

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

## **Finance Act 2020 edition**

### **Part 44**

## **Married, Separated and Divorced Persons**

**December 2020**



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

### **Finance Act 2020 edition**

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## **PART 44**

### **MARRIED, SEPARATED AND DIVORCED PERSONS**

#### CHAPTER 1

##### *Income Tax*

#### **Overview**

This Chapter deals primarily with the tax treatment of married couples and the various assessment options available to them. These options are —

- joint assessment (also known as aggregation),
- separate assessment, and
- separate treatment.

In the absence of an election to the contrary, a couple is deemed to have elected for joint assessment. Under joint assessment, one spouse is chargeable to tax, not alone on his/her own total income, but also on the total income of his/her spouse. The spouse who is chargeable to tax on the income of both spouses is known as the “assessable spouse”.

Under separate assessment (*section 1023*), each spouse is assessed on his/her own income with allowances and reliefs divided between the spouses in accordance with *section 1024*. Separate assessment is also known as “separate assessment within joint assessment” as one spouse’s unused allowances, reliefs and rate bands may be transferred to the other spouse (that is, the aggregate of the tax payable by each spouse under separate assessment cannot exceed the tax payable had that couple elected to be jointly assessed).

Under separate treatment (*section 1016*), each spouse is treated for tax purposes as if unmarried. The main difference between separate treatment and separate assessment is that, under separate treatment, one spouse’s unused allowances, reliefs and rate bands *cannot* be transferred to the other spouse.

Where a couple marry within a year of assessment, relief is provided by way of repayment of tax and divided between each spouse (*section 1020*). The Chapter goes on to provide for repayment of tax to couples jointly assessed (*section 1021*) and for tax due on one spouse where the assessed spouse does not pay any or enough tax (*section 1022*).

Finally, the Chapter deals with maintenance payments for separated spouses (*section 1025*), for the adaptation of certain provisions to allow for the joint assessment of separated and certain divorced spouses (*section 1026*) and for the payments in respect of orders under specific family law legislation to be made without deduction of tax (*section 1027*).

#### **1015 Interpretation (Chapter 1)**

#### **Summary**

This section is an interpretation provision and defines certain references which are used throughout the Chapter.

### Details

The “inspector” is any inspector who the spouse giving a notice under this Chapter may reasonably consider is the inspector to whom the notice should be sent or any inspector who indicates readiness to accept the notice. (1)

A wife is regarded as living with her husband for income tax purposes unless they are separated — (2)

- under a court order,
- by deed of separation, or
- in such circumstances that the separation is likely to be permanent.

A wife’s income includes any income (including income deemed to be the wife’s income) which would be included in computing her total income. (3)(a)

References to a person who has elected to be assessed in a particular way include references to a person who is deemed to have elected to be assessed in such a way. Similarly, references to a husband being assessed on a couple’s joint income include references to a couple being separately assessed. (3)(b)

Any notice concerning the taxation of a married couple may be served by post. (4)

### 1016 Assessment as single persons

This section provides that, where a woman is treated as living with her husband, each spouse is to be assessed and charged on his/her own income as if they were not married, unless they elect to be jointly assessed. (1)

Where they make this election in a given year, this section does not apply for that year. (2)

This section can only apply after a married couple have elected to come out of automatic joint assessment under *section 1018*.

### 1017 Assessment of husband in respect of income of both spouses

#### Summary

This section provides for the assessment of the husband in respect of the total income of both spouses. Here the total income of the wife is treated as the total income of the husband in addition to his own and all reliefs from income tax due to her are due to him for the period they elect to be assessed in this manner.

*Section 1019* should be consulted as regards the assessment of a wife in respect of the income of both spouses.

#### Details

Where a married couple elect to be jointly assessed to tax, then the husband is the assessable spouse and he is assessed, not only in respect of his total income, but also in respect of the total income of his wife. As such, any reliefs from income tax due to the non-assessable spouse in that year of assessment are granted to the assessable spouse. A similar charge follows through in death cases where the husband’s executors or administrators may be chargeable.

This section does not address the question of whether the income of the wife is chargeable to tax. (1)(b)

### 1018 Election for assessment under *section 1017*

## Summary

This section enables a married couple to elect to be jointly assessed under *section 1017*. Provision is also made for the withdrawal of this election. Where such an election has not been made, a couple are automatically jointly assessed. Either spouse may request to be assessed separately and further may withdraw this notice at a later time.

## Details

### *Election to be jointly assessed*

A couple may elect, at any time during a year of assessment, to be jointly assessed by giving a notice in writing to the inspector. Where such an election is made, the income of both spouses is assessed accordingly for that year and each subsequent year of assessment. (1) & (2)

Where notice in writing is given to withdraw this election in any year of assessment, then such election is not to have effect for that year and each subsequent year of assessment. (3)

### *Automatic joint assessment*

Where a married couple living together have not elected to be jointly assessed under this section, they are deemed to have done so unless before the end of the year of assessment either of them gives notice in writing to the inspector that they wish to be assessed as single persons under *section 1016*. (4)

Once this notice has been given, joint assessment is not to apply until such time as the spouse who applied to be assessed separately withdraws such application.

## **1019 Assessment of wife in respect of income of both spouses**

### Summary

This section enables a married couple to elect, or to be deemed to have elected, for the wife to be the assessable spouse in joint assessment cases. Provision is made in the section for the circumstances where this is to occur, the manner in which it is to occur, the withdrawal of an election under this section and the adaption of certain references in the Income Tax Acts.

### Details

#### *Definitions*

“basis year” is the year of marriage or, if earlier, the latest year before that year for which details of the incomes of both the spouses are available at the time they first elect or are deemed to elect for joint assessment under *section 1017*. (1)

“year of marriage” is the year in which the marriage took place.

#### *Circumstances where a wife is the assessable spouse*

A wife is assessable to income tax on both her own and her husband’s income where — (2)

- the couple jointly elect, before the 1st of April in any tax year, that the wife is to be the assessable spouse, or
- the couple —

- married in 1993–94 or later,
- are deemed to be jointly assessed under *section 1017*, and
- in the basis year the wife was the higher income earner.

### *Assessment of wife*

Where a wife is the assessable spouse, references in the Income Tax Acts — (3)

- to a husband being assessed in respect of his own and his wife’s income are to be read as a wife being assessed in respect of her own and her husband’s income, and
- to the income of a wife being deemed to be her husband’s income are to be read as income of a husband being deemed to be his wife’s income.

Where a wife is assessed to income tax on both incomes because she was earning the highest income in the basis year then — (4)(a)

- she is to continue to be so assessed for subsequent years unless —
  - the couple elect for joint assessment which would have the effect of treating the husband as the assessable person,
  - either of them opts for single treatment under *section 1016*, or
  - either of them opts for separate assessment under *section 1023*,and
- such a charge is valid on the wife even if her income does not exceed her husband’s in later tax years (in other words she remains the assessable person).

Where a wife was the assessable spouse before an election for separate treatment (*section 1018*) or separate assessment (*section 1023*), she continues to be the assessable person on the move back to joint assessment. (4)(b)

Where a married couple elect that the wife should be the assessable spouse for a year of assessment, then that election has effect for subsequent years unless it is withdrawn by the couple before the 1<sup>st</sup> of April in a subsequent year. Where the election is withdrawn by the couple, the husband becomes the assessable spouse (unless, of course, the couple opt for single treatment or separate assessment). (5)

## **1020 Special provisions relating to year of marriage**

### **Summary**

This section provides that a married couple are taxed as single persons throughout the year of assessment in which their marriage took place. However, a measure of relief is given by way of repayment after the end of that year where the total tax which would have been paid and payable by the couple under this arrangement exceeds the total tax which would have been payable had they been married throughout the year. Such a repayment is divided between the spouses and is governed by general rules relating to allowances, deductions, reliefs and repayments.

### **Details**

#### **Definitions**

“income tax month” means a calendar month. (1)

“year of marriage” is a year of assessment in which the marriage took place.

## **Relief**

Where the aggregate of — (3)

- the tax paid and payable by the husband on his total income for the year of marriage, and
- the tax paid and payable by the wife on her total income for the year of marriage,

exceeds the tax which would have been payable by the assessable spouse on both their incomes (under joint assessment) if they had been married throughout the year of marriage, then the relief provided is calculated by way of the formula —

$$A \times \frac{B}{12}$$

“A” is the amount of the excess.

“B” is the number of months (including part of a month) for which they were married in the year of marriage.

A married couple may not opt for joint assessment under *section 1018* for the year of marriage but may do so for any subsequent year of assessment. (2)

## **Repayment of tax**

Where a husband and wife wish to obtain a repayment of tax under this section they must make a joint claim to the inspector after the end of the year of marriage. (5)

Where any repayment of tax is due, it is divided between the husband and wife according to the tax paid and payable by them. (4)

The general provisions relating to allowances, deductions and reliefs (*section 459* and *paragraph 8* of *Schedule 28*) and the rate of tax at which repayments are to be made (*section 460*) apply in the same manner to repayments under this section. (6)

## **1021 Repayment of tax in case of certain husbands and wives**

This section applies in a year of assessment to a married couple who are jointly assessed under *section 1017* and to whom *section 1023* (separate assessment) does not apply. (1)

Any repayment of tax due to a couple is to be divided between the spouses on the basis of the tax paid by them for the relevant year of assessment. For administrative reasons, if the amount repaid is below €25 it is to be repaid to the assessable spouse. (2)

Where an inspector is satisfied that a repayment or most of a repayment is due in respect of an allowance or relief which, if separate assessment or separate treatment had applied, would be payable to one spouse only, the repayment may be divided between the spouses in such a manner as the inspector feels is just and reasonable. (3)

## **1022 Special provisions relating to tax on wife’s income**

### **Summary**

This section applies where a couple are jointly assessed to tax. It allows the Revenue Commissioners to collect income tax from the non-assessable spouse where the assessable spouse has failed to pay the tax, or has failed to pay all the tax, assessed. The amount of unpaid tax which can be recovered from the non-assessable spouse is limited to that which is attributable to the income of the non-assessable spouse. In other words, the section does not allow Revenue to recover from the non-assessable spouse any unpaid tax assessed on the assessable spouse which is attributable to the

income of the assessable spouse. The section also allows the assessable spouse to disclaim any liability for unpaid tax attributable to a deceased spouse's income for any year in which he/she is assessed to tax on their combined income. This gives the assessable spouse the option, where there is unpaid tax which is attributable to a deceased spouse's income, of ensuring that the tax is collected from the assets in the estate of the deceased spouse rather than from his/her income.

The provisions of the section also apply for the purposes of capital gains tax by virtue of *section 1029*.

## Details

### *Application*

Where an assessment for any year is made on an individual (or on an individual's trustee, guardian or committee or on an individual's executors or administrators) and the Revenue Commissioners are of the opinion that, if the couple had been assessed separately, an assessment in respect of income tax would have been made on the spouse, or on the representative of, or on the executors or administrators of, the individual's spouse then, if the whole or part of the tax due remains unpaid for 28 days after it is due, the Revenue Commissioners may, by notice in writing, require the non-assessable spouse to pay the amount which would have been assessed on the non-assessable spouse or the amount left outstanding (whichever is the lesser). (1)

Where such a notice is served on the spouse of the individual referred to in *subsection (1)*, the same consequences are to follow in respect of liability to pay tax, priorities in bankruptcy, appeals, etc, as would have ensued if a separate assessment had been made on the spouse or the spouse's representative or on the spouses executors or administrators. (2)

### *Payment of interest on tax due*

The amount of tax required to be paid under the notice ceases to be recoverable under the original assessment. Similarly, the interest on overdue tax is calculated as if the amount which ceases to be recoverable had never been charged. (3)

### *Appeal against a notice*

Where, as a result of an appeal against a notice, the amount of tax payable under it is reduced, the Revenue Commissioners will give such relief as appears just and reasonable to them. In this instance the amount of the reduction again becomes recoverable under the original assessment. (4)

### *Information*

The Revenue Commissioners have the same powers in relation to obtaining information for the purposes of serving a notice under this section as they would in relation to making an assessment if an application for separate assessment under *section 1023* had been in force. (5)

### *Case of a deceased spouse*

A husband or wife has the right to disclaim liability for tax on the deceased spouse's income for any year of assessment (or part of a year) for which he/she was assessed on their combined incomes. The notice of the disclaimer must be given to the executors or administrators and to the inspector within 2 months from the date of the grant of probate or letters of administration, subject to an extension of this time limit with the consent of the deceased spouse's executors or administrators. (6)



The notice to the inspector is invalid unless it specifies the names and addresses of the deceased spouse’s executors or administrators. (7)

Where such a notice has been given to a deceased spouse’s executors or administrators and to the inspector, the Revenue Commissioners must exercise the powers contained in this section to recover the tax from the deceased spouse’s executors or administrators. The Revenue Commissioners must assess tax on, and collect it from, the deceased spouse’s executors and administrators — (8)

- as if he/she was to be assessed separately for the year in question, and
- as if he/she had been assessed separately for previous years.

The words “all assessments previously made had been made accordingly” is used to ensure that the Revenue Commissioners may raise additional assessment(s) in relation to earlier years if he/she had been under-assessed in any of those years (for years to which Self Assessment applies, original assessments are usually amended).

The Revenue Commissioners may delegate the operation of this section to Revenue officers nominated by them in writing. (9)

### 1023 Application for separate assessments

#### Summary

Separate assessment is an option open to a married couple. This section sets out how it is to apply and provides for the application of income tax provisions to the couple as if they were not married, while at the same time ensuring that they do not —

- lose out on personal reliefs, and
- pay more tax than they would if they had been assessed together.

While a return for both incomes may be sent by either spouse, the Revenue Commissioners may, where they are not satisfied, require a further return from either spouse.

#### Details

##### *Definition*

“personal reliefs” are defined, for the purposes of this section and *section 1024*, as relief under any of the provisions specified in the Table in *section 458*, apart from relief for certain widowed persons, one-parent families and widowed parents (*sections 461A, 462B and 463*). (1)

##### *Application for separate assessment*

A husband and wife, who have elected to be jointly assessed to tax on their combined incomes, may, if either of them applies in the manner and form prescribed by the Revenue Commissioners, have their incomes separately assessed and charged to tax for the year of assessment (to which the application relates) as if they were not married. (2)

In such circumstances, the provisions of the Income Tax Acts with respect to the assessment, charge and recovery of tax apply as if they were not married, except that —

- the total amount of personal reliefs allowed to the husband and wife is to be the same as if they were not separately assessed,
- the total tax payable by the couple for that year is to be the same as if they had not been separately assessed, and

- the provisions for apportioning the personal reliefs between the husband and the wife and on charging tax on the income of each spouse apply as set out in **section 1024**.

In applying for separate assessment, the application must be made — (3)

- in the case of a couple marrying during the course of a year, before the 1st of April of the following year,
- in any other case, within 6 months before the 1<sup>st</sup> of April in the particular year of assessment.

An application for separate assessment has effect for the year in which it is made and for all subsequent years of assessment. If, however, this application is withdrawn by written notice before the 1<sup>st</sup> of April in any subsequent year, the couple will not be separately assessed for the year in which the application is withdrawn or for any subsequent year of assessment. (4)

An application for separate assessment can only be withdrawn by the spouse who made the application.

### ***Income tax returns***

A return of the total incomes of the husband and the wife may be made by either one of the spouses but, if the Revenue Commissioners are not satisfied with the return they may require a return to be made by the husband or by the wife, as the case may be. (5)

The Revenue Commissioners may by notice require returns to be made at any time. (6)

## **1024 Method of apportioning reliefs and charging tax in cases of separate assessments**

### **Summary**

This section sets out the method of apportioning personal reliefs between the husband and wife, and to charging tax on the income of each spouse in cases where separate assessment is claimed under **section 1023**. The section provides that any personal allowances and reliefs which are unused, by reason of the fact that they exceed the amount of income of either of the spouses, are to be set against the income of the other spouse. Similarly, any benefit from the application of the lower rate of tax not used by one spouse is to be passed on to the other spouse.

### **Details**

#### ***Apportionment***

Where a husband and wife opt to be separately assessed to tax, the benefits flowing from the personal reliefs may be given by way of repayment of tax already paid, by way of reduction of the amount to be paid or by both means as may be necessary, and the allocation between the husband and wife is to be as follows — (1) & (2)(a)

- (a) In the proportion in which they incurred the expenditure giving rise to the following reliefs —
- relief for interest paid on certain home loans (**section 244**),
  - owner-occupiers for expenditure on construction, refurbishment or conversion, as appropriate, of a qualifying premises (**sections 372AR and 372AAB**),
  - relief for health expenses (**section 469**),
  - relief for insurance against expenses of illness (**section 470**),

- relief for premiums under qualifying long-term care policies (*section 470A*),
  - age-related tax credit for health insurance premiums (*section 470B*),
  - allowance for rent paid by certain tenants (*section 473*),
  - relief for contributions to permanent health benefit schemes (*section 471*),
  - relief for fees paid for third level education (*section 473A*),
  - relief for fees paid for training courses (*section 476*),
  - relief for service charges (*section 477*),
  - relief for payments made by certain persons in respect of alarm systems (*section 478*),
  - relief for new shares purchased on issue by employees (*section 479*).
  - allowances to owner-occupiers in certain areas other than the Custom House Docks Area (*paragraph 12* of *Schedule 32*), and
  - relief for expenditure on certain buildings in certain areas (*paragraph 20* of *Schedule 32*).
- (b) In the proportion of half and half —
- relief in relation to married persons tax credit (*section 461*),
  - age tax credit (*section 464*),
  - incapacitated child tax credit (except where the child is in the sole custody of the claimant – see (c) below) (*section 465*), and
  - relief for blind persons’ tax credit (*section 468*).
- (c) According to who maintains the child or dependent relative —
- relief in respect of an incapacitated child where the child is in the sole custody of the claimant (*section 465(3)*), and
  - dependent relative tax credit (*section 466*).
- (d) Others —
- in the proportion in which they bear the cost of employing a person to take care of an incapacitated individual (*section 467*),
  - the Employee (PAYE) tax credit is given to the spouse who has income subject to tax under PAYE (*section 472*),
  - the deduction for the long-term unemployed (*section 472A*) and the seafarers allowance (*section 472B*) are given to the qualifying individual in each case,
  - relief for Trade Union subscriptions is given to the husband or the wife according as he or she is entitled to the relief (*section 472C*),
  - in the proportion in which they made a film investment (*section 481*),
  - according as the spouse made the relevant donation to the approved body (*section 848A(7)*), and
  - in the proportion in which they subscribed for the eligible shares giving rise to the relief (*Part 16*).

### ***Allocation of exemptions and standard rate bands***

Income tax exemptions under **sections 187** and **188** are to be split between married persons in proportion to the amount of income tax that would have been payable by each if the exemptions had not applied. (2)(b)

Where a couple opt for separate assessment, each spouse is given half the standard rate band of a married couple (**section 15**), with the balance being charged at the higher rate. (2)(c)

### ***Transfer of surplus between spouses***

Where one spouse's tax is reduced to nil without using up all the allowances due to that spouse, as apportioned under this section, any balance of relief is to be granted to the other spouse. (3)

If one spouse has insufficient taxable income to utilise his/her full entitlement at a particular rate of tax, then the balance of that rate band of tax is transferable to the other spouse if this results in a reduction of the amount payable by the other spouse. (4)

## **1025 Maintenance in case of separated spouses**

### **Summary**

This section provides that payments made under a maintenance arrangement by one party to a marriage to the other party of that marriage will —

- be payable without deduction of tax,
- be deductible in computing the total income of the payer, and
- be chargeable to income tax in the hands of the recipient.

While a separated couple are treated for tax purposes as if unmarried, there is provision in **section 1026** for a separated couple to jointly elect for joint assessment in which case maintenance payments are ignored for tax purposes and the foregoing paragraph will not apply.

Maintenance payments specifically for the benefit of children remain the income of the payer. No deduction is due in respect of such payments and the recipient is not taxable on such payments.

### **Details**

#### ***Definitions***

A “maintenance arrangement” is defined as any legally enforceable arrangement under which payments are made by one person to another in consideration, or in consequence, of the annulment or dissolution of a marriage or of a separation of the kind referred to in **section 1015**. The definition is wide enough to cover a court order, an arbitration award and a deed of separation including foreign orders and arrangements. It is not intended that any regard be had for tax purposes to unenforceable payments. (1)

A “payment” includes a part of a payment.

References to a child of a person includes a child in respect of which, before making the maintenance arrangement, the person concerned was entitled to relief under **section 465** in respect of an incapacitated child.

### ***Application***

This section applies to payments made, directly or indirectly, by a party to a marriage, under or pursuant to a maintenance arrangement relating to the marriage, for the benefit of either a child of that party or the other party to the marriage. The payments must be — (2)(a)

- made at the time when the wife is not living with the husband,
- legally enforceable, and
- annual or periodical.

This section does not apply to payments under a maintenance arrangement made before the 8th of June 1983 unless the arrangement is replaced by another new or varied arrangement or the couple jointly request that the section should apply.

Any payment which — (2)(b)

- is made under a maintenance arrangement, and
- is not for the benefit of a third party,

is treated as being for the recipient's benefit.

This applies whether or not the payment is conditional. For example, if the payment is conditional on the recipient (usually the wife) maintaining the child without specifying the amount she must spend on the child, that payment is treated as the recipient's income. While payments to third parties are excluded, payment of rent or school fees are treated as of benefit to the recipient spouse or child and not the landlord or owner of the school.

Where an ascertainable sum is allocated under the maintenance arrangement for the benefit of the child, such sum is not considered to be income of the recipient spouse, but is treated as income of the paying spouse (under *section 795* income settled on a minor is deemed to be the income of the settlor). (2)(c)

### ***Tax treatment where payment is for benefit of the recipient spouse***

Where the payment is for the benefit of the recipient spouse, and the couple are assessed to tax as single persons — (3)

- the person making the payment is not entitled to deduct and retain income tax from the payment,
- the person receiving the payment is chargeable to tax under Case IV of Schedule D, and
- the person making the payment is entitled, on making due claim, to deduct the payment in computing his/her total income for tax purposes for the year in which the payment is made.

### ***Tax treatment where payment is for benefit of child***

Where the payment is for the benefit of a child, and whether or not the parents are taxed singly or jointly — (4)

- the person making the payment is not entitled to deduct and retain income tax from the payment,
- the payments is not regarded for income tax purposes as the income of the child,
- the total income for tax purposes of the person making the payment is computed as if the payment had not been made, and
- for the purposes of a claim to the incapacitated child allowance, the payment is regarded as a contribution towards the child's maintenance by the person making the payment, even though the payment may be made to that person's spouse for

the maintenance of the child. This, in effect, gives the payer a right to all or part of the incapacitated child allowance.

### ***Application of general income tax provisions***

Where a spouse is claiming a deduction of the amount of maintenance from total income, this section applies the general income tax provisions governing — (5)

- deductions allowed in ascertaining taxable income and provisions relating to reductions in tax (*section 458*),
- general provisions relating to allowances, deductions and reliefs (*section 459*), and
- the rate of tax at which repayments are to be made in respect of such a deduction (*section 460*).

## **1026 Separated and divorced persons: adaptation of provisions relating to married persons**

### **Summary**

This section allows permanently separated couples and, in certain circumstances, divorced couples to elect to be assessed jointly for income tax purposes under *section 1018*, subject to certain adaptations of that section.

### **Details**

#### ***Adaptation of section 1018***

Where an enforceable maintenance payment to which *section 1025* applies is made in a year of assessment by a party to a marriage (which has not been annulled or dissolved) and both parties to the marriage are resident in the State, then *section 1018* will apply as if — (1)

- the condition that the wife must be living with the husband were deleted, and
- the provision for the automatic joint assessment to tax on the husband or notice to change such an assessment or the withdrawal of such a notice, were deleted.

This allows separated individuals elect to be jointly assessed (that is, as if the separation had not taken place).

#### ***Method of assessment***

Where a separated couple elect to be jointly assessed under *section 1018* (subject to the adaptations contained in this section) then, as respects any year for which the election has effect — (2)

- the Income Tax Acts apply to that couple as they would to a married couple living together who elect to be jointly assessed,
- the total incomes of both parties is computed for tax purposes as if any maintenance payments had not been made (that is, they would be totally disregarded for tax purposes), and
- income tax is charged, assessed and recovered on the income or incomes of the spouses as if an application for separate assessments had been made by one of the spouses under *section 1023*.

#### ***Joint assessment for divorced persons***

Where an enforceable maintenance payment has been made by one party to a dissolved marriage for the benefit of another, this section may also apply to them in circumstances where — (3)

- the dissolution is under section 5 of the Family Law (Divorce) Act, 1996, or the

law of a country or jurisdiction other than the State, being a divorce that is entitled to be recognised in the State,

- both spouses are resident in the State for tax purposes, and
- neither spouse has entered into another marriage or a civil partnership.

**1027 Payments pursuant to certain orders under Judicial Separation and Family Law Reform Act, 1989, Family Law Act, 1995, and Family Law (Divorce) Act, 1996, to be made without deduction of income tax**

Payments made in respect of orders under the above legislation are made without deduction of income tax.

CHAPTER 2  
*Capital Gains Tax*

**Overview**

This Chapter deals with the capital gains tax assessment of married persons (*section 1028*), the charge of capital gains tax on one spouse where the other spouse has not paid (*section 1029*), and the rules regarding the transfer of assets between separated (*section 1030*) and divorced (*section 1031*) persons.

**1028 Married persons**

**Summary**

This section deals with the assessment treatment of married persons for capital gains tax purposes. It sets out the method of joint assessment, makes provision for applications for separate assessment and provides rules for the transfer between spouses of unutilised losses. It also provides rules for the treatment of disposals between spouses, and subsequent disposals of any assets which had previously been disposed of between spouses.

**Details**

***Joint assessment***

Capital gains tax on the chargeable gains of a married woman living with her husband (1) is to be assessed and charged on the husband. The total tax charged is not to be different from what it would be if each spouse were to be assessed separately.

***Separate assessment***

Joint assessment under *subsection (1)* will not apply for a year of assessment if, on or before 1 April of the following year, either spouse makes an application that *subsection (1)* will not apply. This effective application for separate assessment remains in force for future years of assessment until a notice of withdrawal of the application is made. Such a notice of withdrawal is not valid unless it is made on or before 1 April in the year following the year of assessment for which the notice of withdrawal is given. (2)

***Losses***

If in a year of assessment one spouse has allowable losses which he/she cannot utilise (3) because of an insufficiency of chargeable gains (from which those allowable losses would be deductible under *section 31*), the balance of the losses after being set off against that spouse's gains (if any) can be offset against the other spouse's gains in the

year of assessment. This treatment does not operate for a year of assessment where either spouse makes an application, that this subsection (*subsection 3*) does not apply, on or before 1 April of the following year.

### ***Transfer of unutilised annual exemption between spouses***

This subsection (*subsection(4)*) was repealed by section 75 of the Finance Act, 1998.

### ***Disposal from one spouse to another***

A disposal from one spouse to another is deemed to have been made at a value such that no gain or loss arises to the spouse making the disposal. However, this no gain/no loss rule does not apply to the disposal of trading stock between spouses, (where trading stock means trading stock of a trade carried on by the spouse making the disposal). (5)

The no gain/no loss rule effectively overrules the capital gains tax provisions which fix the consideration deemed to have been given on the disposal or acquisition of an asset (for example, at market value for disposals not made at arm's length). (6)

***The no gain/loss rule does not, however, apply if the spouse who acquires the asset (from the other spouse) could not be taxed in the State (for the year of assessment in which the acquisition took place) on a disposal of the asset in that year and a gain had accrued on that disposal. Such a scenario might arise where the taxing rights on such a disposal, under a Double Taxation Agreement, rested with a foreign jurisdiction.*** (6A)

### ***Subsequent disposal***

Where the no gain/no loss treatment provided in *subsection (5)* applies in relation to the disposal of an asset and the spouse who acquired the asset subsequently disposes of it (the subsequent disposal not being a disposal to which *subsection (5)* applies), he/she is treated as if he/she had acquired it at the time and cost at which it was originally acquired by the other spouse. (7)

### ***Prescribed forms***

An application for separate assessment under this section and a notice of withdrawal of such an application must be made in the prescribed form. (8)

## **1029 Application of section 1022 for purposes of capital gains tax**

By applying the provisions of *section 1022* (special provisions relating to tax on wife's income) with any necessary modifications, this section gives Revenue the right to issue a demand notice to a married woman (or, if she is dead, to her executors) for capital gains tax attributable to chargeable gains accruing to her but which was assessed on her husband. Such a demand may be made where the amount of capital gains tax assessed on the husband remains unpaid 28 days after it became due. Any such demand is confined to the amount of capital gains tax which would have been payable by her if she had been assessed separately or the total amount assessed on the husband, whichever is the lesser.

## **1030 Separated spouses: transfers of assets**

### **Summary**

This section provides that where a person disposes of an asset to his/her spouse as a consequence of —



- an order made on or following a judicial separation,
- a deed of separation,
- a relief order under the Family Law Act, 1995, or
- an order of a foreign court, which is recognised as valid in the State, made on or following a divorce or legal separation of spouses,

a charge to capital gains tax does not arise unless the asset is part of the trading stock of a trade carried on by the spouse making the disposal. The section also provides that where the spouse to whom the disposal is made subsequently disposes of the asset, he/she is treated as having acquired it at the time and cost at which it was originally acquired by the other spouse.

### Details

#### *Definition*

“spouse” is to be construed in accordance with section 2(2)(c) of the Family Law Act, 1995, that is, the term includes a person who is a party to a marriage that has been dissolved under the law of a foreign country or jurisdiction. (1)

#### *Disposals of certain assets between separated spouses*

Where one spouse disposes of an asset to the other spouse by virtue of or in consequence of — (2)

- an order made under Part II of the Family Law Act, 1995 following the granting of a judicial separation under that Act,
- an order made under Part II of the Judicial Separation and Family Law Reform Act, 1989 on or following the granting of a decree of judicial separation where such order is treated by virtue of section 3 of the Family Law Act, 1995 as if it had been made under the Family Law Act, 1995,
- a deed of separation,
- a relief order within the meaning of the Family Law Act, 1995 made following a divorce or legal separation of spouses, or
- an order or other determination of similar effect, (which is comparable to a relief order as mentioned above), of a foreign court made following the divorce or legal separation of spouses which is recognised as valid in the State,

then, subject to *subsection (3)*, the asset is treated for the purposes of the Capital Gains Tax Acts as having been disposed of at a price which gives rise to no gain or loss to the spouse making the disposal.

The no gain/loss rule does not, however, apply if the spouse who acquires the asset (from the other spouse) could not be taxed in the State (for the year of assessment in which the acquisition took place) on a disposal of the asset in that year and a gain had accrued on that disposal. Such a scenario might arise where the taxing rights on such a disposal, under a Double Taxation Agreement, rested with a foreign jurisdiction. (2A)

#### *Relief disallowed for trading stock*

The no gain/no loss treatment provided for in *subsection (2)* does not apply if the asset disposed of is one which formed part of the trading stock of the spouse making the disposal. Likewise, that treatment does not apply if the asset is one which is acquired as trading stock for the purposes of a trade carried on by the spouse receiving it. In each such case the actual consideration is taken into account and the rules for computing trading income generally apply. (3)

### ***Subsequent disposal***

Where the no gain/no loss treatment provided in ***subsection (2)*** applies in relation to the disposal of an asset and the spouse who acquired the asset subsequently disposes of it (the subsequent disposal not being a disposal to which ***subsection (2)*** applies), he/she is treated as if he/she had acquired it at the time and cost at which it was originally acquired by the other spouse. (4)

## **1031 Divorced persons: transfers of assets**

### **Summary**

This section provides that where a person who has obtained a decree of divorce under the Family Law (Divorce) Act, 1996 disposes to his/her former spouse certain assets pursuant to a court order under that Act, a charge to capital gains tax does not arise. The section also provides that where the former spouse to whom the disposal is made subsequently disposes of the asset, he/she is treated as having acquired it at the same time and cost as the other spouse.

### **Details**

#### ***Definition***

“spouse” is to be construed in accordance with section 2(2)(c) of the Family Law (Divorce) Act, 1996, that is, the term includes a person who is a party to a marriage that has been dissolved under that Act. (1)

#### ***Disposals of certain assets between divorced persons***

Where a decree of divorce has been granted and by virtue of or in consequence of an order made under Part III of the Family Law (Divorce) Act, 1996 one spouse disposes of an asset to the other spouse, then, subject to ***subsection (3)***, the asset is treated as having been disposed of at a price which gives rise to no gain or loss. (2)

The no gain/loss rule does not, however, apply if the spouse who acquires the asset (from the other spouse) could not be taxed in the State (for the year of assessment in which the acquisition took place) on a disposal of the asset in that year and a gain had accrued on that disposal. Such a scenario might arise where the taxing rights on such a disposal, under a Double Taxation Agreement, rested with a foreign jurisdiction. (2A)

#### ***Relief disallowed for trading stock***

The no gain/no loss treatment provided for in ***subsection (2)*** does not apply if the asset disposed of is one which formed part of the trading stock of the spouse making the disposal. Likewise, that treatment does not apply if the asset is one which is acquired as trading stock for the purposes of a trade carried on by the spouse receiving it. In each such case the actual consideration is taken into account and the rules for computing trading income generally apply. (3)

### ***Subsequent disposal***

Where the no gain/no loss treatment provided in ***subsection (2)*** applies in relation to the disposal of an asset and the spouse who acquired the asset subsequently disposes of it (not being a disposal to which that subsection applies), he/she is treated as if he/she had acquired it at the time and cost at which it was originally acquired by the other spouse. (4)