date on which they were appropriated or, if less, on 100% of the sale proceeds. The percentage is 100% unless the employee ceases to be employed due to injury, disability or redundancy, or reaches pensionable age, as defined in the Social Welfare Consolidation Act 2005.
- When a participant ceases to be employed due to injury, disability or redundancy the shares can be sold immediately. Similarly, they may be sold immediately when an employee reaches pensionable age. Income tax is charged on 50% of the locked-in value of the shares (or the sales proceeds if less) in the case of such disposals.
- If a participant dies while the trustees are holding scheme shares on his/her behalf, the **period of retention** comes to an end immediately even if the shares have been held for less than two years. The participant's personal

representatives can sell or transfer the shares and an income tax charge will not arise.

Appropriation of shares

- If the participant disposes of shares after the release date, there is no liability to income tax on the disposal.
- The participant is liable to pay USC and PRSI on the value of any shares appropriated under an Approved Profit Sharing Scheme. The chargeable event is at the date of appropriation.
- There is no employer PRSI liability on the value of shares appropriated to participants.

Disposal of shares acquired

- If shares acquired under an APSS are subsequently sold capital gains tax (CGT) may be due where the disposal proceeds exceed the locked in value of the shares at the date of appropriation.

10.2 Key Definitions

10.2.1 Annual Limit

The total initial market value of the shares to be appropriated to any one participant in a year of assessment cannot exceed:

(a) €12,700 in any one year of assessment, or

(b) €38,100 where the shares concerned were transferred to the trustees of the approved scheme by the trustees of an ESOT and the following conditions are satisfied-

a. At each time in the 5 years (or such lesser period as the Minister for Finance may prescribe) commencing with the date of the establishment of the ESOT, 50% of the securities (or such lesser percentage as the Minister for Finance may prescribe) retained by the trustees at the time were pledged by them as security for borrowings.

b. At the time of the transfer referred to in (i) a period of at least 10 years (or such lesser period (not being less than the period referred to in (i)) as Revenue may allow) commencing on the date the ESOT was established and ending at the time when all shares pledged as security for borrowings by the trustees of the ESOT became unpledged has elapsed (this is known as the "encumbered period"), and

c. No shares which were pledged, at any time since the trust was established, as security for borrowings by the trustees of the ESOT were previously transferred to the trustees of the approved scheme because they remained so pledged during the encumbered period.

This €38,100 limit may only be applied in the first year of assessment during which the encumbered period has lapsed and only in respect of shares appropriated after that date.

10.2.2 Appropriation Date

The appropriation date is the date on which the trustees of the approved profit sharing scheme appropriate shares to the participants.

10.2.3 Appropriate Percentage

That part of the Locked-in Value on which income tax will be charged depending on the number of years the shares have been held in the scheme by the trustees on the participant's behalf.

10.2.4 ESOT

An Employee Share Ownership Trust within the meaning of Section 519 and Schedule 12A TCA 1997.

Further information on ESOTSs is available in Tax and Duty Manual (TDM) Share Schemes - Chapter 11.

10.2.5 Initial Market Value

The market value of a share on the date on which the shares are appropriated.

10.2.6 Locked-In Value

The locked-in value of any participant's shares at any time is generally the initial market value of the shares. However,

(a) if prior to that time the participant has become chargeable to income tax in respect of any capital receipt in respect of those shares, the locked-in value of the shares is the amount by which their initial market value exceeds the amount of all those capital receipts.

(b) if the proceeds of a disposal are less than the locked-in value of the shares at the time of disposal, the locked-in value is reduced to an amount equal to the proceeds of the disposal.

Example 1

1,000 shares are appropriated to a participant on 1 January 2018. The initial market value of the shares at that date is €3 per share. The shares are disposed of on 31 March 2019 for €2 each.

The disposal proceeds, €2,000, are less than the locked-in value of €3,000, therefore income tax is chargeable under Schedule E on 100% of the disposal proceeds - €2,000 – and PRSI and USC are also chargeable on this amount.

Example 2

500 shares are appropriated to a participant on 1 January 2017. The initial market value of the shares at that date is €3 per share. The shares are disposed of on 31 March 2019 for €5 each.

The locked-in value, €1,500, is less than the disposal proceeds - €2,500, therefore income tax is chargeable under Schedule E on 100% of the Locked-in value - €1,500 PRSI and USC are also chargeable.

10.2.7 Participant

A participant is an employee/director who has been appropriated shares under the approved profit sharing scheme.

10.2.8 Period of Retention

This is the minimum period during which a participant's shares must remain with the trustees of the approved profit sharing scheme. It is defined in the legislation as being, in relation to any participant's shares, the period beginning on the date on which the shares are appropriated to a participant and ending on the earliest of the following dates:

(a) The second anniversary of that date, or

(b) The date on which the participant ceases to be an employee/ director of the company operating the scheme (or of a participating company if the scheme is a group scheme) by reason of injury, disability or redundancy within the meaning of the Redundancy Payments Act, 1967 to 2014, or

(c) The date on which the participant reaches pensionable age, as defined in the Social Welfare Consolidation Act 2005, or

(d) The date of the participant's death, or

(e) Where the shares concerned were transferred to the trustees of the approved profit sharing scheme by the trustees of an ESOT and -

(i) (a) immediately prior to the transfer the shares had been held in that ESOT for a period of less than 2 years, and

(b) the participant concerned was a beneficiary under that ESOT at all times during the period ending on the date on which the shares were appropriated to him or her,

the day following the day on which a period, being a period equivalent in length to the difference between 2 years and the length of the period for which the shares had been so held, has elapsed since the shares were so appropriated to him or her, or

(ii) (a) immediately prior to the transfer the shares had been held in that ESOT for a period of 2 years or more, and

(b) the participant concerned was a beneficiary under that ESOT at all times during the period ending on the date on which the shares were appropriated to him or her,

the day following the day on which the shares are appropriated to him or her.

10.2.9 Release Date

This is-

(a) The third anniversary of the date on which the shares were appropriated to a participant, or

(b) Where the shares concerned were transferred to the trustees of the approved profit sharing scheme by the trustees of an ESOT and -

(i) (a) immediately prior to the transfer the shares had been held in that ESOT for a period of less than 3 years, and

(b) the participant concerned was a beneficiary under that ESOT at all times during the period ending on the date on which the shares were appropriated to him or her,

the day following the day on which a period, being a period equivalent in length to the difference between 3 years and the length of the period for which the shares had been so held, has elapsed since the shares were so appropriated to him or her, or

(ii) (a) immediately prior to the transfer the shares had been held in that ESOT for a period of not less than 3 years, and

(b) the participant concerned was a beneficiary under that ESOT at all times during the 3 years ending on the date on which the shares were appropriated to him or her,

the day following the day on which the shares are appropriated to him or her.

10.3 Approval of Schemes

10.3.1 The Revenue Technical Service (RTS)

Revenue recognises that taxpayers and or their agents may need, on occasion where a matter is not fully dealt with in Revenue's published guidance, to make contact to clarify the technical treatment of transactions prior to completing a tax return. All such technical queries should be directed to Revenue through the Revenue Technical Service. Comprehensive guidance notes regarding submitting technical queries through the RTS can be found in TDM Part 37-00-00a

10.3.2 Direct contact for approved Share Schemes

The only exception to submitting technical queries through the RTS will be where Companies are proposing to establish and operate specific share schemes requiring approval (i.e. APPS, ESOT or SAYE). In such circumstances, case specific queries prior to application can be sent to Revenue. All such queries and scheme applications should be sent to the Employee Share Scheme Section of Revenue at the below address.

Employee Share Scheme Section,
Personal Taxes Policy & Legislation Division,
New Stamping Building,
Dublin Castle,
Dublin 2.

Alternatively, an email address is available – Shareschemesection@revenue.ie. Revenue does not recommend sending personal or confidential information to this email address as it is not secure. My Enquiries - TDM Part 37-00-36 should be used as an alternative.

10.3.3 Approval Process

Once the Trust Deed is executed, the company must then apply to Revenue for formal approval of the scheme by submitting the following documentation and information:

- A copy of the company resolution establishing the scheme.
- A copy of the scheme rules.
- A copy of the executed trust deed and the Trust Income Tax Registration Number.
- Copies of all documents that will be issued to participants in the scheme i.e. employee booklet, contract of participation etc.

- Where an appraisal scheme is to be used as the basis of calculation of entitlement for the scheme, copies of all forms etc. used for the scheme and an example of how this scheme operated.

- A copy of the Constitution/Memorandum and Articles of Association of any company whose shares will be allocated under the scheme and where the shares to be used for the scheme are in a private company, a copy of the Shareholders Agreement if one exists.

- A declaration that the shares to be used in the scheme satisfy certain conditions. The declaration must be on company headed paper and signed by the Company Secretary of the company whose shares are to be used, that the shares to be used in the scheme satisfy the conditions set out in paragraphs 8 to 11 of Part 3, Schedule 11, TCA, 1997 and stating how the conditions of paragraphs 8 and 9 are met.

- Where the company concerned is a member of a group of companies, a declaration that the scheme does not and would not have the effect of conferring benefits wholly or mainly on directors of companies of the group who are in receipt of higher or the highest levels of remuneration.

- Details regarding the basis of entitlement that will be used in the scheme. Where an appraisal scheme is to be used as the basis of entitlement, copies of all documentation in relation to the appraisal scheme and an example of how the basis of entitlement will be calculated in practice should be submitted.

- Details of tax reference numbers for corporation tax purposes and employer return purposes of all participating companies.

Once approval is granted, Revenue will notify the applicant company.

10.3.4 Approval of Alterations to Schemes

It may be necessary for a company to make amendments to an approved profit sharing scheme (for example, the company may wish to change the basis of entitlement under the scheme). Amendments may be made either by Deed or by way of a Board Resolution depending on the rules of the scheme.

Approval of a scheme will cease automatically if an alteration is made to the terms of an approved scheme or to its Trust Deed, unless the alteration has been approved by Revenue.

The executed Deed or signed Board Resolution, as the case may be, should be submitted for approval.

The amendments do not take effect until they have been approved by Revenue (paragraph 5(2) of Schedule 11 TCA 1997).

Administration related type changes to share scheme documentation do not require Revenue approval if the change does not impact the legislative basis on which approval was granted. Minor amendments to employee documentation do not require approval prior to being issued to participants.

10.3.5 Withdrawal of Approval

Revenue has the power to withdraw approval of a scheme in the following circumstances-

- Where a participant in the scheme is in breach of any of his or her obligations under section 511(4), TCA 1997;
- Where there is, with respect to the operation of the scheme, any contravention of the scheme rules or the terms of the trust;
- Where any of the conditions that require to be met in relation to the shares used for the purposes of the scheme cease to be met;
- Where any of the conditions which require to be met in relation to participants in the scheme cease to be met; or
- Where the trustees of the scheme fail to provide information requested by Revenue under section 510(7) of the TCA 1997 or information which is required to be delivered under section 510(8) of the TCA 1997.

The withdrawal of approval is effective from the date of withdrawal unless Revenue specify a later date.

10.3.6 Right of Appeal

A company has a right to appeal to the Appeal Commissioners where it is aggrieved by:

- Revenue's refusal to approve a profit sharing scheme;
- Revenue's refusal to approve an alteration to a profit sharing scheme; or
- The withdrawal of approval of a profit sharing scheme.

10.3.7 Cessation of scheme

If a scheme is no longer active and will not be active again in the future, the company should advise Revenue so that the scheme can be de-registered. This will end the requirement to file annual returns of information in relation to the scheme. All such notifications should be sent to the Employee Share Scheme Section - see section 10.3.2 for contact details.

10.4 Establishing Company and Participating Companies

10.4.1 Establishing Company

Only a company can operate an APSS. An unincorporated body, for example, a friendly society or a co-operative, cannot operate such a scheme.

10.4.2 Participating Companies

Where the company establishing the scheme has control of another company or companies ("control" within the meaning of section 432 TCA 1997), the scheme may be extended to all or any of the companies over which it has control. A scheme of this kind is called a group scheme and the companies participating in the scheme are called "participating companies".

10.4.3 Extension of Scheme to include Additional Companies

Where a group scheme is being extended to include additional participating companies, the relevant Deed of Adherence or Deed of Amendment must be submitted to Revenue for approval.

10.4.4 Group Scheme Established by Foreign Parent Company

A foreign parent company establishing a scheme to include its Irish subsidiaries, can seek approval for such a scheme where the parent company has control over the Irish subsidiaries.

10.4.5 Companies Leaving the Scheme

Where a participating company in a group scheme ceases to be under the control of the establishing company it can no longer be part of a group scheme. The relevant Deed of Amendment excluding the participating company must be submitted to Revenue for approval.

10.4.6 Costs of Establishing a Scheme and Payments made to Trustees

The establishing company can claim a corporation tax deduction for the costs of establishing an approved profit sharing scheme.

The establishing company, or, in the case of a group scheme, a participating company, is also entitled to a corporation tax deduction in respect of any payments made by it to the trustees of an approved profit sharing scheme, which are used by the trustees:

- In the acquisition of shares for appropriation to individuals who are eligible to participate in the scheme (shares must be purchased within 9 months of the

end of the accounting period in which the payment is charged as an expense in the company's accounts), and

- To cover the expenses of the trustees in administering the scheme (a deduction will only be given in respect of payments towards expenses that are reasonable).

10.5 General Conditions

There are a number of general conditions that must be satisfied before Revenue will approve a profit sharing scheme.

10.5.1 Establishment of Trust

The scheme must provide for the establishment of a trust, that is resident in the State, and the trustees, out of monies paid to them by the company concerned or, in the case of a group scheme, paid to them by a participating company, purchase or subscribe for shares which satisfy the conditions set out in section 10.7. The trustees must also perform their functions in accordance with a trust instrument (see section 10.6.3 for more details on trustees' functions).

The Trust Instrument must be constituted under the law of the State. Revenue cannot approve Trust Instruments which are governed by the laws of any other jurisdiction.

The shares purchased or subscribed for by the trustees must be formally allocated to individuals who are eligible to participate in the scheme.

10.5.2 Non-Essential Features

The scheme must not contain any features which are neither essential nor reasonably incidental to the purpose of providing employees and directors with benefits in the nature of interests in shares.

10.5.3 No Discouraging Features

The scheme must not contain any features which have the effect of discouraging employees from participating in the scheme.

10.5.4 Requirement Regarding Loans

An APSS must not be associated in any way with loan arrangements under which directors or employees borrow from their employer in order to take part in the scheme.

10.5.5 Requirement Regarding a Group Scheme

Where the company setting up a scheme has control of another company or companies, the scheme may be extended to all or any of the companies over which it has control. A scheme of this kind is called a group scheme.

A participating company in a group scheme is the company which established the scheme or a company over which the company has control and to which the scheme extends. Where the company setting up the scheme is a member of a group of

companies, the scheme must not have the effect of conferring benefits wholly or mainly on directors of companies in the group or on those employees of companies in the group who are in receipt of higher or the highest levels of remuneration.

10.5.6 Specification of Basis of Calculation of Entitlement

The basis of calculation of entitlement under the scheme must be clearly set out in the rules of the scheme or in an appendix to the rules.

A scheme may be approved where it:

- includes a facility for employees to forgo salary in order to increase their entitlement,
- requires participants to buy shares out of their own resources in order to receive free shares (usually called a contributory scheme), or
- where bonuses may be used for the purposes of the scheme.

A scheme which provides for salary forgone only will not be approved.

More information in relation to the use of bonuses, salary forgone and contributory schemes is set out in Section 10.10.

10.5.7 Annual Limit

The scheme must provide that the total Initial Market Value of the shares appropriated to any one Participant in a year of assessment will not exceed the Annual Limit. This includes free shares, shares funded by bonuses, salary forgone and matching shares (in the case of a contributory scheme).

10.6 Conditions Relating to the Trust

10.6.1 Trustees

For an APSS to operate, a trust must be established, the purpose of which is to hold the shares appropriated to eligible employees. Corporate trustees or individual trustees may be appointed.

Where individual trustees are appointed, there must be at least three, one of whom must be independent of the company. Where a corporate trustee is appointed, that trustee may act either as a sole trustee or jointly with individual trustees.

10.6.2 Registration of the Trust

The trust must be registered with Revenue using the Form TR1 . Revenue will then issue the applicant with a Tax Registration Number (TRN).

10.6.3 Residence of Trustees

The trustees of an APSS must be resident in the State. Revenue will, however, in exceptional cases, and only in the case of a scheme that has individual as opposed to corporate trustees, consider a scheme in respect of which it is proposed to appoint a trustee who is resident outside the State. However, a majority of trustees must still be resident in the State.

10.6.4 Functions of the Trustees

The functions of the trustees must be clearly set out in the Trust Instrument. This should include general functions relating to the purchase of shares for appropriation to participants, the transfer of the shares into the participant's name after the period of retention and to look after the interests of the participants, as shareholders. In addition to these general functions, there are specific mandatory functions that must be included in the trust instrument.

10.6.5 Mandatory Provisions in Trust Instrument

The trust instrument **must** contain provisions-

(a) Prohibiting the trustees from disposing of any shares:

- during the period of retention except in certain circumstances (e.g. the disposal of shares in return for other shares or cash in a company take-over, amalgamation or a transaction which effects a new holding),
- after the period of retention and before the release date except pursuant to a direction given by or on behalf of the participant and by

a transaction which would not involve a breach of the participant's obligations under the legislation.

(b) Obliging the trustees to:

- dispose of the shares only for the best consideration in money that can reasonably be obtained at the time of sale.
- notify each participant, in writing, as soon as possible after each appropriation of the number, description and initial market value of the shares which have been allocated to the participant.
- pay over to the participant any money or money's worth including dividends or other income received by them for or by reference to the participant's shares except where:
  - the participant instructs the trustees to use the funds arising from the sale of rights arising under a rights issue in the acquisition of additional shares, stock, securities etc., or
  - the money consists of a sum equivalent to income tax at the standard rate on the appropriate percentage of the locked-in value of the shares where a participant directs the trustees to transfer ownership of the shares to him/her at any time after the period of retention and before the release date, or
  - the money's worth consists of new shares arising from a reconstruction or amalgamation.
- deal only with a direction given by or on behalf of the participant in relation to any rights conferred in respect of his or her shares to be allocated other shares, securities or rights of any description.
- maintain such records as may be necessary to carry out their obligations in relation to the scheme.
- inform a participant of any facts in relation to the calculation of any liability to income tax under Schedule E he or she may have in respect of the shares.

10.6.6 Appointment and Removal of Trustees

Where a trustee is removed and a new trustee is appointed, Revenue must be notified, and the relevant Deed of Removal and Appointment must be submitted to Revenue.

The trustees of APSS should carry out their functions (including the removal and appointment of trustees) independently of the company that has established the scheme.

However, where the rules of the scheme allow for the establishing company to appoint and/or remove trustees, with prior written notification to Revenue, this is permissible. In these circumstances where there is a change in the trustees, the relevant Board Resolution must be submitted to Revenue.

10.6.7 Monies Held by Trustees

Any monies to be held by the trustees must be held in a deposit or current account in the State (i.e. it cannot be held in investments or outside the State).

10.6.8 Trustees' Expenses

The expenses of the trust are generally borne by the establishing company and the participating companies. If the trustees hold monies, which are not required for the purchase of shares for appropriation, the expenses can be paid from these monies or from the sale of shares which are not to be appropriated. Under no circumstances may shares that have been appropriated to participants be sold to pay the expenses of the trust.

10.6.9 Acquisition of Shares by Trustees

The shares to be appropriated by the trustees of an APSS must actually be in the possession of the trustees at the date of appropriation. It is not permissible for the trustees to notionally appropriate the shares to the participants and then acquire them later.

The Trustees may acquire shares:

- by purchasing them from existing holders, including participants in the scheme.
- by subscription for newly issued shares.
- by way of gift.
- by way of rights or bonus issue for shares which they have acquired but have not yet allocated to participants.

10.6.10 Reporting Requirements

10.6.10.1 Form ESS1

The trustees of an APSS are required, in relation to any year of assessment, to make an annual return of information on Form ESS1 to Revenue on or before 31 March in the year following that year of assessment. Approval of a scheme may be withdrawn where the trustees fail to make a timely return.

Revenue are in the process of migrating all share scheme returns from paper to online.

The current phase of return migration involves the 2019 Form ESS1 – Return of Information by the Trustees of an Approved Profit Sharing Scheme. This return is now available within the Share Scheme Reporting Obligation section on ROS.

In order to file the ESS1 through ROS for 2019, it will be necessary to ensure that the trust established for the purpose of the Approved Profit Share Scheme (APSS) is registered for income tax for 2019. The 2019 ESS1 will be filed on ROS using the trust's tax registration number. It should be noted that the requirement to register the trust established for the purposes of an APSS is not a new requirement. For those trusts already in existence, but which have not been previously registered, registration should be made immediately.

Once the trust is registered for income tax, it is necessary for the trust to register for the share scheme reporting obligation in ROS. This is a once off registration required in order for the trust to be able to access the ESS1 return. In 2019, Revenue published Chapter 15 of the consolidated Share Scheme Manual (Chapter 15 – Filing Guidelines for Share Scheme Reporting) which deals with the Share Scheme Reporting Obligation and provides a step by step guide on how to effect this registration.

In order to allow sufficient time to take the necessary actions prior to filing the ESS1 return, the 2019 filing deadline for the ESS1 is extended from 31 March 2020 to 31 October 2020. A paper ESS1 return for 2019 will not be available.

The tax registration number of the establishing company, or of its Irish subsidiary in cases where the establishing company is a foreign parent company, is a mandatory field on the ESS1. An APSS must have an establishing company and that company must have control of any participating companies in the case of a group scheme. It is the responsibility of the establishing company, and of any participating companies, to ensure they are registered for tax as appropriate.

As noted above, the trustees of an APSS are required, in relation to any year of assessment, to make an annual return of information on Form ESS1 to Revenue. Trustees should complete an ESS1 even when there has been no activity during the year of assessment. The trustee should indicate that it is a "nil" return on ROS when filing the ESS1.

10.6.10.2 Form 1

The trustees of an approved profit sharing trust are under the same obligations as any other trustees of any other trust. This means that the trustees are also required (under section 890 TCA 1997 as applied by section 894(3) TCA 1997) to make an annual return of any income or gains arising to the trust on Form 1 on or before 31 October.

10.6.10.3 DAC2-CRS and FATCA

A trust established for the purposes of an approved profit sharing scheme is considered an "Excluded Account" for DAC2-CRS purposes and an "Excluded Product" for FATCA purposes.

Specifically, for DAC2-CRS it comes within the definition of a "non-retirement tax-favoured account" under Subparagraph C(17)(b), Section VIII of the Standard for Automatic Exchange of Financial Account Information in Tax Matters ("the Standard"). For FATCA it has been listed in Annex II paragraph III B of the FATCA Intergovernmental Agreement (IGA) as an Excluded Product.

The trust is considered a Financial Institution under the Standard and the IGA, it should be registered for FATCA and DAC2-CRS. As the trust is set up for a single purpose i.e. for the specific profit sharing scheme, then the trust only holds non-reportable Financial Accounts and is obliged to file a nil DAC2-CRS return and a nil FATCA return. If there was some circumstance in which the trust also held a reportable account, that account should be reported on the DAC2-CRS return and/or FATCA return.

Trustees for an APSS can be individual and/or corporate trustees. If a corporate trustee is a Financial Institution for CRS-DAC2 and/or FATCA in its own right, then it must separately register for DAC2-CRS and/or FATCA and file accordingly.

The Standard and TDM Part 38-03-26 'Filing Guidelines for DAC2-Common Reporting Standard (CRS)' provide further guidance on the DAC2 reporting requirements. TDMs Part 38-03-22 - 'Guidance Notes on the Implementation of Foreign Account Tax Compliance Act (FATCA) in Ireland' and 'Part 38-03-25 - Filing Guidelines for Foreign Account Tax Compliance Act (FATCA)' provide further guidance on the FATCA reporting requirements.

10.6.11 Surcharge on Undistributed Income of the Trust

Where the trustees of an APSS acquire shares and within a period of 18 months beginning with the date of acquisition of those shares, the trustees appropriate the shares to the participants under the scheme, then any dividends received by the trustees in respect of the shares for the period prior to appropriation are not liable to a section 805 TCA 1997 surcharge.

For the purposes of determining whether shares are appropriated within the 18 months period, the first-in-first-out rule should be applied.

10.6.12 Capital Gains Tax

The trustees of an APSS are exempt from Capital Gains Tax on any gains arising on the appropriation of shares to participants where the shares are appropriated within 18 months of acquisition.

For the purposes of determining whether shares are appropriated within the 18 months period, the first-in-first-out rule should be applied.

10.7 Conditions Regarding Shares

10.7.1 Introduction

To ensure that the shares acquired by the participants in an APSS are ordinary shares with normal rights attaching to them, the legislation provides that only certain types of shares may be used for the purposes of a scheme.

10.7.2 Types of Shares that may be Used

The shares must form part of the ordinary share capital of:

(a) the company which has established the profit sharing scheme,

(b) a company which has control of the company concerned,

(c) a company which either is or has control of a company which –

- is a member of a consortium owning either the company concerned or a company having control of that company, and
- beneficially owns not less than 15% of the ordinary share capital of the company so owned, or

(d) a company which issued the shares to the trustees of an ESOT in an exchange to which section 586 TCA 1997 applied, where these shares were transferred to the trustees of an APSS by the trustees of the ESOT.

A reference to shares in (d) above includes a reference to shares acquired by the trustees of an ESOT (as a result of a company reorganisation to which section 584 TCA 1997 applies) which replaced shares or "specified securities" the ESOT previously acquired as a result of an exchange to which section 586 TCA 1997 applies.

"Specified securities" are securities other than ordinary shares, which were transferred to the trustees of the APSS by the trustees of an ESOT, which itself acquired those securities by way of an amalgamation to which section 586 TCA 1997 applies. It also includes securities which replaced these securities as a result of a company reorganisation under section 584 TCA 1997 as well as any further securities acquired using dividends on the securities previously acquired.

10.7.3 Further Conditions Regarding Shares

The shares must be:

- shares of a class quoted on a recognised stock exchange,
- shares in a company not under the control of another company, or

- shares in a company under the control of a company (other than a company which is, or if resident in the State would be, a close company (within the meaning of section 430 TCA 1997)) whose shares are quoted on a recognised stock exchange.

The shares must be:

- fully paid up,
- not redeemable, and
- not subject to any restrictions other than restrictions which attach to all shares of the same class or permitted restrictions.

10.7.4 Permitted Restrictions

The shares may be subject to a restriction which is imposed by the company's Constitution /Articles of Association requiring employees/ directors of the company (or of any other company controlled by that company) to dispose of their shares when they cease to be employees/ directors, and individuals who are not, or have ceased to be, such employees/ directors to dispose of, on acquisition, shares which they have acquired in pursuance of rights or interests obtained by them.

The disposal must be by way of sale for money and on terms specified in the Constitution /Articles of Association. The same terms for disposal must apply to all shares of the same class.

In deciding if scheme shares that are (or are to be) acquired by any participant are subject to any restriction, any contract, agreement, arrangement or condition is regarded as a restriction, if it-

- restricts freedom to dispose of the shares, any interest in the shares, or the proceeds from the sale of the shares.

- restricts freedom to exercise any right conferred by the shares.

- would cause any disadvantage to the participant, or any connected person, if shares were disposed of or any right conferred by them was exercised.

10.7.5 Requirement Regarding the Majority of Shares

Except where the scheme shares are in a company whose ordinary share capital, at the time of the acquisition of the shares by the trustees, consists of shares of one class only, the majority of the issued shares of the same class must be held by persons, other than:

- persons who acquired their shares in pursuance of a right conferred on them or an opportunity afforded to them as an employee/ director of the company concerned, or any other company and not in pursuance of an offer to the public (e.g. shares acquired by participants of an APSS).

- Trustees holding shares on behalf of persons who acquired their beneficial interests in the shares in pursuance of such a right or opportunity as is mentioned above (e.g. trustees of an APSS).

- companies which have control of the company whose shares are being used for the purposes of the profit sharing scheme or of which that company is an associated company, where the shares are not quoted on a recognised stock exchange but are shares in a company which is under the control of a company whose shares are quoted on a recognised stock exchange.

10.7.6 Prohibited Shares

With effect from 4 February 2010, the shares must **not** be shares: -

- in a service company, or

- in a company that has control of a service company, where the company (i.e. the company that has control of the service company) is under the control of the same person(s) as that of the service company.

10.7.7 Meaning of a Service Company

A service company is defined in para 8B of Schedule 11 as a company whose business is the provision of the services of persons employed by it and the majority of those services are provided to:

- a person or two or more persons who together control the company.

- an associated company.

- an associated partnership.

A company is associated with another company where both companies are under the control (within the meaning of section 432 TCA 1997) of the same person or persons or where both companies act in pursuit of a common purpose, or where a person or persons with a reasonable commonality of identity have or had the power to determine the trading operations of both companies, or have control of the company.

An associated partnership means where the partnership and the service company act in pursuit of a common purpose.

A reference to a partnership includes a reference to a person. Where a partner or a partner together with other persons has control of a company, then the partnership is to be treated as having control of that company.

10.7.8 Declaration regarding the shares

When seeking approval for a profit sharing scheme, a company must forward to Revenue a declaration to the effect that the shares to be appropriated to the participants under the scheme comply in all respects with the provisions of Part 3, Schedule 11, TCA 1997. The declaration must be on company headed notepaper and signed by the Company Secretary of the company whose shares are to be used for the purposes of the scheme.

The declaration must also specify:

- which of the conditions in paragraphs 8 to 9, Part 3, Schedule 11, TCA 1997 are met and how they are met, and
- that the requirements of paragraph 10 & 11, Part 3, Schedule 11, TCA 1997 are complied with.

10.7.9 Valuation of Unquoted Shares

The value of a shareholding in an unquoted company depends on many factors. For example, the value will depend on the business sector/industry, the net assets of the business, the profitability of the business and its future prospects in the marketplace. Revenue expects that in valuing the shares the company should use a valuation method which complies with relevant accounting standards. Revenue will not provide an opinion regarding company specific share valuations.

10.8 Conditions Regarding Participants

10.8.1 Introduction

The legislation on approved profit sharing schemes provides that participation in such a scheme must be open to all "eligible employees" and provides for certain obligations on those eligible employees who do participate in the scheme.

10.8.2 Who Must be Allowed to Participate?

Participation in an APSS must be open at each appropriation date to every person who-

- is then an employee or "full-time director" of the company (or a Participating Company, in the case of a group scheme),
- has been such an employee or full-time director during a qualifying period not exceeding 3 years, and
- is chargeable to income tax in respect of that office or employment under Schedule E.

Reference to an employee includes full-time, part-time and temporary employees.

A "full-time" director is a director who is required to devote substantially the whole of his or her time to the service of the company.

10.8.3 Who May be Allowed to Participate?

An approved profit sharing scheme may also allow the following categories of individuals to participate:

- part-time directors;
- employees or directors who have worked for the company for less than the required qualifying period;
- employees /directors who are not chargeable to tax in respect of their office or employment under Schedule E (i.e. those for which PAYE Exclusion Orders are in place); or
- former employees/ directors who left the company within the preceding 18 months.

All employees/directors meeting the qualifying conditions must be eligible to participate on similar terms. The minimum service requirement can be set by the company and cannot exceed 3 years. This does not mean that every participant must be allocated the same number of shares. A scheme may provide for the

appropriation of shares to participants by reference to their levels of remuneration, their length of service or similar factors. Where levels of remuneration are used these should relate to basic remuneration. Any fluctuating emoluments must be excluded i.e. overtime, bonuses etc. Shift premium payments are treated as part of basic salary for this purpose. Where there is an appraisal scheme in operation for all employees in a company, and that scheme is considered by Revenue to be objective, non-discriminatory and in accordance with the "similar terms" provisions of the legislation, shares can be appropriated on the basis of the results of that appraisal scheme. The question of whether a scheme is open to all participants on similar terms can only be finally determined by reference to the rules of the particular scheme.

10.8.4 Participation by Directors and Employees is Voluntary

While all eligible employees must be allowed participate in an APSS, participation in the scheme is voluntary. A director/ employee may choose not to participate.

10.8.5 Who Cannot Participate?

An APSS must not allow shares to be appropriated to an individual at a particular time –

(a) unless at that time or within the preceding eighteen months the individual was a director or employee of the company which has established the scheme, or, if the scheme is a group scheme, of a participating company.

(b) unless the shares were transferred to the trustees of the approved profit sharing scheme by the trustees of an ESOT and the individual is at that time, or was within the preceding 30 days, a beneficiary of that ESOT;

(c) if at that time, the individual has already had shares appropriated to him or her during the year under another approved profit sharing scheme established by-

(i) the company concerned, or

(ii) a company which controls or is controlled by that company or which is controlled by a company which also controls that company, or

(iii) a company which is a member of a consortium owning that company or which is owned in part by that company as a member of a consortium,

unless any of the companies referred to in subparagraphs (i) to (iii) inclusive above, is taken-over by another company under a scheme for reconstruction or amalgamation (within the meaning of section 587 TCA 1997) – in this situation the annual limit applying to the aggregate value (€12,700) of the shares appropriated under both schemes cannot be exceeded;

(d) if the individual, at that time has, or at any time in the previous 12 months had, a "material interest" in a close company which is either the company whose shares are to be appropriated, or which has control of the company whose shares are to be appropriated, or is a member of a consortium which owns that company.

An individual has a "material interest" in a company if he or she, either on his or her own or with any one or more of his or her associates, or if any associate of his or hers with or without any such other associate, is the beneficial owner of, or is able, directly or through the medium of other companies or by any other indirect means, to control more than 15% of the ordinary share capital of the company.

10.8.6 Qualifying Period

An APSS may contain a rule that to be eligible to participate, employees/ directors must have a minimum period of service with the company at the appropriation date. If such a qualifying period is set, it cannot exceed 3 years.

Under the rules of some APSS, service with a company within the same group as the company operating the scheme is considered to be service for this purpose, notwithstanding that the other company may not be a participating company in the APSS.

In other cases, service with a company that is not within the group is taken into account. This may occur where the company operating the APSS acquires part of a business of another unconnected company and it wishes to accumulate the service with that company for the purposes of determining the length of service.

In either case this is acceptable provided that it is clearly set out in the rules of the scheme and applies to all eligible employees and directors.

In other instances, the APSS may refer to service with a company, which is not within the group. This will occur where part of a business of another unconnected company is acquired and the company wishes to accumulate the service with the unconnected company for qualifying purposes.

This is acceptable provided the rules of the scheme are drafted to take account of this, by specifically referring to other companies in the group or the specific company in which service may be accumulated.

10.8.7 Contract of participation

An employee/ director participating in an APSS must contract with the company:

(a) to permit the shares to remain with the trustees for the period of retention;

(b) not to assign, charge or otherwise dispose of his or her beneficial interest in the shares during that period;

(c) if he or she directs the trustees to transfer the shares to him or her after the period of retention but before the release date, to pay to the trustees before the transfer takes place, a sum equal to income tax at the standard rate on the appropriate percentage of the locked-in value of the shares at the time of the direction; and

(d) to agree not to direct the trustees to dispose of his or her shares before the release date except by sale for the best consideration in money that can reasonably be obtained at the time of sale.

10.9 Basis of Calculation of Entitlement under a Scheme and Similar Terms

10.9.1 Examples of Basis of Calculation of Entitlement

The following are some examples of how a participant's entitlement to shares under an APSS may be calculated.

Participants may receive:

- The same number of shares.
- A number of shares for each year of service.
- A number of shares by reference to a fixed percentage of their basic remuneration.
- A number of shares in the ratio of their salary to the salary of all participants.
- A number of shares based on the results of a Performance Appraisal Scheme.

10.9.2 Entitlement Based on Levels of Remuneration – Meaning of Remuneration

Where levels of remuneration are used for the purposes of calculating a participant's entitlement under an APSS (e.g. where a participant is entitled to receive a number of shares by reference to a % of his/her salary), these should relate to basic remuneration only. Any fluctuating emoluments must be excluded (i.e. overtime, bonuses etc.). Shift premium payments may be treated as part of basic salary for this purpose.

10.9.3 Entitlement Based on Performance Appraisal Schemes

Where there is a performance appraisal scheme in operation for all employees in a company, and that scheme is considered by Revenue to be objective and non-discriminatory, shares may be appropriated on the basis of the results of that performance appraisal scheme.

Where a company intends using such a scheme as the basis of calculation of entitlement for the APSS, copies of all forms etc. used for the performance appraisal scheme, together with an example of how it operates in practice, must be submitted to Revenue as part of the approval process.

10.9.4 Entitlement Based on Age, Status or Grade

Calculation of a participant's entitlement under an APSS by reference to the age of the participant or the status (e.g. seniority) or grade of the participant is not permissible.

10.9.5 Use of Bonuses and Sales Commission

Revenue will allow certain bonuses and sales commission to be used for the purposes of an APSS and to form the basis of participants' entitlements under the scheme. The below sets out the position in relation to different types of bonuses.

10.9.5.1 Fixed Bonuses

Fixed bonuses **cannot** be used for the purposes of an APSS. A fixed bonus is as a bonus to which an employee has a contractual entitlement (written or implied), for example, a fixed amount of bonus provided for under an employee's contract of employment.

10.9.5.2 Discretionary Bonuses

Revenue are prepared to allow discretionary bonuses to be used by a company for the purposes of an APSS and to form the basis of participants' entitlement under the scheme where such bonuses are available to all eligible employees/ directors.

A discretionary bonus is a bonus where both the payment and the amount are determined at the discretion of the employer and the employee does not have a contractual right (written or implied) to the bonus. Revenue are however prepared to accept that, for this purpose, an employee will not be treated as having a contractual right to a bonus solely because the bonus becomes payable on specified performance criteria being met under a company performance scheme/individual performance appraisal scheme.

Where a company intends using discretionary bonuses for the purposes of a scheme, full particulars (including copies of all appraisal forms used in the case of individual performance appraisal schemes and an example of how the scheme operates in practice) must be sent to Revenue when application for approval of a scheme, or application for approval of amendment to an existing scheme, as the case may be, is being made.

10.9.5.3 Sales Commission

Where a company operates a sales commission payment scheme for sales staff and a separate discretionary bonus payment scheme for non-sales staff, Revenue are prepared to allow a company to use sales commission commensurate with the general level of discretionary bonus payable to other employees to form the basis of Participants' entitlements under the scheme. Where a company intends using sales commission for the purposes of a scheme, full particulars must be sent to Revenue.

10.9.5.4 Team Bonuses

Revenue will allow team bonuses to be used for the purposes of an APSS and to form the basis of entitlement under the scheme, where they are satisfied that:

- the team bonus is not a fixed bonus.
- the team performance measures are based on business results or other objective tests.
- where there are different teams with different targets, the measurement of the achievement of those targets and the ratings applied to the achievements are comparable, and
- there are equal opportunities for all teams.

Where a company intends using team bonuses for the purposes of a scheme, full particulars must be sent to Revenue as part of the approval process.

10.10 Salary Forgone and Contributory Schemes

10.10.1 Introduction

Revenue will consider approving a profit sharing scheme which includes a facility for participants to forgo part of their salary in order to increase their entitlement under the scheme. Revenue will also consider approving a scheme which requires participants to acquire shares out of their own resources in order to acquire free shares under the scheme. These are generally referred to as "contributory schemes".

10.10.2 Guidelines on Salary Forgone

Each scheme must be considered by reference to its own particular rules, but the following general guidelines are used by Revenue when considering approval of a salary forgone element in a profit sharing scheme:

- salary forgone must form only a subsidiary element of the overall scheme.
- salary forgone must be optional for each participant.
- the maximum amount of salary that may be forgone is the lower of the value of the company's contribution to the scheme and 7.5% of basic salary.
- where it is intended to include a provision for a minimum amount of salary to be forgone, that minimum amount cannot exceed the lesser of €127 or 1% of basic salary.
- where varying percentages are included in a scheme the same choice must be given to all participants.
- in respect of each participant there must be at least a 1:1 ratio between the shares appropriated using monies provided by the company and shares appropriated in lieu of salary forgone.

10.10.3 Practical Operation of Salary Forgone

One of the fundamental principles of the legislation on approved profit sharing schemes is that all eligible employees and directors must be allowed to participate in the scheme on similar terms. This means that on each date that a company makes an appropriation of shares, all eligible employees and directors must be treated on similar terms. This in turn means that shares appropriated in lieu of salary forgone should be appropriated at the same time as shares funded by other monies provided by the company.

In exceptional circumstances where it is not possible to appropriate shares in lieu of salary forgone at the same time as shares funded by monies provided by the company, the following procedure may apply:

- monies to be used for shares in lieu of salary forgone may be deducted from a participant's salary over a period of time and used to purchase shares in lieu of salary forgone, at a time after shares are appropriated funded with monies by the company, provided this is in the same tax year.
- the value of shares appropriated in lieu of salary forgone must not exceed the limits set out in section 10.10.2 above.
- the value of shares appropriated in lieu of salary forgone must not exceed the value of shares funded by other monies provided by the company in that tax year.
- in no circumstances may shares in lieu of salary forgone be appropriated prior to shares funded by other monies provided by the company in any tax year.

10.10.4 Contributory Schemes

A scheme which requires participants to buy shares out of their own resources in order to receive free shares under a scheme (usually called a "contributory scheme") may be approved. This is where participants are required by their employer company to purchase shares out of their own resources in order to receive matching shares (at no cost to the participant) under a scheme.

Each scheme must be considered by reference to its own particular rules, but the following general guidelines are used by Revenue when considering approval of a contributory scheme:

- the contributory amount must form only a subsidiary element of the overall scheme.
- the maximum amount of shares purchased by the participant out of his/her own resources cannot exceed 7.5% of basic salary.
- where a company intends to include a minimum amount in respect of a participant's contribution that minimum amount cannot exceed the lesser of €127 or 1% of basic salary.
- each participant must receive at least 1 free share for each share purchased.
- while the 'purchased' shares do not form part of an APSS, they must be retained for the employee by the trustees of the scheme for a minimum period of two years (i.e. the Period of Retention").

10.10.5 Practical Operation of Contributory Schemes

Where a contributory scheme operates, the employee/ director's contribution is generally deducted from his or her net salary on a monthly basis. Where the amount of the employee/ director's contributions (against which the company will give matching shares) is not sufficient to purchase a number of whole shares on a particular appropriation date, any surplus contributions may be carried forward to the next appropriation date within the same tax year, subject to the following conditions:

- the surplus contributions carried forward when added to the employee's or director's normal monthly contribution cannot exceed the maximum allowable monthly contribution (the maximum allowable contribution will be specified in the rules of the APSS, but, bearing in mind that there must be at least a 1:1 ratio between the number of matching shares appropriated under the approved profit sharing scheme and the number of shares purchased by the participant, the maximum monthly contribution cannot in any event exceed €529.16)

- the participant must agree to the carrying forward of the contributions

- the monthly contributions must be fixed at the beginning of the year and cannot be varied from month to month.

- the employee/ director must agree to the carrying forward of the contributions.

- any contributions which have not been used during the tax year must be repaid to the participants prior to the end of the tax year.

The approval of such "contributory" schemes is concessional and therefore subject to review.

10.11 Annual Limit, Excess and Unauthorised Shares

10.11.1 Introduction

There is a limit on the value of shares that a participant can acquire under an APSS in any tax year. Where the total of the initial market value of the shares appropriated to a participant exceeds the annual limit, the shares that cause the limit to be exceeded are known as "excess shares". Shares allocated to an individual who was not eligible to participate in the scheme are known as "unauthorised shares".

10.11.2 Limit on the Value of Shares Appropriated

The maximum value of shares which may be appropriated to any participant in any tax year is €12,700 [this includes shares funded by bonuses and salary forgone, free shares and matching shares (in the case of a contributory scheme)]. Shares acquired under the salary forgone element of a scheme and free shares acquired under a contributory scheme all count towards this annual limit.

There is no minimum limit on the value of shares that may be appropriated to a participant.

In certain limited circumstances, this annual limit of €12,700 may be increased to €38,100. The circumstances are where the shares were transferred to the trustees of the APSS by the trustees of an ESOT and the following conditions are satisfied:

(a) at each time in the 5 years or such lesser period as the Minister for Finance may prescribe, commencing with the date of the establishment of the ESOT, 50% or such lesser percentage as the Minister for Finance may prescribe, of the securities retained by the trustees at the time they were pledged by them as security for borrowings,

(b) at the time of the transfer referred to in (a), a period of at least 10 years (or such lesser period (not being less than the period referred to in (a)) as Revenue may allow) commencing on the date the ESOT was established and ending at the time when all shares pledged as security for borrowings by the trustees of the ESOT became unpledged (encumbered period) has elapsed, and

(c) no shares which were pledged, at any time since the trust was established, as security for borrowings by the trustees of the ESOT.

This €38,100 limit must only be applied in the first year of assessment during which the encumbered period has lapsed and only in respect of shares appropriated after that date.

10.11.3 Excess Shares and Unauthorised Shares

Where the total of the initial market value of all shares appropriated to an individual in a year of assessment exceeds the annual limit, the shares that cause the annual limit to be exceeded, are "excess shares".

In the rare event of simultaneous appropriations under more than one approved scheme, the rule is that the same proportion of shares under each scheme is to be regarded as excess shares.

Shares appropriated to an individual at a time when that individual is not eligible to participate in a scheme are "unauthorised shares".

10.11.4 Income Tax Treatment of Excess and Unauthorised Shares

Excess and unauthorised shares are treated differently than other shares for tax purposes.

- the locked-in value of such shares at any time (e.g. when they are disposed of) is their market value at that time,
- the initial market value and the effect of any capital receipts which are normally deductible in computing the locked-in value are disregarded (see section 10.13 for more information on capital receipts), and
- the appropriate percentage is always 100%.

The effect of this is that when excess or unauthorised shares are disposed of, the whole of the proceeds of sale or the market value of the shares, if it is not an arm's length sale, are chargeable to income tax at the time of disposal.

10.11.5 Identification of Shares

When a participant who has been appropriated excess or unauthorised shares disposes of some shares he or she is treated as disposing of shares which are not excess or unauthorised shares before shares which are. This is subject to the first-in-first-out identification rule and overrides any direction given to the trustees by a participant.

Example

100 shares are appropriated to a participant on 1 January 2017. The initial market value of the shares at that date is €5 per share. On 1 January 2018, a further 50 shares were appropriated to the employee at a time that he was ineligible to participate. The market value of the shares at that date was €6 each.

On 1 March 2019, 120 shares were disposed of at €10 each (which is the market value of the shares at that date).

Applying the first-in-first-out rule, the 120 shares disposed of comprise of 100 appropriated on 1 January 2017 and 20 unauthorised shares appropriated on 1 January 2018.

Normal scheme shares
Income tax charge on the Locked-in value - €500 x 100% = €500
as this is lower than the disposal proceeds (€1,000)

Unauthorised shares
Income tax charge on the disposal proceeds €200 x 100% = €200

If the remaining 30 unauthorised shares are still retained at the release date, they are treated as having been disposed of immediately before that date, at their market value at that time and income tax is chargeable accordingly.

10.11.6 Excess or Unauthorised Shares Held at Release Date or Date of Death

Excess or unauthorised shares still held at the earlier of the release date or the date of the participant's death are treated as having been disposed of immediately before that date, at their market value at that time and income tax is chargeable accordingly.

10.12 Tax Implications of Appropriation, Disposal and Transfer of Shares

10.12.1 Introduction

This section sets out the income tax, USC, PRSI and capital gains tax implications on the appropriation, transfer and disposal of shares acquired by a participant under an APSS.

10.12.2 Appropriation of Shares

A participant is not liable to income tax on the value of shares at the date of appropriation. However, with effect from 1 January 2011, a participant is liable in respect of PRSI and the USC on the value of the shares at the date of the appropriation. Employer PRSI does not apply to share-based remuneration.

Employers must include the employee PRSI and USC due in the Relevant Payroll Notification and pay the Collector General by the payment date for the relevant month.

On the disposal/transfer of these shares after the end of the period of retention but before the release date, there will be no liability to PRSI/USC as this will have been paid at the time the shares were appropriated.

10.12.3 Disposal of Shares during Period of Retention

A participant in an APSS may not generally sell or transfer any shares acquired under the scheme during what is known as the period of retention. However, see the exception in section 10.14.2 in relation to disposals in the case of company reconstruction or amalgamation).

The period of retention is generally a period beginning on the date on which the shares are appropriated to a participant and ending on the second anniversary of that date.

However, there are exceptions to this general rule in the case of a disposal arising on death, cessation of employment on account of injury, disability of redundancy (within the meaning of the Redundancy Payments Acts 1967-2014), persons reaching pensionable age and in the case of the disposal of shares which were previously held in an ESOT (see definition of period of retention in section 10.2.8).

The disposal or transfer of shares during the period of retention can result in the withdrawal of approval of the scheme.

10.12.4 Disposal of shares after the end of the Period of Retention but before the Release Date

A participant in an APSS may sell or transfer his or her shares after the period of retention but before the release date. However, if shares are sold or transferred after the period of retention but before the release date, the participant will be liable to income tax on the appropriate percentage of the lesser of the locked-in value of the shares and the disposal proceeds or in the case of a transfer, the market value of the shares at the date of transfer.

10.12.5 Release Date

The release date is generally the third anniversary of the date on which the shares are appropriated to a participant (periods during which the shares were held in an ESOT are counted for this purpose – see definition of release date in section 10.2.9).

10.12.6 Appropriate Percentage

The appropriate percentage is 100%, except where the shares are disposed of-

- on the cessation of the participant's employment by reason of injury, disability or on account of dismissal by reason of redundancy, within the meaning of the Redundancy Payments Act, or
- on the participant reaching pensionable age.

In these circumstances, the appropriate percentage is 50%.

Example 1

1,000 shares are appropriated to a participant on 1 January 2016. The initial market value of the shares at that date is €3 per share. The shares are disposed of on 31 March 2018 for €2 each.

The disposal proceeds, €2,000, are less than the locked-in value of €3,000, therefore income tax is chargeable under Schedule E on 100% of the disposal proceeds - €2,000 – and PRSI and USC are also chargeable on this amount.

Example 2

500 shares are appropriated to a participant on 1 January 2017. The initial market value of the shares at that date is €3 per share. The shares are disposed of on 31 March 2019 for €5 each.

The locked-in value, €1,500, is less than the disposal proceeds - €2,500, therefore income tax is chargeable under Schedule E on 100% of the Locked-in value - €1,500 PRSI and USC are also chargeable.

10.12.7 Different Appropriation Dates

Shares can be appropriated to participants at different times. Where there is a disposal from a holding which comprises shares appropriated at different times, the disposal is treated as being of shares which were appropriated earlier before those which were appropriated later. This overrides any specific direction given by a participant to the trustees.

10.12.8 Disposal of shares in non-arm's length transaction

Where shares are disposed of otherwise than at arm's length, the market value of the shares disposed of will be substituted for the amount of the sale proceeds for the purpose of calculating the charge to income tax.

10.12.9 Death of a Participant

If a participant dies while the trustees are holding the shares on his or her behalf, the period of retention immediately comes to an end even if the shares have been held for less than two years. The participant's personal representatives can sell or transfer the shares and no income tax is payable.

10.12.10 Transfer of Shares

After the period of retention and before the release date, a participant may direct the trustees to transfer the shares to him or her. However, the participant must pay to the trustees, before the transfer takes place, a sum equal to income tax at the standard rate on the appropriate percentage of the locked-in value of the shares at the time of direction.

The participant will be entitled to credit for the tax so paid against his or her final liability to income tax on the transfer of the shares. This liability is calculated by reference to the appropriate percentage of the lesser of the locked-in value of the shares and the market value of the shares at the date of transfer.

Example 1

1,000 shares are appropriated to a participant on 1 January 2017. The initial market value of the shares at that date is €3 per share. The participant requests the trustees to transfer the shares to her on 31 March 2019 at which time the shares are valued at €5 each.

On the transfer the participant must pay the trustees €600. The participant will be entitled to a credit for this tax against his or her final liability to income tax on the shares.

Final liability

Schedule E	100% of locked-in value*	€3,000 at say 40%	€1,200
	Credit for tax paid on transfer		€600
	Additional income tax due		€600
	USC due 600 x (say) 4.75%		€29
	PRSI due 600 x 4%		€24
	Total due		€653

* Locked-in value is less than the market value of the shares at the date of transfer

Example 2

1,000 shares are appropriated to a participant on 1 January 2016. The initial market value of the shares at that date is €5 per share. The participant requests the trustees to transfer the shares to her on 31 March 2018 at which time the shares are valued at €3 each.

On the transfer the participant must pay the trustees €1,000. The participant will be entitled to a credit for this tax against his or her final liability to income tax on the shares.

Final liability
Schedule E

100% of market value of the shares*	€3,000 at say 40%	€1,200
Credit for tax paid on transfer		€1,000
Additional income tax due		€ 200

* The market value of the shares at the date of transfer is less than the Locked-in value.

10.12.11 Capital Gains Tax

The normal capital gains tax (CGT) rules apply to the disposal of shares acquired under an APSS. The base cost for CGT purposes is the initial market value of the shares at the date they are appropriated to the participant.

Where the shares to be disposed of are shares which the participant received through his participation in an approved ESOT, the CGT arising on the disposal is calculated by reference to the disposal proceeds less the market value of the shares when they could have first been transferred to the APSS under the terms of the ESOT.

10.12.12 Participants Omitted from Appropriation

Revenue is aware of cases where, due to an administrative error by the employer or service provider, a participant is unintentionally excluded from a bulk purchase and appropriation of scheme shares. Revenue cannot agree to any request for a participant who is granted shares at a later date to be treated as having been appropriated shares at the same earlier date as other participants. This would create an artificial tax event and no legislative provision allows this. Revenue will allow late appropriations on a case by case basis however these appropriations must take place on an actual basis i.e. the number of shares to be appropriated must be based on the initial market value of shares at the once off purchase date / actual date of appropriation. The period of retention and the release date must run from the actual appropriation date.

This position must be applied in order that all subsequent tax liabilities arising are dealt with correctly. For example, where a participant sells their shares following the release date the actual details of the share purchase must be used for capital gains tax purposes in terms of the initial market value at the appropriation date. It would not be correct to artificially allow an earlier purchase date and a lower base cost.

Example

X Ltd appropriates shares to its participants on the 15th of December 2019. Due to an administrative error on the part of the company a participant is omitted from this appropriation.

The omission is noticed on the 15th of January 2020 and shares are appropriated to the participant on this date. The market value of the shares for future use is the market value of the shares at the actual appropriation date. The date of appropriation is recorded as the 15th of January 2020. The total market value of all shares appropriated to the participant in 2020, including those appropriated on the 15th of January, must not exceed €12,700.

10.13 Capital Receipts

10.13.1 Introduction

During the period that shares are held on behalf of a participant by the trustees of an APSS, the trustees or participant may become entitled to receive money or money's worth in respect of the shares. These sums are described as capital receipts. An income tax charge under Schedule E arises on the capital receipts.

10.13.2 Money or Money's Worth not Treated as Capital Receipts

Money or money's worth does not constitute a capital receipt to the extent that:

- it already constitutes income in the hands of the participant for income tax purposes (e.g. dividends on scheme shares).
- it consists of the proceeds of a disposal of scheme shares.
- it consists of new shares issued under a company reconstruction or amalgamation and which were issued in respect of, or otherwise represent, the original shares.
- it consists of the proceeds of disposal of part of the rights arising under a rights issue if these proceeds are used to exercise other such rights, or
- the amount or value does not exceed €13.

10.13.3 Income Tax Charge

The amount chargeable to income tax is the appropriate percentage of the amount the participant receives. If the amount or value of the capital receipt exceeds the locked-in value of the relevant shares the charge to tax is restricted to the appropriate percentage of the locked-in value of the shares immediately before the entitlement. Immediately after a participant has become entitled to a capital receipt which is chargeable to tax the locked-in value of the shares giving rise to that entitlement is reduced by the amount of the capital receipt charged to income tax.

There is no charge on a capital receipt where the entitlement arises after a participant's death, or the amount or value of the receipt does not exceed €13.

Example

1 January 2017: 500 shares, valued at €1 each, are appropriated to a participant.

1 July 2018: Capital receipt of 10c per share received (€50 received).

1 January 2019: Capital receipt of €1 per share received (€500 received).

1 October 2019: The shares are sold for €3 each.

The locked-in value of the shares immediately before the first capital receipt is €500.

First capital receipt

There is an income tax charge under Schedule E for 2018 on the first receipt. Income tax is chargeable on €50 x 100% (€50).

The locked-in value of the shares immediately after the receipt is €500 – €50 = €450.

Second capital receipt

There is an income tax charge under Schedule E for 2019 on the second receipt. As the value of the receipt (€500) exceeds the locked-in value of the shares before the receipt (€450) the income tax charge is on the appropriate percentage of the locked-in value i.e. €450 x 100% (€450).

Immediately after the second receipt the locked-in value of the shares is NIL (€450 – €450) and so there is no income tax chargeable on the disposal of the shares on 1 October 2019.

10.14 Company Reconstructions and Amalgamations

10.14.1 Introduction

While scheme shares are held by the trustees, the shares may be the subject of a bonus or rights issue or a share exchange or the company may reorganise or reduce its share capital or may be subject to an amalgamation or a successful take-over offer. There are special rules to cater for these situations, to broadly ensure that the new shares acquired on a company reconstruction or amalgamation stand in the place of the original shares appropriated to a participant and are dealt with by the trustees in the same way as the original shares.

10.14.2 Disposal of Shares during the Period of Retention

Notwithstanding the general prohibition on the disposal of shares during the period of retention (see section 10.12.3), a participant may instruct the trustees to dispose of his or her shares during the period of retention in return for new shares, securities or cash in a company take-over or amalgamation. Any new shares or securities issued stand in the place of the original shares and are dealt with by the trustees in the same way as the original shares (however see section 10.14.3 below).

10.14.3 Reconstructions involving Repayment of Capital and Bonus Issue of Shares

Shares issued as part of a company reconstruction, which trigger a distribution charge in accordance with section 131(2) TCA 1997 (i.e. where there is a bonus issue of shares following repayment of share capital – see Tax and Duty Manual Part 06-02-02 for more details on distributions of this nature), should not be treated as standing in the place of the original shares in respect of which they were issued.

10.14.4 New Holding Equated with Original Holding

Where as a result of a reconstruction or amalgamation, there is a transaction in relation to any shares held on behalf of a participant which, for capital gains tax purposes, results in a new holding being equated with an original holding, the transaction is treated as not involving a disposal of the shares comprised in the original holding, and the date on which any new shares are to be treated as having been appropriated to the participant is the date on which the original shares were appropriated.

To determine whether or not the transaction falls within section 584 TCA 1997, the company may forward all documentation governing the transaction together with a brief outline of the steps involved and a synopsised diagrammatic representation of the company group organisational structure pre and post-restructure detailing shareholdings, etc.

10.14.5 Income Tax Charge on Disposal of Shares

When scheme shares are disposed of, the participant is liable to income tax on the appropriate percentage of the locked-in value of the shares. When there is a company reconstruction that involves the exchange of shares it is necessary to apportion the locked-in value of the old corresponding shares among the new shares.

The following steps should be taken to determine the amount chargeable to income tax:

- Ascertain the locked-in value, before the reconstruction, of the old corresponding shares which have the same locked-in value as each other.
- Distribute that locked-in value to any of the old shares, and the new shares, pro rata, according to their market value immediately after the reconstruction. Any subsequent income tax charged in respect of the shares in the new holding will be by reference to their locked-in value immediately after the reconstruction.

Example

On 1 January 2016, 500 shares valued at €1 each are appropriated to a participant.

On 1 July 2018, 200 shares, valued at €2 each are appropriated to the participant.

On 1 October 2018 there is a bonus issue of 1 for 2.

On 1 December 2018, 750 shares are sold for €3 each.

On 1 January 2020, 300 shares are sold for €4 each.

Following the bonus issue the new holding comprises:

- 700 corresponding shares (500 + 200)
- 350 new shares (250 + 100)

The locked-in values of the corresponding shares immediately before the bonus issue are as follows:

- 500 with locked-in value of €500
- 200 with locked-in value of €400

The locked-in values of the new shares immediately after the bonus issue are as follows:

- 500 + 250 = 750 shares with locked-in value of €500
- 200 + 100 = 300 shares with locked-in value of €400

Disposal of shares in 2018

As the shares are disposed of prior to the third anniversary of the date of appropriation, a charge to income tax arises on the disposal. The locked-in value is used as it is less than the disposal proceeds.

750 shares locked-in value	€500
Amount charged to income tax €500 x 100% =	€500

Disposal of shares in 2020

As the shares are disposed of prior to the third anniversary of the date of appropriation, a charge to income tax arises on the disposal. The locked-in value is used as it is less than the disposal proceeds.

300 shares locked-in value	€400
Amount charged to Income tax (USC and PRSI) €400 x 100%	€400

10.14.6 Capital Receipt and Shares

Where, as part of a company reconstruction, the trustees become entitled to a capital receipt in addition to new shares, the necessary adjustment to the locked-in value of the corresponding shares in respect of the capital receipt must be made before the locked-in value of the new shares is calculated. In other words, because the income tax charge on the capital receipt reduces the value of the corresponding shares, the locked-in value of the new shares must be determined by reference to that reduced amount.

Example

On 1 January 2016, 500 shares in company A valued at €1 each are appropriated to the participant.

On 1 July 2017, 400 shares in company A valued at €1 each are appropriated to the participant.

On 1 October 2018, Company A is taken over by company B. Shareholders are entitled to one share in company B and cash of 40c for every 2 shares in company A.

On August 2019, 300 shares in Company B are disposed of for €2 per share.

The capital receipt of 20c per share is treated as arising immediately before the takeover and the income tax charge for 2017 is as follows —

- 500 "A" shares appropriated on 1 January 2016 gives rise to a capital receipt of €100
- 400 "A" shares appropriated on 1 July 2017 gives rise to a capital receipt of €80

Income tax charge on capital receipt.

As the sum is received before the third anniversary of each appropriation, the appropriate percentage is 100% and the income tax charge is on—

500 shares - €100 @ 100%	€100
400 shares - €80 @ 100%	€80
Total	€180

Revised locked-in values immediately after the capital receipt

- 500 shares in Company A with locked-in value of €500 less capital receipt of €100 = €400
- 400 shares in Company A with locked-in value of €400 less capital receipt of €80 = €320

Locked-in value following the takeover

- 250 shares in Company B with locked-in value of €400
- 200 shares in Company B with locked-in value of €320

Income tax charge on disposal of shares

Using the "first-in-first-out" identification rule the 300 shares disposed of comprise:

- 250 shares in Company B with locked-in value of €400
- 50 shares in Company B with locked-in value of €80 (€320 x 50/200)

The locked-in value in both cases is less than the disposal proceeds, so this is used for the purposes of calculating the income tax charge.

There is no income tax charge on the disposal of the 250 shares as they are disposed of after the third anniversary of the date of appropriation. However, an income tax charge arises on the disposal of the 50 shares in Company B. The income tax charge is €80 x 100% = €80.

The remaining 150 shares in Company B with a Locked-in Value of €240 (€320 - €80) are deemed to have been appropriated on 1 July 2017.

10.14.7 Take-Overs Involving Cash Only Offer

Where the take-over offer allows for the exchange of shares for cash only, on application by the company, Revenue may agree to apply the treatment set out in section 10.14.4 where all of the following conditions are met:

- under the terms of the reconstruction the shares can only be exchanged for cash,
- the take-over company will continue the approved profit sharing scheme.
- all of the cash is retained by the trustees and is not passed to the participants, and
- the total sums are invested by the trustees without delay in shares in the take-over company.

10.14.8 Rights Issues

A rights issue occurs when a company offers to sell new shares to shareholders, often at a beneficial price, in proportion to their existing shareholding. It is a means of raising additional funds from shareholders to finance acquisitions or capital investments.

There are special rules for participants who wish to exercise their rights. If a participant directs the trustees to take up all or any of the entitlement to a rights issue, it is necessary to ensure, that when the shares which are subject of the rights issue are disposed of, the participant gets credit in calculating the charge to tax for any money paid to acquire the additional shares.

The rule is that, if at any time before disposing of the scheme shares, a participant has made a payment to acquire shares on a rights issue, the calculation made to determine whether the proceeds of the disposal are less than the acquisition cost will take into account the payments made by the participant.

This is achieved by reducing the proceeds of the disposal by the proportion of the amounts paid by the participant which the market value of the shares disposed of bears to the market value of the participant's total holding of scheme shares at the time of disposal.

Shares acquired under a rights issue must be held by the trustees in the same way as the original shares. The new shares are allocated on a pro-rata basis among the existing appropriations of scheme shares. The total locked-in value of each share is reduced.

There is no charge to income tax on the proceeds from the sale of some of the rights arising under a rights issue to the extent that the trustees, at the direction of the participant, use all the proceeds to take up the balance of the rights.

10.14.9 Direct Demergers

Ordinarily where there is a distribution in specie, the provisions of sections 586 and 587 TCA 1997 do not apply since both sections require that shares are issued.

This section sets out the tax treatment of a distribution in specie from a demerged company where shares have been appropriated to participants of an APSS and the Release Date for those shares has not been reached. The following treatment applies in circumstances where a company makes a distribution in specie to its shareholders consisting of shares in another company which is its 100% subsidiary.

10.14.9.1 Income Tax

An income tax charge will not arise on the distribution in specie when all the following circumstances apply:

- The distribution by the company consists of shares in another company that is its 100% subsidiary,
- The relevant scheme shares have been appropriated to participants of the APSS and the shares have not yet reached their Release Date,
- The scheme shares are retained by the trustees until their Release Date,
- The scheme is continued by the company, and
- The distributed shares are retained by the Trustees and not passed to the participants until the Release Date.

10.14.9.2 Capital Gains Tax

Where the above income tax treatment applies, the original base cost for capital gains tax purposes must be apportioned over the original and distributed shares by reference to their market value at the date of distribution of the shares.

10.14.9.3 Application for Foregoing Tax Treatment

Prior to applying the above treatment agreement must be approved by Revenue. Each case is reviewed on its individual facts. The following documents must be submitted for approval to be considered.

- A copy of the document covering the transaction,
- An outline of the mechanism (step by step) by which the proposed transaction will take place,
- A tax analysis of the transaction detailing the appropriate legislative provisions,
- Copies of any documents covering the transaction and showing how the shareholding percentages will be revised, and
- A synopsised diagrammatic representation of the group organisational structure both pre and post restructure.

10.14.9.4 Mature shares

In demerger/spinoff cases, participants may also hold mature shares in the demerged company, which were originally acquired through an APSS and held until after the Release Date or obtained through other means, for which they will receive a distribution in specie consisting of shares in another company.

TDMs Part 19-04-06, Part 19-04-10 and Part 19-04-11 set out further guidance on the application of sections 584, 586 and 587 TCA 1997 respectively with regards to company reconstructions.

Where a matter is not fully dealt with in Revenue's published guidance, technical queries regarding the tax treatment of mature shares may be referred to the Revenue Technical Service (see section 10.3.1).