

[07.01.20] Special Trusts for permanently incapacitated individuals – Section 189A of the Taxes Consolidation Act 1997

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1. Introduction

1.1 Section 189A of the Taxes Consolidation Act (TCA) 1997 (inserted by section 12 of Finance Act 1999) provides certain exemptions from income tax and capital gains tax for

(I) the trustees of a trust which is established with funds raised by public subscriptions for the benefit of one or more permanently and totally incapacitated individual or individuals, and

(II) the incapacitated individual or individuals.

1.2 The purpose of this instruction is to

(a) set out the main features of the exemptions, and

(b) outline the action required in Revenue Districts.

2. Conditions of Exemption

2.1 *Qualifying Trust*

To qualify for relief under section 189A TCA 1997, a trust established by deed has to satisfy the following:

(I) the trust must be created exclusively for the benefit of one or more than one named incapacitated individual,

(II) the trustees hold trust funds which are to be applied for the benefit of the named incapacitated individual or individuals,

(III) in the event of the death of the incapacitated individual or the last surviving individual, as the case may be,

➤ the undistributed part of the trust funds shall form part of the estate of the individual provided the individual has a surviving spouse, civil partner or child, or

➤ otherwise the undistributed part of the trust funds shall be applied for charitable purposes or be appointed in favour of the trustees of charitable bodies,

and

- (IV) none of the trustees is connected with the incapacitated individual or individuals.

2.2 Incapacitated Individual An incapacitated individual means an individual who is permanently and totally incapacitated, by reason of mental or physical infirmity, from being able to maintain himself or herself.

2.3 Trust funds

The funds in a qualifying trust consist of the following:

- public subscriptions raised on behalf of the incapacitated individual or individuals for whose benefit the trust was created, and
- moneys and other property derived directly or indirectly from such public subscriptions. This would include secondary investments (e.g. deposit interest) and secondary investment income (e.g., rental income).

2.4 Public subscriptions

“Public subscriptions” means subscriptions raised following a public appeal and either of the following conditions are met:

- the total subscriptions raised are €381,000 or less, or
- the subscriptions, at any time on or after the return date for the period in which the exemption is first claimed, do not contain a subscription made by any one person which exceeds 30 per cent of the total subscriptions raised.

Therefore, there is no upper limit put on the quantum of funds that can be raised by public subscription. However, if the subscriptions exceed €381,000, no one person may contribute more than 30 per cent of the total amount of the subscriptions.

3. Income and gains covered by the exemption

3.1 The exemption covers:

- (I) dividends or other income arising to the trustees which would, but for section 189A TCA, be chargeable to tax under Schedule C or under Case III, Case IV (in circumstances where tax has been deducted at source under section 59 TCA 1997 or under section 745 TCA 1997 where tax has not been deducted at source) or Case V of Schedule D, or under Schedule F,

(II) income which consists of

- payments made by the trustees to or in respect of an incapacitated individual, or
- income, in the form of dividends or other income, arising to an incapacitated individual from the investment of payments made by the trustees out of the trust fund, where such dividends or other income would, but for section 189A TCA, be chargeable to tax under Schedule C or under Case III, Case IV (in circumstances where tax has been deducted at source under section 59 TCA 1997, or under section 745 or section 747E TCA 1997 where tax has not been deducted at source) or Case V of Schedule D or under Schedule F,

(III) capital gains accruing to the trustees in respect of the trust funds;

(IV) capital gains accruing to the incapacitated individual (including allowable losses) within the meaning of the Capital Gains Tax Acts, from the disposal of

- (a) assets acquired with payments made by the trustees,
- (b) assets acquired with relevant income (as defined in section 189A(4)(a) TCA), or
- (c) assets acquired directly or indirectly with the proceeds from the disposal of assets referred to in paragraphs (a) and (b).

3.2 The exemption, in the case of the individual, only applies where the payments made by the trustees and dividends or other income referred to at 3.1(II) above exceed 50% of the aggregate total income and total chargeable gains (including allowable losses) of the individual for a year of assessment.

If a couple are assessed under the provisions of section 1017 TCA 1997 (aggregation basis), the 50% test should be applied only to the income of the incapacitated spouse/civil partner, and not to the aggregated income of both spouses/civil partners in determining if exemption is due.

If the incapacitated individual is in receipt of an invalidity pension or benefit payable by the Department of Social Protection, and the individual's injury or disability which gave rise to the payment of the benefit/pension by that Department is the same injury or disability in

respect of which the public appeal was made and the special trust established, then that benefit/pension should not be taken into account for the purposes of determining whether the investment income is the sole or main income of the individual. Tax Manual (section 5) [7.1.2](#) which deals with the treatment of payments by the Department of Social Protection in cases where section 189 TCA 1997 applies is similarly applicable to section 189A TCA 1997.

3.3 The exempt income is not to be taken into account in computing total income for tax purposes.

4. Requirement to make a return

Notwithstanding the exemptions provided under section 189A TCA 1997, returns of total income must be made. This means that the exempt income must be shown on the returns made by the trustees and the incapacitated individuals.

5. Deposit Interest Retention Tax

5.1 Repayment of appropriate deposit interest retention tax (DIRT) can be made to trustees of trusts which qualify for exemption from tax under section 189A TCA 1997 in respect of interest arising from the investment of the trust funds which is paid on or after 6 April 1997.

5.2 The incapacitated individual who is entitled to exemption under section 189A TCA 1997 can claim a refund of deposit interest retention tax attaching to such income even though the relevant interest does not form part of his/her total income.

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