Mortgagees-in-Possession (MIPs) and Asset Receivers

This document should be read in conjunction with section 76(2) of the VAT Consolidation Act 2010 (VATCA 2010) and section 851A of the Taxes Consolidation Act 1997 (TCA 1997)

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Introduction

The guidance Guidelines on Tax Consequences of Receivership and Mortgagee in Possession (MIP) addresses the tax obligations of Receivers and Mortgagees-in-Possession (MIPs), and also refers to the sharing of information by Revenue in respect of VAT. To supplement the information contained in that manual, this guidance addresses the specific issue of the disclosure of information to Receivers and Mortgagees-in-Possession in more detail.

While the confidentiality provisions contained in section 851A TCA 1997 normally apply, information can be released by Revenue to MIPs or receivers in the circumstances covered by this Instruction.

Where a Mortgagee-in-Possession or a receiver has insufficient information to conclusively determine whether the transactions in any of the properties over which he or she has been appointed would give rise to a VAT charge, then he or she may write to the Revenue District of the debtor/borrower setting out the confirmation sought. Where the relevant information is available in Revenue records, Revenue will assist the MIP or receiver to enable him or her to meet his or her obligations under the VAT Acts.

The growing number of asset receiverships has led to increased requests for such information. The purpose of this guidance is to assist in clarifying the type of information which may, or may not, be released to assist a MIP or receiver to establish the VAT history of a property so that the correct VAT treatment can be applied. MIPs/Receivers are expected to make every effort to obtain the necessary information, including VAT Number of the debtor/borrower, before approaching Revenue. It must be noted that Revenue is only obliged to assist in situations where gaps exist in the information already obtained by receivers and MIPS. Revenue is not obliged to provide information in circumstances where an information request is non-specific or pro-forma, or where the request would impose an unreasonable burden on available resources due to search and retrieval requirements, or where there is otherwise little or no evidence that the requester has made efforts to obtain information from other sources before submitting a request for information to Revenue. The information required should be specified and itemised in all cases.

1.1. Tax arising on sales of properties

The supply of freehold or freehold equivalent interests in “new” properties in the course of an economic activity is subject to VAT. The five and two-year rules determine whether a property is “new”, that is, –

- the first supply of a property within five years of completion is subject to VAT;
- the second and subsequent supply of a property within five years of completion is subject to VAT, if it takes place within two years of occupation.

A notable exception is the sale of residential properties by a developer/builder, in which case the two and five-year rules do not apply. In such cases, the sale by the developer/builder is always taxable. Generally, all sales of "old" property, that is, those outside the period when considered "new", are exempt from VAT.

Where an exempt supply occurs, a Capital Goods Scheme (CGS) adjustment may arise obliging the seller to pay VAT back to Revenue. The CGS adjustment is based on the VAT deductibility taken on the acquisition or development of the property, reduced by the number of years that have elapsed in the CGS adjustment period for the property. However, a joint option for taxation is allowed in certain circumstances, whereby the vendor and the purchaser can jointly choose to apply VAT to the sale. In such cases, the purchaser is liable to pay the VAT on the reverse charge basis and, because a taxable supply has occurred, there is no CGS adjustment for the vendor. See VAT on Property Guide for further details of these concepts.

1.2. VAT treatment when a Receiver or MIP sells a property

In relation to "forced sales", the same rules apply. If the sale of the property occurs when the property is "new", the MIP or receiver will account for VAT on the supply and pay this VAT to Revenue. If the sale occurs outside this period, a CGS adjustment may arise. The tax due under this adjustment (ref. section 64(6) of the Value-Added Tax Consolidation Act 2010) is payable by the MIP or receiver. This is because the wording of section 76(2) of the Act provides that the MIP or receiver is liable to pay the "tax due in relation to that supply". The tax due in relation to an exempt sale is the amount calculated in accordance with the formula in section 64(6) of the Act.

2. Information

2.1. Information required by a Receiver or MIP

The most frequently requested information will be:

- Whether the debtor/borrower(s) was/were registered for VAT and the effective date of the registration
- If so, whether the debtor/borrower(s) was/were registered for VAT as partnership or as co-owners
- Whether the debtor/borrower had a waiver in place and the effective date of the waiver
- Whether the debtor/borrower had claimed a deduction for the acquisition or development of the property and the amount of that deduction
- Whether the property was acquired VAT-free under Transfer-of-Business rules
- Whether a VAT 4B was previously issued to the lessor and the figures therein, where available

Lenders, who have appointed receivers, will have access to significant pieces of information submitted to them in support of loan applications. This is information that may not be on Revenue files and MIPs or receivers should be expected to explore this source fully in the first instance.

Revenue is satisfied that, where this information is available in Revenue records, it may be disclosed to a MIP or receiver to enable him or her to meet his or her obligations under the VAT Acts without breaching Revenue's confidentiality obligations. It is likely that all this information will not be available in Revenue's records in all cases.

2.2. Action to be taken in Districts

Where a MIP or receiver makes a written request to a Revenue District seeking information to enable the determination of any VAT arising in relation to a transaction, the District may supply the information in writing, if it is available from Revenue records, as to whether the debtor/borrower was registered for VAT and the effective date of the registration.

2.3. If debtor/borrower was registered for VAT as a partnership or as co-owners

- Whether the debtor/borrower had a waiver in place and the effective date of the waiver
- Whether the debtor/borrower had claimed a deduction for the acquisition or development of the property and the amount of that deduction[1]
- Whether the property was acquired VAT-free under Transfer-of-Business rules
- Whether a VAT 4B was previously issued to the lessor and the figures therein, where available.

If the information requested is not available and it is not possible to make an informed opinion, the MIP/receiver should be advised accordingly.

[1] If this information is not available, it may be possible to form an informed opinion by reference to the T2 entry on the return for the period in which the property was acquired or the immediately following period. If this is possible the receiver should be told that you have been unable to verify with certainty but that it is likely that a deduction has been claimed.

2.4. Limitations on Information to be disclosed to Receiver or MIP

Revenue has a duty of confidentiality to taxpayers. Information held by Revenue is provided to enable the MIP/Receiver to comply with his or her obligations under the VAT Acts.

Revenue may not disclose any information relating to a taxpayer, or his or her affairs, save for the purposes of the various Taxes Acts. Any information requested which is personal to the taxpayer, including the taxpayer's PPSN or details of their Tax Credits or Allowances, is subject to the provisions of the Data Protection Acts 1988 and 2003 and section 851A TCA 1997, and should therefore not be disclosed to the MIP/Receiver.

Where a MIP or receiver is liable for tax on a "forced sale" the MIP/receiver is the taxpayer and any disclosures made to him or her about the tax are not regarded as made to a third party.

Furthermore, it is an offence for a MIP or Receiver to request or hold a record of a PPSN unless they are specifically permitted by section 262 of the Social Welfare Act 2005 to do so.

Since VAT is a self-assessment tax, the Receiver or MIP should use the Revenue information together with other information and reasonable assumptions based on this information to determine whether a transaction in a property gives rise to a VAT charge. Revenue will not seek to challenge the VAT treatment where the information and assumptions support the treatment.

It should be noted that the role of Revenue is exclusively to provide information to assist a Receiver or MIP. Revenue's role is not to provide an opinion or adjudication on the VAT treatment of the transaction. Since Revenue Districts will confine their role to the provision of information, a Receiver or MIP will not be provided with guidance in relation to the general VAT treatment of an individual case. However, where a Receiver or MIP identifies a specific legal or technical issue in relation to the VAT treatment, this issue should be addressed to the Revenue Technical Service.