

Payment made without deduction of income tax

Part 42 Chapter 4 of the Taxes Consolidation Act (TCA) 1997

Part 42-04-66

This document should be read in conjunction with Section 986A of the Taxes Consolidation Act 1997

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1. Introduction

Section 77 and Paragraph 4(f) of Schedule 1 to the Finance Act 2017 introduced a new section - Section 986A into the Taxes Consolidation Act 1997. Section 986A is designed to address the non-operation of PAYE. It applies with effect from 1 January 2018, in respect of the tax years 2018 et seq., in certain circumstances where an employer makes a payment of emoluments to an employee or director but fails to deduct and remit tax on the emoluments as required under the PAYE system of tax deduction.

Section 58(1)(u) of the Finance Act 2018 introduced **subsection (4)** which provides that re-grossed income under section 986A is chargeable on the employee as Schedule E (employment) income.

This manual explains the circumstances in which re-grossing will apply or will not apply and the rate at which to re-gross.

2. Overview

Employers who fail to operate statutory PAYE obligations may obtain a payroll cost advantage at the expense of the Exchequer. In addition, the non-operation of the PAYE system may confer an unfair tax advantage on those who receive their emoluments, or part of the emoluments, without PAYE deductions.

Income tax, USC and PRSI collected under the PAYE system are 'fiduciary taxes' and there is a statutory obligation on an employer to deduct and remit the appropriate amounts to the Collector-General. In that context, it should be noted that the employer's obligation to remit the appropriate tax exists even in circumstances where the employer fails to make the necessary deductions from emoluments paid.

2.1 What is re-grossing?

The term "re-grossing" refers to the computation of a notional gross pay amount that would have given rise to the actual amount paid after deduction of tax. In cases falling within the provisions of section 986A the employer is liable to pay the amount of tax due in respect of the re-grossed amount of the emoluments (see examples).

3. When will re-grossing occur?

3.1 Circumstances where re-grossing will apply

Re-grossing will apply where:

- there is **total** non-operation of PAYE by an employer in respect of emoluments to an employee (e.g. all payments to an employee have been paid gross, i.e. without PAYE deductions),

or
- an employer disguises the payment of emoluments. This includes, for example,
 - describing emoluments as
 - invoice payments,
 - advertising expenses, etc.,
 - and also includes the payment of emoluments from cash sales or other receipts, discounts or credits, which are omitted from the employer's books or records and, in respect of which, there may be additional tax liabilities (VAT, income tax, corporation tax).

Note: Emoluments include benefits and perquisites.

Example 1

Mary is employed by ABC DAC but her earnings are not taxed by ABC DAC under the PAYE system. Instead, Mary is simply paid "off the books" in cash.

As there is total non-operation of PAYE by ABC DAC in respect of Mary's earnings, the payments to her will be treated as a payment of a net amount after deduction of income tax. The net amount is to be re-grossed by reference to the applicable income tax rate.

Example 2

John is employed by XYZ DAC. He is paid on a weekly basis and this income is taxed under the PAYE system. However, John also does overtime, and the overtime is paid in cash to him from unrecorded cash sales. In this case, the employer has disguised by omission the payment of those emoluments and is liable to pay tax on those amounts on a re-grossed basis. The net amount is to be re-grossed by reference to the applicable income tax rate. In these circumstances, it is likely that XYZ DAC will also have tax issues in relation to its undisclosed profits and potentially a VAT liability.

Example 3

Jennifer is employed by STU DAC. She is paid a monthly round sum car allowance, but STU DAC processes the payments in the payroll as tax free travel expenses. Revenue conduct a compliance intervention and the company is advised that these cash payments are subject to tax under the PAYE system. Following completion of the compliance intervention however, the employer continues to classify these

payments as tax free travel expenses. As STU DAC is now knowingly misclassifying the emoluments as tax free expenses, the employer is disguising the nature of the emoluments in its records. The emoluments are therefore to be re-grossed by reference to the applicable income tax rate.

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3.2 Circumstances where re-grossing will not apply

Re-grossing will be the default position only in the circumstances outlined in Paragraph 3.1. However, section 986A is not intended for situations where genuine or innocent mistakes or errors happen in payroll.

Complete failure to operate PAYE in respect of an employee (i.e. “off the books” employees) will not generally be considered to be a genuine error.

Example 4

Leo is employed by PQR DAC and his employer has taxed his income under the PAYE system. On occasion, Leo has taken a taxi to work and the employer has reimbursed Leo with this cost. As this payment does not meet the requirement of being “expenses incurred wholly, exclusively and necessarily in the performance of the employee’s duties”, the payment should have been taxed on Leo as an emolument. PQR DAC assumed that payment could be made gross. This may be an innocent mistake by the employer and, where the caseworker is satisfied that it was an innocent mistake, re-grossing should not apply. In that scenario, the employer is liable for income tax on the cost of the taxi fares at the employee’s highest rate, together with USC and PRSI.

Example 5

Martha is employed by FGH DAC. She is paid on a weekly basis and this income is taxed under the PAYE system. Martha is also provided with a company vehicle and the vehicle is available for her private use. Therefore, a benefit-in-kind (BIK) charge arises. FGH DAC do not operate PAYE in respect of the BIK. Revenue conduct a compliance intervention and the company is advised that PAYE should be operated in respect of the BIK. Re-grossing should not apply where the caseworker is satisfied that the employer has not disguised, by omission or otherwise, the benefit or the nature of the benefit in its books and records.

4. Rate at which to re-gross

Re-grossing will be applied to untaxed emoluments taking account of emoluments that have been subject to PAYE, if any.

For the tax year 2019 et seq., where, at the date the payment was made, a relevant RPN has been sent to or made available to the employer, the information on that notification is used to calculate the tax to be deducted. In circumstances where a RPN has not been received by or made available to the employer the emergency basis of deduction applies.

For the tax year 2018 only, the appropriate certificate of tax credits and standard rate cut-off point held by the employer at the date the payment was made is used to calculate the tax to be deducted. In the absence of a tax credit certificate, the emergency tax provisions apply.

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Note - figures have been rounded to the nearest decimal in the following examples.

Example 6

An employer has operated PAYE on an employee's emoluments. The employee's standard rate income tax band and tax credits have been fully utilised against emoluments of €45,000 comprising salary and benefits. During a compliance intervention, an additional disguised payment of €1,000 has been identified and re-grossing is to apply. The calculation of the liability (using 2021 rates and thresholds) is:

		€
Actual payment to employee		1,000
Re-grossed amount (1,000 / (100% - 40%))		1,667
Income Tax	1,667 x 40%	667
PRSI	1,667 x 11.05% (employer)	184
	1,667 x 4% (employee)	<u>67</u>
USC	1,667 x 4.5% (income between €20,687 and €70,044)	<u>75</u>
Total due		993

Example 7

An employer has operated PAYE on an employee's emoluments for 2021 of €35,000 consisting of salary and benefits. The employee's standard rate income tax band for the year is €35,300. During a compliance intervention, an additional disguised payment of €1,000 has been identified and re-grossing is to apply.

As €35,000 of this person's total standard rate income tax band of €35,300 has already been utilised against salary and benefits, any additional income up to €300 will be liable to income tax at the standard rate ($€35,300 - €35,000 = €300$). Therefore, when the disguised payment is re-grossed, only €300 of this re-grossed amount is liable to income tax at the standard rate and the excess is liable to income tax at the higher rate.

€300 is the equivalent of €240 re-grossed at the standard rate of income tax (i.e. €300, the gross amount $\times (100\% - 20\%) = €240$, the net amount). Therefore, of the total €1,000 disguised payment that is to be re-grossed, €240 of this is re-grossed at the standard rate of income tax. The balance of €760 (i.e. $€1,000 - €240$) is re-grossed at the higher rate of income tax, giving a re-grossed figure of €1,267. Taken together, the total re-grossed payment is $€300 + €1,267 = €1,567$.

The calculation of the liability is:

		€
Actual payment to employee		1,000
Re-grossed amount		
	$240 / (100\% - 20\%) = 300$	
	$760 / (100\% - 40\%) = 1,267$	1,567
Income Tax	$300 \times 20\%$	60
	$1,267 \times 40\%$	<u>507</u>
		567
PRSI	$1,567 \times 11.05\%$ (employer)	173
	$1,567 \times 4\%$ (employee)	<u>63</u>
		236
USC	$1,567 \times 4.5\%$ (income between €20,687 and €70,044)	<u>71</u>
Total due		874

In this example, as a result of the employee's recorded income being adjusted upwards for the re-grossed payment, the employee has moved from being a standard rate taxpayer to a higher rate taxpayer.

Example 8

A company car has been provided to an employee. However, the employer has incorrectly recorded the cost of the company car as a staff entertainment expense in its books and records and has not operated PAYE on the benefit. The Revenue caseworker is of the view that this is not a genuine or innocent error and the provisions of section 986A apply to the disguised payment. The cash equivalent of the car is €8,100 (original market value of €27,000 $\times 30\%$). Assuming the individual is

liable to income tax at the higher rate, the calculation of the liability is (using 2021 rates and thresholds):

			€
Value of Benefit – Cash Equivalent			8,100
Amount of Income Tax			
The taxable amount less income tax equals the value of the benefit which the recipient would be entitled to after the deduction of income tax			
(8,100 / (100% - 40%)) * 40%			5,400
Taxable amount			
The taxable payment equals the value of the benefit plus the amount of income tax			
			13,500
Income Tax	13,500 x 40%		5,400
PRSI	13,500 x 11.05% (employer)	1,492	
	13,500 x 4% (employee)	<u>540</u>	2,032
USC	13,500 x 4.5% (income between €20,687 and €70,044)		<u>608</u>
Total due			8,040

5. Specific circumstances where re-grossing does not apply

As set out in section 986A of the legislation, re-grossing does not apply to the following emoluments:

- where an employee is granted a benefit from their employer which forms part of a 'qualifying incentive' within the meaning of section 112B TCA 1997, or
- where the employer has entered into a PAYE settlement agreement with Revenue to discharge the PAYE liability arising on minor and irregular benefits paid to an employee as provided for under section 985B TCA 1997.

6. Granting of credit for tax recovered

With effect from 1 January 2018 and confirmed by the Finance Act 2018, notwithstanding sections 18 and 19 TCA 1997, the re-grossed amount will be an amount chargeable to tax under Schedule E on the employee concerned.

The emoluments of an employee will include any re-grossed amount and credit may be granted to an employee for the additional income tax, paid by the employer on the re-grossed payment.

In relation to company directors, the position regarding the granting of credit in respect of tax deducted from emoluments is set out in [Tax and Duty Manual Part 42-04-59](#).

7. USC and PRSI

A liability to USC and PRSI arises on the re-grossed amount of emoluments.

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