

Transitional arrangements for property-based incentive schemes and certain industrial buildings

(Finance Acts 2004 and 2006)

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Introduction

Generally speaking, transitional arrangements in the case of the property-based incentive schemes refer to arrangements put in place in the context of extensions of the termination dates as part of the phasing out of the various schemes. The termination date is the date by which construction expenditure must be incurred if it is to qualify for tax relief.¹ Expenditure may be incurred after the termination date but it cannot qualify for relief. Expenditure is incurred when it is attributable to work that has actually been carried out.² The arrangements were designed to ensure that only those projects that were at a certain stage of development could benefit from the extended qualifying period, for example, a person may have been required to have entered into a binding contract with a builder or to have completed a certain amount of work by a specified date.

Since their introduction, most of the property-based incentive schemes and some of the industrial buildings have had their termination dates extended on several occasions and these extensions have been conditional on a variety of transitional arrangements being met. The arrangements introduced by Finance Acts 2004 and 2006 were the subject of several Tax Briefing articles.³ This instruction is essentially an amalgam of those articles. The table at the end summarises how particular schemes/buildings were affected.⁴ Separate instructions on the individual schemes and industrial buildings contain details of any relevant transitional arrangements (if any) for that particular scheme/building but do not go into the same level of detail as this instruction.

Where the word 'construction' is used, it also includes 'refurbishment' and, where appropriate, 'conversion'. The word 'building' also includes 'structure'.

1 Extension from 31 December 2004 to 31 July 2006

Prior to Finance Act, 2004 the termination date for most of the property-based incentive schemes was 31 December 2004. Finance Act, 2004⁵ extended this termination date to 31 July 2006.

¹ Capital allowances, section 23 or owner-occupier relief, as appropriate.

² This is an exception to the general rule that expenditure is incurred when it becomes payable.

³ Tax Briefing issues 60, 63, 64 and 65 contained articles on the various transitional arrangements.

⁴ Table taken from Tax Briefing 63, page 9.

⁵ Sections 25, 26 and 27 Finance Act, 2004.

1.1 Planning application received on or before 31 December 2004

The 31 July 2006 termination date applied only to projects in respect of which a valid application for full planning permission was received by the relevant local authority on or before 31 December 2004 and where the work to which the qualifying expenditure was attributable was covered by that particular planning application. The termination date continued to be 31 December 2004 where these two conditions were not met (but see section 1.2 for exceptions to the planning application condition).

The extension did not apply to projects where the application for planning permission was received after 31 December 2004. Nor did it apply where, for whatever reason, a further planning application for the project was submitted after that date. This is because the work to be carried out would be covered by that later application and not by the application that was submitted on time. A further planning application may have been required because, for example, the applicant made changes to the project as originally planned or the local authority was not satisfied with the application. Where work was carried out that was not covered by the planning application submitted on time, and without the need for a further planning application, the construction expenditure should be apportioned between the qualifying work (covered by planning application) and non-qualifying work (not covered by planning application).

Local authorities are precluded from accepting planning applications during the period 24 December to 1 January. Because applicants were not aware of this, Revenue agreed to regard planning applications acknowledged as received by local authorities on or before 7 January 2005 as meeting the statutory deadline of 31 December 2004.

1.2 Planning permission not required

Planning permission is not required for certain types of project. In such cases alternative arrangements applied. Work to the value of 5% of the development costs must have been carried out by 31 December 2004 and a detailed plan in relation to the development work and a binding written contract under which the expenditure was to be incurred must have been in place by that date.

1.3 Integrated area urban renewal scheme

Alternative arrangements applied for certain schemes that did not require the submission of a full and valid planning application on or before 31 December 2004. In the case of an urban renewal project, the relevant local authority was required to certify in writing on or before 30 September 2003 that 15% of the overall project costs had been incurred on or before 30 June 2003. A similar '15%' certificate was required on or before 31 December 2003 for costs incurred on or before 30 September 2003 in the case of a multi-storey car park. In the case of a third-level education building, an application must have been made to the Minister for Finance on or before 31 December 2004.

1.4 Sale of site/building

A person who owned a site or a building that was to be refurbished or converted may have sold the site/building after he/she had applied for or obtained planning permission. In such a situation the purchaser of the site/building is treated in exactly the same way as the original applicant/vendor and relief is only given to the extent that the work that was carried out on the project was that provided for in the original valid application for full planning permission received by the local authority on or before 31 December 2004.

1.5 Examples

The following examples are for illustrative purposes only and are not intended to convey any view on the workings and decisions of the planning process.

Example 1

Mrs. Murphy submitted a valid application for full planning permission for the construction of a house to a local authority under the rural renewal scheme on 1 December 2004. Planning permission was granted for the house on the basis of the planning application received and no revisions were required. If all work on the house was carried out on or before 31 July 2006 in accordance with the planning application the full amount of the expenditure incurred qualifies for relief.

Example 2

Mr. O'Brien submitted a full and valid planning application for the living over the shop scheme on 5 December 2004. The local authority was not satisfied with the size of the balcony and the refuse storage area that was proposed. However, it accepted the planning application but required Mr. O'Brien to provide additional balcony space and a covered storage area in the rear yard. The cost of constructing the additional balcony space and the covered storage area qualify for relief as this work was necessary to meet the local authority's requirements in relation to the valid planning application submitted before the deadline.

Example 3

Mr. Ryan submitted a full and valid planning application for an apartment block to be used as student accommodation on 20 December 2004. In April 2005 he decided to alter the project by adding an extra floor comprising four apartments. The local authority required him to submit a further planning application for the entire apartment block. None of the expenditure incurred on the apartment block can qualify for relief as work on the project will have been carried out in accordance with the second planning application submitted after 31 December 2004.

2 Extension from 31 July 2006 to 31 December 2006

Finance Act, 2006⁶ extended the termination date from 31 July 2006 to 31 December 2006 without imposing any new transitional arrangements. Projects that qualified for the 31 July 2006 termination date by meeting previously imposed conditions (see sections 1.1 to 1.4) automatically qualified for the 31 December 2006 termination date. Otherwise, the termination date continued to be 31 December 2004.

3 Extension from 31 December 2006 to 31 July 2008

Along with the extension from 31 July 2006 to 31 December 2006 where certain existing conditions were met (see sections 1.1 to 1.4), Finance Act, 2006 further extended the termination date to 31 July 2008 where certain new conditions were met. These new conditions were that a binding contract for the construction work must have been in place on or before 31 July 2006 and that work to the value of 15% of the overall project costs must have been carried out on or before 31 December 2006. Arising from E.U. Commission 'State Aid' rules more onerous arrangements applied to industrial/commercial projects than applied to residential projects.

Finance Act, 2006 also restricted the amount of construction expenditure that could qualify for tax relief. The full amount of the construction expenditure incurred during 2006 can qualify for relief. However, relief is restricted to 75% of the expenditure incurred in 2007 and 50% of the expenditure incurred in the period 1 January 2008 to 31 July 2008.

3.1 Binding contracts

In the case of industrial/commercial projects, a binding contract in writing, under which expenditure on construction work was to be incurred, must have been in place for the particular project on or before 31 July 2006. A binding contract was not required for residential projects.

3.1.1 Multiple v. single contracts

The 'binding contract' condition can be met, inter alia, where there was either a single global contract for the entire project or where individual contracts for various elements of the construction work were in place by 31 July 2006.

Where there was a single global contract for a project comprising several individual buildings, the 'binding contract' condition is regarded as satisfied for each individual building. Where there were separate contracts for each building, for example, building agreements with each investor, and no single global contract, each building agreement would have to have been in place on or before 31 July 2006.

⁶ Sections 25 to 34 Finance Act, 2006.

3.1.2 'Self-construction'

As the projects in question are industrial/commercial they are unlikely to have been undertaken by one person and would invariably have involved the engagement of third parties to carry out some, or all, of the construction work. In the exceptional situations where a site was owned by an individual/company and that individual/company used only his/her/its own employees to carry out the development, without recourse to third parties, Revenue regards the 'binding contract' condition as met where the site owner has sworn an affidavit, on or before 31 July 2006, stating that the entire development would be carried out by the site owner's own employees. The affidavit should also contain a statement about the degree to which arrangements were in place to begin work on the particular project at that time. The employees must have been employed directly by the site owner and not, for example, by an individual's development company where the site was owned by that individual.

3.1.3 Parties to contract

The binding contract must be one under which expenditure on the construction of the particular building(s) was incurred. It is a question of fact in each case whether the contract met this requirement. It was not necessary for the contract to provide for investor entitlement to the capital allowances. It was sufficient that it provided for a binding commitment to the actual construction expenditure. The legislation is silent about the parties to such a contract. The type of contract put in place would have depended on the type of project and the various parties involved in the development. It was not, therefore, possible to be prescriptive about the type of contract that Revenue would regard as satisfying the condition. Possible examples of acceptable contracts are a development agreement between a site owner and a development company that was responsible for delivering over a completed building, a building agreement between a site owner/development company and a builder or a building agreement between an investor and a development company/builder.

3.1.4 Documentation for investors/purchasers

A copy of the binding contract, or affidavit in the case of 'self-construction' projects, should be given to the investor(s)/purchaser(s) along with any other documentation that may be required to support a claim for capital allowances in the event of a Revenue audit.

3.2 '15% value of work' condition

Work to the value of 15% of the actual construction costs must have been carried out on or before 31 December 2006. This new '15%' condition should not be confused with the earlier 2003 '15% project cost' conditions that applied to the urban renewal and multi-storey car park schemes (see section 1.3).⁷ In the cases of nursing home residential units and the general countrywide refurbishment scheme, the extension to 31 July 2008 applies without having to satisfy this new '15%' condition.

3.2.1 Local authority certification

In the case of industrial/commercial projects the relevant local authority must have certified compliance with the '15% value of work' condition. An application for the local authority certificate must have been made on or before 31 January 2007. Where satisfied, local authorities must have issued certificates on or before 30 March 2007. Guidelines in relation to local authority certification have been issued by the Department of the Environment, Heritage and Local Government. A local authority certificate must contain the following information:

- A statement indicating whether the local authority was satisfied or not that work to the value of at least 15% of the actual construction costs was carried out on or before 31 December 2006,
- The actual amount of the capital expenditure incurred on or before 31 December 2006, and
- The projected balance of the expenditure to be incurred after 31 December 2006.

The amount of the qualifying expenditure incurred in 2007 and 2008 is then restricted to and cannot exceed the projected amount. That restricted amount is, in turn, subject to the 75% and 50% restrictions outlined in section 4. Where the projected expenditure is exceeded the qualifying expenditure is treated as incurred in 2007 (and thus subject to 75% rather than 50% restriction) to the fullest extent consistent with work having actually been carried out during that period.

3.2.2 Residential projects

While local authority certification is not required in the case of residential projects there is still a requirement for work to the value of 15% of the actual construction costs to have been carried out on or before 31 December 2006. Unlike industrial/commercial projects there is no restriction of relief where the actual expenditure exceeds the projected post-December 2006 expenditure, apart from the 75% and 50% limits for expenditure incurred in 2007 and 2008 respectively.

⁷ Further details available in the instructions on these particular schemes.

However, the satisfaction of the '15%' condition may be retrospectively affected depending on the extent to which the post-December 2006 projected costs are exceeded.

It is a statutory requirement that the person claiming relief be able to show that the '15%' condition has been met. Revenue expects that builders/developers will have provided investors/purchasers with a statement prepared by a quantity surveyor or architect (or similarly qualified person) clearly showing the work that was carried out on or before 31 December 2006, the construction costs attributable to this work, the projected construction costs to completion of the project and the percentage of the total figure represented by the work that was carried out on or before 31 December 2006. The statement should also contain the name and address of the individual/company that is carrying out the construction, the name and address of the development and the relevant scheme.

3.2.3 Attributable costs for '15%' test

The new '15%' condition relates to the degree to which work has been carried out as opposed to expenditure incurred. Unlike the earlier '15% project cost' condition for the urban renewal and multi-storey car park schemes, it does not include the cost of the site or any costs associated with its acquisition. Instead, the emphasis is on the value of the actual construction work that had been carried out. The value of work and costs associated with site preparation such as site clearance, laying foundations, power supply, drainage, sanitation and water supply could, however, be taken into account. As indicated above, the new '15%' test was to be established by reference to the value of actual work carried out and not just on the basis of expenditure incurred. No account could be taken of any advance payments made for work that had not yet been carried out. Visible and tangible construction work had to have been carried out and this work had to be manifested as an integral part of the building/development on or before 31 December 2006. Construction costs such as raw materials and labour, equipment hire, and architects' fees could be taken into account in establishing the value of the work carried out where these were directly attributable to work actually carried out on the building. For example, an architect's fees could only be taken into account where they were directly attributable to work that had already been carried out, for example, drawing up plans. Ongoing work such as project management yet to be delivered as of 31 December 2006 was not to be taken into account. Work that was carried out 'off-site' or work that was involved in the assembly of a part of a building but that had not yet been integrated into the building was not to be taken into account. For example, while the expenditure on the work involved in assembling a bathroom pod or in assembling a roof-frame could ultimately be treated as qualifying construction costs, it was not to be taken into account for the purposes of establishing the value of the work that had been carried out until such time as the bathroom pod or roof-frame had actually been put in place and integrated into the building itself. The value of the work that was established as actually carried out on this basis on or before 31 December 2006 was then compared to the sum of that value and the value of the work to be carried out after 31 December 2006 (i.e. the overall cost of the project) to establish if the 15% test had been met.

3.2.4 Building v. development

The Tax Acts apply the '15%' test to individual buildings. However, where there are several buildings involved in a development as, for example, in the case of a housing estate or a student accommodation development, the '15%' condition can be regarded as met for each building in a development where work to the value of 15% of the actual construction costs of the overall development had been carried out on or before 31 December 2006.

Meeting the '15%' condition will not, of course, be an issue in the case of individual buildings in a development completed in 2006 as work to the value of 100% of their construction costs will have been carried out before 31 December 2006. The value of the work attributable to these buildings can count in meeting the '15%' condition where the option was taken to treat a development as a single entity for the purpose of that condition. However, it is possible that where projected costs for a development were exceeded on some buildings constructed after 31 December 2006 that the 15% condition was not met when the total development costs are taken into account.

3.2.5 Evidence for investors/purchasers that '15%' condition met

A builder/developer who sells a completed building(s) should provide the investor/purchaser with either a local authority '15%' certificate or the statement referred to in section 3.2.2., along with the other documentation that may be required in the event of an audit by Revenue where the person claiming the relief may have to show that he/she has complied with all of the conditions applicable to a particular incentive scheme.

4 Limit on amount of qualifying construction expenditure⁸

There is a gradual reduction in the amount of construction expenditure incurred after 31 December 2006 that can qualify for relief. Expenditure incurred during 2006 can qualify in full without restriction. However, only 75% of expenditure incurred in 2007 and 50% of expenditure incurred in the period 1 January 2008 to 31 July 2008 can qualify for relief. For the purposes of determining when expenditure is incurred, only the amount of the expenditure attributable to work actually carried out during a particular period is taken into account. Therefore, it was not possible to circumvent the deadlines by making an advance payment for materials or for work that would be carried out after the deadlines.

⁸ This refers only to **'qualifying'** construction expenditure. Not all of the expenditure incurred on a project is eligible for relief.

It is the amount of the actual construction expenditure, and not the amount of the relief, that is to be reduced to the 75% and/or 50% limit as appropriate. For the purposes of calculating the relief due where “the net price paid” formula in section 279 TCA, 1997 applies, the numerator “C” in the formula becomes the amount of the expenditure as appropriately reduced.

A person claiming relief needs to know how to calculate the amount of relief that is due in respect of his/her particular property. Revenue expects that builders/developers will have provided investors/purchasers with sufficient information for this purpose. Thus, investors/purchasers need to know the relevant costs attributable to the construction work that was carried out on or before 31 December 2006, during 2007 and in the period 1 January 2008 to 31 July 2008. This information may be required in the event of a Revenue audit. The option to look at an overall development rather than at each individual building in that development only applies in relation to the ‘15%’ condition as outlined in section 3.2.4. It is not an option in relation to the 75% and 50% limits on qualifying expenditure incurred during 2007 and 2008 respectively. Thus, the apportionment of relief among all buildings in a development is not possible. For example, a person who purchased a house that was constructed during 2006, subject to excluding site and non-construction costs, can qualify for 100% relief while a person who purchased a house that was constructed between January and July 2008 can only qualify for relief on 50% of the construction expenditure. Where construction spans more than one year the relevant limit applies to the portion of expenditure incurred in each year.

4.1 Example illustrating effect of limit on qualifying expenditure

A builder purchased a site in an urban renewal area for €100,000 on which he constructed an industrial building for a cost of €420,000. The building was completed in August 2008 and, without having been used, was sold by the builder to X on 1 October 2008 for €600,000. X immediately started to use the building for his manufacturing trade.

The construction expenditure attributable to the various periods is as follows:

2006 - €100,000

2007 - €220,000

1 January to 31 July 2008 - €80,000

August 2008 - €20,000

As expenditure was incurred on an industrial building both within and outside of the qualifying period for the urban renewal scheme, capital allowances are available under that scheme as well as under the general 25-year write off regime for industrial buildings in respect of the expenditure attributable to August 2008.

The projected amount of post-December 2006 expenditure, as certified by the local authority, was €280,000. Therefore, the combined expenditure for the period 1 January 2007 to 31 July 2008 (€300,000) is restricted to €280,000. The restriction (€20,000) is made in respect of the period 1 January to 31 July 2008 in priority to the year 2007. Accordingly, expenditure treated as incurred in the period 1 January to 31 July 2008 (before the 50% restriction is applied) is €60,000 (€80,000 less €20,000).

In relation to the urban renewal scheme, X's capital allowances are calculated using the 'net price paid' formula in section 279 TCA, 1997. This is:

$$B \times \frac{C}{D + E}$$

Where:

B = purchase price

C = expenditure in qualifying period as reduced by restrictions

D = actual expenditure incurred

E = site cost

The total expenditure for the purposes of the numerator "C"* in the formula is calculated by attributing the construction expenditure to the various periods and then restricting it as appropriate:

2006 - €100,000

2007 - €220,000 x 75% = €165,000

1 January to 31 July 2008 - €60,000 x 50% = €30,000

August 2008 - nil (outside of the qualifying period).

Total expenditure for the purposes of the numerator "C"* in the formula is therefore €295,000. Applying the formula:

$$\begin{aligned} \text{€600,000} \times \frac{\text{€295,000}}{\text{€420,000} + \text{€100,000}} &= \text{€340,385} \end{aligned}$$

X is deemed to have incurred construction expenditure on 1 October 2008 equal to the 'net price' paid by him of €340,385. His capital allowances are based on this amount at the rates applicable to the urban renewal scheme.

*NOTE: The numerator "C" in the formula is the amount of construction expenditure incurred during the qualifying period for the scheme as reduced in accordance with subsections (5) and (7) of section 270 TCA, 1997. The denominator "C" in the original formula - now "D" in the revised formula - is the full amount of construction expenditure incurred, both within and outside of the qualifying period before any restrictions.

As €20,000 of the expenditure on the building is attributable to August 2008 (a period falling outside the qualifying period for the urban renewal scheme), that amount is eligible for capital allowances under the general regime for industrial buildings. Again, using the 'net price paid' formula, the qualifying expenditure for capital allowances is calculated as follows:

$$\begin{array}{rcccl} \text{€600,000} & \times & \text{€20,000} & & = & \text{€23,077} \\ & & \text{€420,000 + €100,000} & & & \end{array}$$

X is deemed to have incurred construction expenditure of €23,077 on 1 October 2008 under the general industrial buildings regime and capital allowances on this element of the relief are available at the rate of 4% per annum over 25 years.

If the building had been a 'commercial' instead of an 'industrial' building no capital allowances would have been due in respect of the expenditure incurred outside of the qualifying period.

Summary of Transitional Arrangements for terminating schemes

Scheme	Extension to 31/12/2006 Existing conditions	Extension to 31 July 2008		Cap on expenditure 75% 2007- 50% 2008	TCA 1997
		Work = 15% costs by 31/12/06	Binding contract by 31/7/06		
Hotels ('accelerated' allowances)	Full and valid planning application by 31/12/04	Local authority to certify	Yes	Yes	270/316 268/272/274
Holiday Camps ('accelerated' allowances)	Full and valid planning application by 31/12/04	Local authority to certify	Yes	Yes	270/316 268/272/274
Registered Holiday Cottages	Full and valid planning application by 31/12/04	Local authority to certify	Yes	Yes	270/316 268/272/274
Multi-Storey Car Parks	15% project costs by 30/9/03 - certified by 31/12/03	Architect/quantity surveyor to certify	No	Yes	270/316 344
Sports Injury Clinics	No existing conditions No previous termination date	Architect/quantity surveyor to certify	No	Yes	270/316 268
Nursing Home Residential Units	No existing conditions	Work = 15% costs not required	No	100% to 24/3/07 75% 25/3/07 - 31/12/07	270/316 268

				50% 1/1/08 - 31/7/08	
Third Level Educational Buildings	Application to Minister for Finance by 31/12/04	Architect/quantity surveyor to certify	No	Yes	270/316 843
Urban Renewal	15% project costs by 30/6/03 - certified by 30/9/03	Local authority to certify commercial/Industrial Architect/quantity surveyor to certify residential	For commercial/ industrial only	Yes	372AL/372AS 270/316 372A/372B/ 372BA/372C/372D
Rural Renewal	Full and valid planning application by 31/12/04	Local authority to certify commercial/Industrial Architect/quantity surveyor to certify residential	For commercial/ industrial only	Yes	372AL/372AS 270/316 372L/372M/372N
Town Renewal	Full and valid planning application by 31/12/04	Local authority to certify commercial/Industrial Architect/quantity surveyor to certify residential	For commercial/ industrial only	Yes	372AL/372AS 270/316 372AA/372AB/ 372AC/372AD
Living over the Shop	Full and valid planning application by 31/12/04	Architect/quantity surveyor to certify	No	Yes	372AL/372AS 270/316 372A/372B/ 372BA/372C/372D
Park and Ride (including commercial/residential)	Full and valid planning application by 31/12/04	Architect/quantity surveyor to certify	No	Yes	372AL/372AS 270/316 372U/372V/372W
Student Accommodation	Full and valid planning application by	Architect/quantity surveyor to certify	No	Yes	372AL/372AS

	31/12/04				
General rented residential	No existing conditions No previous termination date	Work = 15% costs not required	No	Yes	372AM 372AL/372AS