

# **Special Trusts for permanently incapacitated individuals**

## **Part 07-01-20**

This manual should be read in conjunction with section 189A of the Taxes Consolidation Act 1997

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## 1. Introduction

Section 189A of the Taxes Consolidation Act (TCA) 1997 provides for certain tax exemptions for both trustees and incapacitated individuals where a special qualifying trust is established for the benefit of permanently incapacitated individuals.

It provides for exemptions from Income Tax, Pay Related Social Insurance (PRSI), Universal Social Charge (USC) and Capital Gains Tax on income arising and gains accruing in respect of investment of trust funds where certain conditions are met.

The qualifying trust must be established with funds raised by public subscriptions for the benefit of one or more than one permanently and totally incapacitated individual.

The purpose of this manual is to:

- provide guidance on how section 189A applies in practice,
- set out the main features of the exemption, and
- advise how compensation payments in respect of personal injuries (section 189 TCA), and certain social welfare payments are to be treated when ascertaining a person's income for the purposes of deciding if exemption under section 189A applies.

Section 189 TCA exempts permanently incapacitated individuals from Income Tax, PRSI, USC and Capital Gains Tax on the income arising and gains accruing from the investment, in whole or in part, of compensation payments which arise from an order under section 38 of the Personal Injuries Assessment Board Act 2003 or the institution by the individual of court proceedings in respect of personal injury claims. For further details see Tax and Duty Manual [Part 07-01-02](#).

## 2. Conditions of Exemption

### 2.1 Qualifying Trust

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

- (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.

For the purposes of this provision, “maintain” can generally be regarded as supporting oneself by earning an income from working. In cases where an individual is not capable of earning a living from any kind of work, Revenue will regard such cases as satisfying the “totally incapacitated” requirement. The incapacity must also be permanent so that there must be no prospect of the individual recovering or of the condition improving to the extent that the individual would be able to maintain him or herself.

It should be noted that there is a high threshold of incapacity. For example, a visually impaired individual or an individual who has lost the use of his or her legs could be described as permanently incapacitated but not necessarily totally incapacitated or incapable of maintaining himself or herself by working.

Where an individual suffers a catastrophic life changing injury, and due to the severity of the injury, he or she will have significant on-going medical and other costs and needs (arising from the injury) in addition to day to day living expenses, he or she may qualify for relief under this section, notwithstanding he or she may be in a position to perform some work (albeit restricted) at a future date. In this regard, among other considerations, earning a living to maintain oneself may also have regard to the ability to earn income to cover all such expenses and needs. Thus, for cases where the individual may be in a position to perform some work in the future, qualification for relief under s189A TCA can only be determined on an examination of the full facts and circumstances of the particular case.

To assist in assessing the circumstances of an individual, a certificate from a medical practitioner:

- stating the cause, nature and extent of the infirmity and the nature and extent of the incapacity arising therefrom, and
- confirming that the individual is permanently incapacitated by reason of physical or mental infirmity from maintaining him or herself

should accompany any claim for the exemption.

Notwithstanding the explanation of 'permanent and total incapacity' above, by long-standing practice, engagement in rehabilitative work in sheltered workshops has not been considered as indicating that an individual may not be permanently and totally incapacitated.

## 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 where 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 Overview of exemption

The exemption covers the following:

- I. Trustees:
  - i. An exemption from Income Tax, PRSI and USC on income arising to trustees that is chargeable to tax under Schedule C, Cases III, IV or V of Schedule D, or Schedule F.
  - ii. Capital Gains Tax exemption for chargeable gains accruing to the trustees in respect of the trust funds.
- II. Incapacitated individual:
  - i. An exemption from Income Tax, PRSI and USC exemption on income which consists of:
    - (a) payments made by the trustees to or in respect of an incapacitated individual, or
    - (b) income arising to an incapacitated individual from the investment of payments made by the trustees out of the trust fund that is chargeable to tax under Schedule C, Cases III, IV or V of Schedule D, or Schedule F.

- ii. Capital Gains Tax exemption on:
- chargeable 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 of the qualifying trust (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 50% Test

In the case of an incapacitated individual, the exemption in 3.1(II) only applies where the aggregate of income and gains 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 for tax under joint assessment (section 1017 TCA 1997), 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.

### 3.3 Compensation Payments in respect of Personal Injuries (Exemption of Investment Income, s189)

Section 189 TCA 1997 exempts permanently incapacitated individuals from Income Tax, PRSI, USC and Capital Gains Tax on the income arising and gains accruing from the investment, in whole or in part, of compensation payments which arise from an order under section 38 of the Personal Injuries Assessment Board Act 2003 or the institution by the individual of court proceedings in respect of personal injury claims. For more information see Tax and Duty Manual [07-01-02](#).

Provided all other conditions are met, where “relevant income” and “relevant gains” arise under both section 189 TCA 1997 and section 189A TCA 1997, it is Revenue’s view that such “relevant income” or “relevant gains” arising under section 189 TCA 1997 is not included as “total income and gains” when applying the 50% test for section 189A TCA 1997 and vice versa.

### 3.4 Income from the Department of Social Protection

If the incapacitated individual is in receipt of an invalidity pension or benefit payable by the Department of Social Protection (DSP), 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 [Part 07-01-02](#), section 5 which deals with the treatment of payments by the DSP in cases where section 189 TCA 1997 applies is similarly applicable to section 189A TCA 1997.

### 3.5 Exempt income not included in calculating total income

The exempt income under section 189A TCA 1997 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

Deposit interest retention tax (DIRT) arising from the investment of trust funds can be repaid to trustees of trusts which qualify for exemption from tax under section 189A TCA 1997.

Persons who are:

- permanently incapacitated or
- trustees of a special trust for permanently incapacitated individuals where the income is exempt from tax

can make a declaration to Revenue ([Form DE2](#)) that they would be entitled to a refund of the entire amount of DIRT if so deducted.

The financial institution, on receipt of notification from Revenue that no DIRT is to apply, will pay interest without the deduction of DIRT.



## 6. Dividend Withholding Tax (DWT)

An exemption from dividend withholding tax may apply to Irish resident persons as follows:

- The trustees of “qualifying trusts”, the funds of which were raised by public subscriptions on behalf of individuals who are permanently incapacitated from maintaining themselves, where the income arising to the trusts from the investment of trust funds is exempt from income tax under section 189A(2) TCA;
- Permanently incapacitated individuals who, by virtue of section 189A(4)(b) TCA, are exempt from income tax in respect of payments received from “qualifying trusts” within the meaning of that section, and in respect of income arising from the investment of such payments.

Before accepting that such persons are exempt, the paying company or authorised withholding agent (AWA) must be satisfied that the person:

- If not a Qualifying Intermediary (QI), (see detailed description of QI under Part D of Tax and Duty Manual [Part 06-08a-01](#) is the person beneficially entitled to the distribution, and
- Has made the appropriate declaration of exemption to the company making the distribution (see Schedule 2A TCA 1997) or, if the distribution is being paid to the excluded person through a QI, to the QI.

Further information on Dividend Withholding tax may be found in Tax and Duty Manual [Part 06-08a-01](#) .

## 7. Life Assurance Exit Tax

Life assurance exit tax will be deducted in the normal manner. However, an individual or trust exempt under section 189 or section 189A TCA may be entitled to a repayment of the exit tax under section 730GA TCA.

## 8. Tax Deducted by Investment Undertakings

A repayment of any tax deducted by an investment undertaking can be made under section 739G TCA where the unit holder to which the deducted tax relates is entitled to claim income tax exemption under section 189 or section 189A TCA.

The following material is either exempt from or not required to be published under the Freedom of Information Act 2014.

[...]

## 10. Worked Example

The following example illustrates how section 189A TCA operates in practice.

Simon was employed as a plumber. He has rented out 2 houses for many years, yielding a total net profit (after allowable expenses) of €28,800 per annum. He was involved in an accident playing a rugby game, as a result of which he suffered severe injuries such that he is permanently and totally incapacitated from maintaining himself.

Friends of his family set up a trust and raised public subscriptions for Simon's benefit. The trust satisfied the conditions of Section 189A TCA. Trustees (no connection to Simon) were appointed as administrators of the funds to maintain and operate the assets of the trust for the benefit of Simon.

The money raised was invested, and currently yields €36,000 per annum which was paid to Simon. Simon is also entitled to an invalidity pension of €10,347 per annum.

In 2019, Simon claims an exemption under section 189A TCA 1997. His total income for 2019 is -

Investment Income	€36,000
Rental Income	€28,800
Invalidity Pension	<u>€10,347</u>
Total	<u>€75,147</u>

For the purposes of deciding whether Simon is entitled to the exemption, the invalidity pension is ignored.

As Simon's income from the investment of the trust funds is €36,000, which is more than 50% of his total income excluding the invalidity pension, (i.e. €64,800 x 50% = €32,400), he is entitled to the exemption.

His income for income tax purposes is calculated as follows:

Rental Income	€28,800
Invalidity Pension	<u>€10,347</u>
Total Income for tax purposes	<u>€39,147</u>

The investment income of €36,000 is exempt from Income Tax, PRSI and USC by virtue of section 189A TCA.

The exempt income is not taken into account in computing total income for tax purposes. This does not relieve the individual of the obligation to return the exempt income if making a return of income.

The trustees are exempt from income tax, USC and PRSI in respect of investment income arising from the trust funds.